

प्रतिबोधविदितं मतममृतत्वं हि विन्दते ।
आत्मना विन्दते वीर्यं विद्यया विन्दतेऽमृतम् ॥

—केनोपनिषद् (२-४)

*He who realises God within
As the source of all consciousness
Alone attains immortality.
From Self comes strength
And through knowledge of the Self—
Emancipation.*

—KENA UPANISHAD (II, 4)

**Books
Checked**

"No more vital truth was ever uttered than that freedom and free institutions cannot long be maintained by any people who do not understand the nature of their own government."—WOODROW WILSON.

COMMENTARY
ON THE
CONSTITUTION OF INDIA

VOLUME TWO
(ARTICLES 20 TO 117)

COMMENTARY ON THE CONSTITUTION OF INDIA

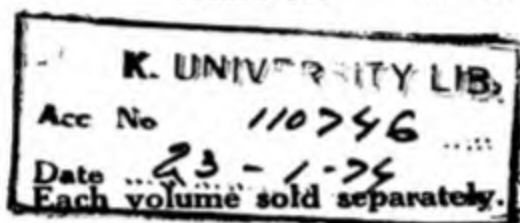
*(Being a comparative treatise on the universal principles of
Justice and Constitutional Government
with special reference to
the organic instrument
of India)*

BY
DURGA DAS BASU

FIFTH EDITION
Revised and Enlarged

*All rights reserved by the Author
and no part of this Commentary shall be translated or reproduced
(except for reference in judgments) without express permission in
writing of the Author.*

First Edition (M. L. J., Madras)	...	November, 1950
Second Edition (S. C. Sarkar & Sons Ltd.)	...	January, 1952
Third Edition (S. C. Sarkar & Sons Ltd.) (in two Volumes)	...	1955—1956
Fourth Edition (S. C. Sarkar & Sons Ltd.) (in five Volumes)	...	1961—1964
Fifth Edition (S. C. Sarkar & Sons Ltd.)	...	
Volume One	...	February, 1965
Volume Two	...	November, 1965



Price for Volume Two

Indian Edition Rs. 40/-

Companion Volumes:

1. *Cases on the CONSTITUTION OF INDIA (1950-51) (Rs. 15/-).*
2. *Cases on the CONSTITUTION OF INDIA (1952-54) (Rs. 22/-).*
3. *Shorter CONSTITUTION OF INDIA, Fourth Edition,
1964 (Indian Edition, Rs. 40/-; Foreign Edition, £4 :: \$ 12).*
4. *Introduction to the CONSTITUTION OF INDIA, Third Edition,
October, 1964 (Rs. 14/-).*
5. *CONSTITUTION AMENDMENT ACTS (I-XVII) (Rs. 2/-).*
6. *SELECT CONSTITUTIONS OF THE WORLD (U.S.A., Canada,
Switzerland, Australia, U.S.S.R., Eire, Japan, France), 1964 (Rs. 6/-).*
7. *GOVERNMENT OF INDIA ACTS, 1858, 1915, 1935, with the Indian
Independence Act, 1947 (Rs. 12/-).*
8. *ACTS, RULES & ORDERS UNDER THE CONSTITUTION OF INDIA,
(Book I, Arts. 1-226), Rs. 20/-; (Book II, Arts. 227-309), Rs. 20/-.*

Published by Sri R. N. Sarkar, B.Com., of 26C, Madan Mitra Lane, Calcutta - 6 and
Printed by P. C. Ray at Sri Gouranga Press Private Ltd., 5, Chintamani Das Lane, Calcutta - 9.

Paper supplied by Messrs. Bholanath Paper House Private Ltd.,
32 A, Brabourne Road, Calcutta - 1.

PREFACE
TO THE
FIFTH EDITION
(VOLUME TWO)

The topics which have received special attention in developing the material included in this Volume, *inter alia*, are—Arts. 32, 76 and 105. Great controversy gathered round the functions and status of the office of the Attorney-General and the power of *our* Legislatures to commit for contempt, during the period which has intervened the publication of the previous Edition of this Volume and the present one. For a solution of the problems relating to these topics, it is hoped, the pages added in this Volume will be found useful.

The Opinion of the Supreme Court in the Reference Case relating to the Uttar Pradesh Legislature has introduced momentous ideas with a view to bringing the imported privileges of the British House of Commons into harmony with the guarantees of individual rights in *our* written Constitution. The adjustment of the Legislatures to these new ideas is not yet complete and the cry for a constitutional amendment or legislation to give a definite shape to the relationship between the Legislature and the Courts in India has been drowned by the clash of arms with an aggressive neighbour. With the restoration of a calmer atmosphere, the problem is bound to raise its head again, and any attempt to make a stable solution would be welcome, for, any conflict between the two organs of *our* body politic as went on in England for years would undermine our strength on the home front which we can ill afford to suffer. Considerations for such solution may be found in the comments under Art. 105(3), in this Volume.

The text of the Articles is correct up to the Seventeenth Constitution Amendment Act.

The Table of Cases and Subject Index will appear in a Cumulative Volume after the Commentary is completed.

8, Camac Street,
CALCUTTA - 16.
November, 1965.

THE AUTHOR.

FROM THE PREFACE TO THE FIRST EDITION

As DR. AMBEDKAR observed in the Constituent Assembly, it is impossible to frame a Constitution which is absolutely new or original, at this hour in the history of the world. "The only new things, if there be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country." A proper understanding of *our Constitution* is not thus possible unless it is studied with reference to the Constitutions of other countries, particularly those from which the framers of *our Constitution* have borrowed provisions or ideas, and the interpretation put by the Courts upon those provisions. Ever since the Constituent Assembly first sat in December, 1946, I cherished the desire of preparing such a Commentary on *our Constitution* as would not only explain it in the light of analogous provisions of other Constitutions, but would also place *our Constitution* in a distinctive position amongst the leading Constitutions of the world, by elucidating the points upon which the framers of *our Constitution* have sought to improve, in the light of experience gathered from elsewhere.

The method of treatment adopted in this work, is therefore, *comparative*. Though this has inevitably led to an increase in the bulk, the reader would find in this book a commentary not only on the Constitution of India, but also on the parallel provisions of the Constitutions of the *United States, Eire, Australia, Canada, South Africa, Japan, the Republic of France, Burma and Ceylon*, with important decisions available up to 1948-49. Though the Constitution of *England* is unwritten and we do not get codified expressions, it is commonplace to point out that the immutable principles of modern constitutional government were first evolved in Britain and that no later Constitution adopting the Parliamentary system of government could do without drawing from the basic principles of England. Even the fathers of the American Constitution were guided by those fundamental English principles, though, owing to difference in the soil, the traces of their English origin are at places obliterated beyond recognition. So, these principles of English Common Law, as modified by important legislation, have also found a place in this Commentary. In order to avoid confusion, the comments under each Article have been divided under two heads: (a) 'OTHER CONSTITUTION'; (b) 'INDIA'. For a ready reference to the annotation of the clauses of *our Constitution*, only the contents under the head 'INDIA' need be referred to.

So far as the Author is aware, such a systematic comparison of different Constitutions, from the standpoint of legal interpretation, has not so far been attempted in any other work.

A Constitution may be studied from different points of view,—legal, political, sociological and the like. The object of this work, primarily, is to present a *juridical* interpretation of the Constitution of India as may be of use in the Courts, where the application, progress and development of the Constitution would be shaped. On the other hand, though the object of this commentary is a *juridical* study of the Constitution,—the political and constitutional aspects, too, have been given full attention to, so that the publication may be of use to statesmen, parliamentarians and students of Political Science and Comparative Politics. Again, reference to existing laws, with reference to which the question of interpretation has arisen and will arise. So, the book contains a reference to the statute law under the major Constitutions, particularly of *England, the United States and India*.....

REFERENCES

I. BOOKS

(A) GENERAL.

- BOWIE. *Studies in Federation* (Little Brown & Co., Boston, 1954).
BRETT. *Cases and Materials in Constitutional & Administrative Law* (Butterworths, 1962).
CRAIES. *Statute Law* (Sweet & Maxwell, 6th Ed., 1963).
DICEY. *Conflict of Laws* (Stevens & Sons, 6th Ed., 1949).
FERRIS. *Extraordinary Legal Remedies* (Thomas Law Book Co., 1926).
FINDLAY SHIRRAS. *Science of Public Finance*, Vol. I (Macmillan & Co., 1936).
FINER. *Theory and Practice of Modern Government* (Henry Holt & Co., N.Y., 1949; English Ed., 1954, Methuen & Co. Ltd., London).
HALSBURY. *Laws of England* (Simonds Ed., 1953).
MAXWELL. *Interpretation of Statutes* (Sweet & Maxwell; NN. M. Tripathi, 10th Ed., 1953).
MUNRO. *Government of Europe* (Macmillan, 1954).
OGG & ZINK. *Modern Foreign Governments* (Macmillan, 1949).
PITT COBBETT. *Cases on International Law*, Vol. I, (6th Ed., 1947, Sweet & Maxwell).
SHORT & MELLOR. *The Practice of the Crown Office* (Stevens & Haynes, 2nd Ed., 1908).
SPELLING. *A Treatise on Injunctions and other Remedies*, Vol. II (Little, Brown & Co., Boston, 1901).
STARKE. *An Introduction to International Law* (Butterworth & Co., 1954).
STROUD. *Judicial Dictionary*.
WHARTON. *Law Lexicon* (1946).
WHEARE. *Federal Government* (Oxford University Press, 2nd Ed., 1951).

(B) ENGLAND.

- ALLEN. *Law and Orders* (Stevens & Sons Ltd., 2nd Ed., 1956).
BLACKSTONE. *Commentaries on the Laws of England* (Baker, Voorhis & Co., 4th Ed., 1938).
DENNING. *Freedom under the Law* (Hamlyn Lectures).
DO. *The Road to Justice* (1955, Stevens & Sons Ltd., London).
DICEY. *Law of the Constitution* (10th Ed., 1950).
FRIEDMANN. *Law in a Changing Society* (Stevens & Sons, 1959).
HOOD PHILIPS. *Constitutional Law*, 3rd. Ed., 1962 (Sweet & Maxwell, London).
CLIVE PARRY. *Nationality and Citizenship Laws of the Commonwealth* (Stevens & Sons Ltd., London, 1957).
GARNER. *Administrative Law* (Butterworths, 1963).
GRIFFITH & STREET. *Law and the Executive in Britain* (Pitman, London, 1952).
DO. *Principles of Administrative Law*, Third Ed., 1962.
ILBERT. *Parliament* (H.U.L., Oxford University Press, 1950).
JENNINGS. *Parliament* (Cambridge University Press, 1948).
DO. *Cabinet Government* (Cambridge University Press, Third Ed., 1959).
JENNINGS & YOUNG. *Constitutional Laws of the Commonwealth* (Case book: 1952, Oxford University Press, London).
JONES. *British Nationality Law* (2nd Ed., 1956).
KEIR & LAWSON. *Cases in Constitutional Law* (3rd Ed., 1948, Oxford University Press).

KEITH. *Constitutional Law* (Steven & Sons, 1939, 7th Ed. of Ridge's Constitutional Law of England).

DO. *British Cabinet System* (1952, 2nd Ed., Stevens & Sons, London).

LOWELL. *Government of England* (Vol. I).

MACDERMOT. *Protection from Power under English Law* (1957, Hamlyn Lectures, Ninth Series, Stevens, London).

MAY. *Parliamentary Practice* (Butterworth & Co., 16th Ed., 1957).

MORRISON. *Government and Parliament* (Oxford University Press, 1954).

ROBSON. *Justice and Administrative Law* (3rd Ed., Stevens & Sons, 1951).

SMITH. *Judicial Review of Administrative Action* (Stevens & Sons, 1959).

SCHWARTZ. *Law and the Executive in Britain* (New York University Press, 1949).

STEPHEN. *Commentaries on the Laws of England* (Butterworth & Co., 21st Ed., 1950).

WADE. *Administrative Law* (Oxford Press, 1961).

WADE & PHILLIPS. *Constitutional Law* (Longmans, 6th Ed., 1960).

STREET. *Governmental Liability* (Cambridge University Press, 1933).

JOURNAL OF THE SOCIETY OF CLERKS-AT-THE-TABLE.

REPORT OF THE FRANKS COMMITTEE, 1957 Cmnd. 218.

(C) FRANCE.

The New French Constitution, adopted by a referendum held on September 28, 1958 (Issued by the French Embassy in India).

LIDDERDALE. *Parliament of France* (Hansard Society, London, 1954).

NEUMANN. *European and Comparative Government* (3rd Ed., 1960, McGraw-Hill Book Co., N.Y.).

SCHWARTZ. *French Administrative Law and the Common Law World* (1954, N.Y. University Press).

(D) AUSTRALIA.

FRIEDMANN & BENJAFIELD. *Australian Administrative Law* (1962, Law Book Co. of Australasia).

KERR. *Law of the Australian Constitution* (Law Book Co. of Australasia, 1925).

MITCHELL. *Essays on the Australian Constitution* (Law Book Co. of Australasia, 1952).

NICHOLAS. *Australian Constitution* (Law Book Co. of Australasia, 2nd Ed., 1952).

QUICK. *Legislative Powers* (Law Book Co. of Australasia, 1919).

SAWER. *Cases on the Constitution of Australia* (Law Book Co. of Australasia, 1948).

WYNES. *Legislative and Executive Powers in Australia* (Law Book Co. of Australasia, 3rd Ed., 1962).

LANE. *Australian Constitutional Law* (Law Book Co. of Australasia, 1964).

(E) CANADA.

CLOKIE. *Canadian Government and Politics* (Longmans, Green and Co., 1944).

DAWSON. *The Government of Canada* (1949, University of Toronto Press).

LASKIN. *Canadian Constitutional Law* (Carswell Co., Toronto, 2nd Ed., 1960).

SCHMEISER. *Civil Liberties in Canada* (Oxford University Press, 1964).

VARCOE. *Distribution of Legislative Power in Canada* (Carswell & Co., 1954).

(F) CEYLON.

JENNINGS. *Constitution of Ceylon* (Oxford University Press, 3rd Ed., 1953).

(G) U.S.A.

Annual Survey of American Law (New York University School of Law).

ANTIEU. *Commentaries on the Constitution of the United States* (Dennis & Co., Buffalo, N.Y.), 1960.

BARRETT. *Constitutional Law* (Casebook), 1959 (Foundation Press, Brooklyn).

- BROGAN. *Government of the People* (American Political System) (Harper & Bros., 1943).
- COOLEY. *A Treatise on Constitutional Limitations* (Little, Brown & Co., 8th Ed., 1927).
- DO. *General Principles of Constitutional Law* (Little, Brown & Co., 4th Ed., 1931).
- CORWIN. *Constitution of the U.S.A.* (U.S. Senate Doc., 1953).
- CUSHMAN. *Leading Constitutional Decisions* (Appleton, N.Y., 1950).
- DAVIS. *Administrative Law Text* (West Publishing Co., 1959).
- DODD. *Cases on Constitutional Law* (West Publishing Co., Minnesota, 1949).
- DOUGLAS. *We the Judge* (Doubleday & Co., Inc., Garden City, N.Y., 1956). [Indian Edition—*From Marshall to Mukherjea* (T.L.L., Eastern Law House Ltd., Calcutta, 1956).]
- DOWLING. *American Constitutional Law* (Foundation Press, Brooklyn, 1954).
- DO. *Cases on Constitutional Law* (Foundation Press, Brooklyn, 1950).
- EMERSON & HABER. *Political and Civil Rights in the United States* (Casebook: 1958, Dennis & Co., N.Y.).
- FERGUSON & MCHENRY. *American Federal Government* (McGraw Hill Book Co., 4th Ed., 1956).
- DO. *American System of Government* (Do., 4th Ed., 1956).
- FRANK. *Cases and Materials on Constitutional Law* (Callaghan & Co., Chicago, 1952).
- FREUND & OTHERS. *Constitutional Law—Cases and others Problems* (Case book; 1954, Little, Brown & Co., Boston).
- FORKOSCH. *Administrative Law* (Bobbs-Merrill Co., Indianapolis, 1956).
- GELLHORN. *American Rights* (Macmillan, 1960).
- GELLHORN & BYSE. *Administrative Law, Cases and Comments* (Brooklyn, Foundation Press, 1954).
- HART. *Introduction to Administrative Law* (Appleton-Century-Crofts, Inc., 2nd Ed., 1950).
- KAUPER. *Constitutional Law, Cases and Materials* (2nd Ed., 1960, Prentice Hall, N.Y.).
- KONVITZ. *Bill of Rights Reader (Leading Constitutional Cases)*, (2nd Ed., 1960, Cornell University Press, Ithaca).
- KELLY & HARBISON. *American Constitution* (North & Co., N.Y., 1948).
- LASKI. *American Presidency* (Allen & Unwin, 1943).
- MUNRO. *Government of the United States* (Macmillan, 1944).
- OGG & RAY. *Introduction to American Government* (Appleton, N.Y., 10th Ed., 1951).
- PARKER. *Administrative Law* (Bobbs-Merrill Co., 1952).
- PRITCHETT. *American Constitution* (Mc-Graw Hill, 1959).
- REPPY. *Civil Rights in the United States* (1951, Central Book Co., N.Y.).
- ROTTSCHAFFER. *Cases on Constitutional Law* (West Publishing Co., Minnesota, 1948).
- STRONG. *American Constitutional Law* (Casebook), (1950, Dennis & Co., N.Y.).
- SCHWARTZ. *American Constitution* (1950, Cambridge University Press).
- DO. *An Introduction to American Administrative Law* (1958, Pitman, London).
- DO. *A Commentary on the Constitution of the United States* (Macmillan Co., 1963—Two volumes).
- United States Government Organisation Manual* (1951-52).
- WILLIS. *Constitutional Law of the United States* (Principal Press, 1936).
- WILLOUGHBY. *Constitutional Law of the United States* (Baker, Voorhis, 2nd Ed., 1929, in 3 Vols.).
- ZINK. *American Government* (Macmillan, 1944).

(H) SWITZERLAND.

- HUGHES. *Federal Constitution of Switzerland* (Oxford University Press, 1954).
- SHOTWELL. *Governments of Continental Europe* (1932, Macmillan & Co., N.Y.).

(I) *WEST GERMANY.*

NEUMANN. *European and Comparative Government* (3rd Ed., 1960, McGraw Hill, N.Y.).

SHOTWELL. *Government of Continental Europe* (1932, Macmillan & Co., N.Y.).

(J) *GOVERNMENT OF INDIA PUBLICATIONS.*

Constituent Assembly Debates (Con. 2, Vol. I to X).

Constitutional Precedents (1947, in 3 series; Con. 5/47).

White Paper on Indian States (1950: M.S. 6).

General Rules and Orders under the Constitution (1959: L.D. 105).

India, 1964 (Publications Division).

Report of the Taxation Enquiry Commission (1953-54; 3 Vols.).

Report of the Press Commission (1954: D.I.B. 9).

(K) *PARLIAMENT SECRETARIAT PUBLICATIONS.*

Rules of Procedure (Conduct of Business in the House of the People (*Lok Sabha*), 5th Ed., 1957 (C.B. (I) No. 66).

Do. in the Council of States (*Rajya Sabha*). (Revised Ed., 1964).

Privileges Digest (C.B. (I) No. 121)—an annual publication.

II. *REPORTS**England.*

A.C.	...	(L.R.) Appeal Cases (since 1891).
A. & E.	...	Adolphus & Ellis' Reports (King's Bench).
All E.R. or A.E.R.	...	All England Reports.
App. Cas.	...	(L.R.) Appeal Cases (H.L.) 1857-1890).
Amb.	...	Ambler.
B. & Ad.	...	Barnewall & Adolphus' Reports (K.B.) (1830-34).
Atk.	...	Atkyn's Reports.
B. & C.	...	Barnewall & Cresswell's Reports (K.B.) (1822-1830).
C.B.	...	Common Bench Reports (1945-1956).
C.B. (N.S.)	...	Do. (New Series).
B. & A.	...	Barnewall & Alderson.
Barn. & Ad.	...	Barnewall & Adolphus.
Beav.	...	Beavan.
Bing.	...	Bingham (C.P.).
Burr.	...	Burrow (K.B.).
B. & S.	...	Best and Smith (K.B.).
Cl. & F.	...	Clark & Finnelly (H.L.).
Com.	...	Comyns.
C.P.	...	Common Pleas.
C.P.D.	...	Common Pleas Division.
Co. Rep.	...	Coke (K.B.).
Cowp.	...	Cowper (K.P.).
Ch.	...	(L.R.) Chancery Division (since 1891).
Ch. App.	...	(L.R.) Chancery Appeals (1865-1875).
Camp.	...	Campbell's Reports.
Cox. De G. & J.	...	De Gex and Jones' Reports.
De G. F. & J.	...	De Gex, Fisher and Jones' Report (Chancery) (1862-1865).
De G. J. & S.	...	De Gex, Jones & Smith's Reports (Chancery) (1862-1865).
De G. M. & G.	...	De Gex, Macknaughten & Gordon's Reports (Chancery) (1851-1857).

Ch. D.	...	...	(L.R.) Chancery Division (1875-1890).
Dods.	...	...	Dodswell's Reports.
Dow.	...	...	Dow (H.L.).
E.R.	...	...	English Reports.
Eq.	...	...	Equity Reports.
Ex. or Exch.	...	...	Exchequer Reports (1841-1856).
East.	...	...	East's Reports.
E. & B.	...	...	Ellis & Blackburn's Reports.
E. & E.	...	...	Ellis & Ellis.
Ex. D.	...	...	Exchequer Division.
H. & N.	...	...	Hurlstone & Norman.
Hare	...	...	Hare's Chancery Reports (1857-1865).
H.L.C.	...	...	House of Lords Cases (Clark).
K.B.D.	...	...	(L.R.) King's Bench Division.
Knapp.	...	...	Knapp's Privy Council Reports.
Leach	...	...	Leach's Crown Cases.
Jur.	...	...	Jurist Reports (1837-1854).
Jur. (N.S.)	...	...	Jurist Reports (1855-67).
I.R. or Ir.	...	...	Irish Law Reports.
L.T.	...	...	Law Times.
L.J.	...	...	Law Journal.
L.R.	...	...	Law Reports.
M. & W.	...	...	Meeson & Welsby's Reports.
Mer.	...	...	Merivale's Reports.
Moo. P.C.	...	...	Moore's Privy Council Cases.
P.	...	...	Probate, Divorce and Admiralty Cases (since 1890).
P.D.	...	...	Law Reports Probate Division (1876-90).
Q.B.	...	...	Queen's Bench Reports (A. & E.).
Q.B.D.	...	...	Law Reports, Queen's Bench Division.
R.R.	...	...	Revised Reports.
S.C.	...	...	Scotch Cases.
Sim.	...	...	Simons.
S.T. or St. Tr.	...	...	State Trials.
Stark.	...	...	Starkie's Reports.
Taunt.	...	...	Taunton's Reports.
T.L.R.	...	...	Times Law Reports.
T.R.	...	...	Term Reports.
Ves.	...	...	Vesey Junior Reports (Chancery) (1789-1817).
W.N.	...	...	Law Reports, Weekly Notes (since 1866).
W.R.	...	...	Weekly Reporter.
W.L.R.	...	...	Weekly Law Reports.

U.S.A.

Blatch.	...	...	Blatchford's Reports.
Cr.	...	...	Cranch's Reports (Supreme Court).
Dall.	...	...	Dallas' Report.
F. (2nd)	...	...	Federal Reporter (2nd Series).
Fed. Rep.	...	...	Federal Reporter.
Gray	...	...	Gray's Reports.
How.	...	...	Howard's Reports.
Mass.	...	...	Massachusetts Reports (Supreme Court).
N.Y.	...	...	New York (Court of Appeal).
Pet.	...	...	Peter's Reports (Supreme Court).
U.S.	...	...	United States (Supreme Court).
Wall.	...	...	Wallace's Reports (Supreme Court).
Wheat.	...	...	Wheaton's Report (Supreme Court).

Australia.

A.L.J.	Australian Law Journal.
C.L.R.	...	...	Commonwealth Law Reports.
N.S.W.	...	...	New South Wales Reports.

Canada.

S.C.R. (Can.)	...	...	Canadian Supreme Court Reports.
Dom. L.R. (Can.)	...	...	Dominion Law Reports.

Ireland.

I.R.	Irish Reports.
------	-----	-----	----------------

India.

A. or A.I.R.:	...	...	All India Reporter:
A.P.	...	...	Andhra Pradesh.
All.	...	...	Allahabad.
Bom.	...	...	Bombay.
Cal.	...	...	Calcutta.
Guj.	...	...	Gujarat.
Mad.	...	...	Madras.
H.P.	...	...	Himachal Pradesh.
Hyder.	...	...	Hyderabad.
Ker.	...	...	Kerala.
M.B.	...	...	Madhya Bharat.
M.P.	...	...	Madhya Pradesh.
Mys.	...	...	Mysore.
Punj.	...	...	Punjab.
Sau.	...	...	Saurashtra.
T.C.	...	...	Travancore-Cochin.
A.L.J.	...	...	Allahabad Law Journal.
Bom. L.R.	...	...	Bombay Law Reporter.
C.L.J.	...	...	Calcutta Law Journal.
C.W.N.	...	...	Calcutta Weekly Notes.
C.W.N. (F.R.)	...	...	Do. (Federal Court Reports).
C.W.N. (P.C.)	...	...	Do. (Privy Council).
E.L.R.	...	...	Election Law Reports (Govt. of India Publication).
I.L.R.:	...	...	Indian Law Reports (Govt. of India Publication):
Nag.	...	...	Nagpur.
Pat.	...	...	Patna.
Rang.	...	...	Rangoon.
I.A.	...	...	Law Reports (Eng.)—Indian Appeals.
I.C.	...	...	Indian Cases.
I.T.R.	...	...	Income Tax Reports.
M.L.J.	...	...	Madras Law Journal.
F.C.R.	...	...	Federal Court Reports.
F.L.J.	...	...	Federal Law Journal.
S.C.J.	...	...	Supreme Court Journal.
S.C.R.	...	...	Supreme Court Reports (Govt. of India Publication).
S.C.A.	...	...	Supreme Court Appeals.
S.C.D.	...	...	Supreme Court Decisions (Cuttack).
S.T.C.	...	...	Sales Tax Cases.

III. PARLIAMENTARY DEBATES

England.

H.C. Deb or H.C.D.	...	House of Common Debates.
C.J.	...	Journal of the House of Commons.

India.

L.A. Deb	...	Indian Legislative Assembly Debates.
Parl. Deb. or P.P. Deb.	...	Debates of the Provisional Parliament.
C.A. (Legis.) Deb.	...	Constituent Assembly (Legislative) Debates.
C.S. Deb.	...	Council of States Debates.
H.P. Deb	...	House of the People Debates.
R.S. Deb.	...	Rajya Sabha Debates.

IV. ABBREVIATIONS

F.B.	...	Full Bench.
S.B.	...	Special Bench.
P.C.	...	Privy Council.
F.C.	...	Federal Court.
S.C.	...	Supreme Court.
I.P.C.	...	Indian Penal Code, 1860.
C.P.C.	...	Code of Civil Procedure, 1908.
Cr. P.C.	...	Criminal Procedure Code, 1898.
'Act of 1935'	...	The Government of India Act, 1935.
'Existing Law'	...	The law existing in India at the commencement of the Constitution.
'Legislation by Parliament'	...	Laws made by the Parliament of India since the commencement of the Constitution.
'Our Constitution'	...	The Constitution of India.
(1950-51) C.C. 1	...	Author's Cases on the Constitution of India (1950-51). p. 1.
(1952-54) 2 C.C. 1	...	Author's <i>Cases on the Constitution of India</i> , Vol. 2. p. 1.
C 4, Vol. I., p. 1	...	Author's <i>Commentary on the Constitution of India</i> , Fourth Edition, Vol. I, p. 1.
(1964) 4 Sh. 1	...	Author's <i>Shorter Constitution of India</i> , Fourth Ed., 1964, p. 1.
'Rules of the House'	...	Rules of the House of the People.
'Rules of the Council'	...	Rules of the Council of States.

CONTENTS

OF

VOLUME TWO

REFERENCES	...	...	...	...	...	ix
CONTENTS	...	...	...	...	...	xvii

PART III (CONTD.)

ARTICLE	PAGE
20 Protection in respect of conviction for offences	1
21 Protection of life and personal liberty	66
22 Protection against arrest and detention in certain cases	96
<i>Right against Exploitation</i>	
23 Prohibition of traffic in human beings and forced labour	142
24 Prohibition of employment of children in factories, etc.	146
<i>Right to Freedom of Religion</i>	
25 Freedom of conscience and free profession, practice and propagation of religion	147
26 Freedom to manage religious affairs	162
27 Freedom as to payment of taxes for promotion of any particular religion	167
28 Freedom as to attendance at religious instruction or religious worship in certain educational institutions	169
<i>Cultural and Educational Rights</i>	
29 Protection of interests of minorities	172
30 Right of minorities to establish and administer educational institutions	177
<i>Right to Property</i>	
31 Compulsory acquisition of property	181
31A Saving of laws providing for acquisition of estates	250
31B Validation of certain Acts and Regulations	268
<i>Right to Constitutional Remedies</i>	
32 Remedies for enforcement of rights conferred by this Part	269
33 Power to Parliament to modify the rights conferred by this Part in their application to Forces	290
34 Restriction on rights conferred by this Part while martial law is in force in any area	304
35 Legislation to give effect to the provisions of this Part	307

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

ARTICLE		PAGE
36	Definition ...	310
37	Application of the principles contained in this Part ...	310
38	State to secure a social order for the promotion of welfare of the people ...	315
39	Certain principles of policy to be followed by the State ...	316
40	Organisation of village panchayats ...	319
41	Right to work, to education and to public assistance in certain cases ...	319
42	Provision for just and humane conditions of work and maternity relief ...	320
43	Living wage, etc., for workers ...	321
44	Uniform civil code for the citizens ...	321
45	Provision for free and compulsory education for children ...	322
46	Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections ...	323
47	Duty of the State to raise the level of nutrition and the standard of living and to improve public health ...	324
48	Organisation of agriculture and animal husbandry ...	325
49	Protection of monuments and places and objects of national importance ...	325
50	Separation of judiciary from executive ...	326
51	Promotion of international peace and security ...	328

PART V

THE UNION

CHAPTER I.—THE EXECUTIVE

The President and Vice-President

52	The President of India ...	345
53	Executive power of the Union ...	352
54	Election of President ...	373
55	Manner of election of President ...	376
56	Term of office of President ...	384
57	Eligibility for Re-election ...	385
58	Qualifications for elections as President ...	386
59	Conditions of President's office ...	387
60	Oath or affirmation by the President ...	389
61	Procedure for impeachment of the President ...	389
62	Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy ...	392
63	The Vice-President of India ...	392
64	The Vice-President to be <i>ex-officio</i> Chairman of the Council of States ...	392
65	The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence of President ...	393
66	Election of Vice-President ...	394

67	Term of office of Vice-President	...	...	...	396
68	Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy	...	...	...	396
69	Oath or affirmation by the Vice-President	...	...	...	397
70	Discharge of President's functions in other contingencies	...	...	...	397
71	Matters relating to or connected with the election of a President or Vice-President	...	...	...	397
72	Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases	...	...	...	400
73	Extent of executive power of the Union	...	...	...	410

Council of Ministers

74	Council of Ministers to aid and advise President	...	...	415
75	Other provisions as to Ministers	...	...	437

The Attorney-General for India

76	Attorney-General for India	461
----	----------------------------	-----	-----	-----

Conduct of Government Business

77	Conduct of business of the Government of India	...	...	469
78	Duties of Prime Minister as respects the furnishing of information to the President, etc.	...	...	475

CHAPTER II.—PARLIAMENT

General

79	Constitution of Parliament	...	...	480
80	Composition of the Council of States	...	...	482
81	Composition of the House of the People	...	...	495
82	<i>Readjustment after each census</i>	...	...	500
83	Duration of Houses of Parliament	...	...	502
84	Qualification for membership of Parliament	...	...	506
85	Sessions of Parliament, prorogation and dissolution	...	...	512
86	Right of President to address and send messages to Houses	...	...	520
87	Special address by the President at the commencement of every session	...	...	523
88	Rights of Ministers and Attorney-General as respects Houses	...	...	527

Officers of Parliament

89	The Chairman and Deputy Chairman of the Council of States	...	529
90	Vacation and resignation of, and removal from, the office of Deputy Chairman	...	531
91	Power of the Deputy Chairman or other persons to perform the duties of the office of, or to act as, Chairman	...	532

ARTICLE		PAGE
92	The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration ...	534
93	The Speaker and Deputy Speaker of the House of the People ...	534
94	Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker ...	542
95	Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker ...	545
96	The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration ...	547
97	Salaries and allowances of the Chairman and Deputy Chairman and the Speaker and Deputy Speaker ...	548
98	Secretariat of Parliament ...	548

Conduct of Business

99	Oath or affirmation by members ...	551
100	Voting in Houses, power of Houses to act notwithstanding vacancies and quorum ...	552

Disqualifications of Members

101	Vacation of seats ...	554
102	Disqualifications for membership ...	566
103	Decision on questions as to disqualifications of members ...	576
104	Penalty for sitting and voting before making oath or affirmation under article 99 or when not qualified or when disqualified ...	578

Powers, Privileges and Immunities of Parliament and its Members

105	Powers, privileges, etc., of the Houses of Parliament and of the members and Committees thereof ...	580
106	Salaries and allowances of members ...	632

Legislative Procedure

107	Provisions as to introduction and passing of Bills ...	634
108	Joint sitting of both Houses in certain cases ...	665
109	Special procedure in respect of Money Bills ...	672
110	Definition of "Money Bills" ...	678
111	Assent to Bills ...	683

Procedure in Financial Matters

112	Annual financial statement ...	691
113	Procedure in Parliament with respect to estimates ...	702
114	Appropriation Bills ...	711
115	Supplementary, additional or excess grants ...	714
116	Votes on account, votes of credit and exceptional grants ...	719
117	Special provisions as to financial Bills ...	721

20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Protection in respect of conviction for offences.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

Scope of Art. 20.—This Article imposes certain constitutional limitations upon the power of the State to enact and enforce criminal laws. The three clauses deal with three different safeguards against arbitrary action against the individual.

CLAUSE (1).

OTHER CONSTITUTIONS¹

(A) U.S.A.—Article I, s. 9 (3) of the Constitution of the U.S.A. says—

"No . . . *ex post facto* law shall be passed."

There is a similar prohibition against the States in Art. I, s. 10.

This Article is confined to penal legislation² and has no application to legislation relating to civil action.

Thus, the expression *ex post facto* law has been interpreted³ to include—

(i) Every law that makes an action done before the passing of the law and which was innocent when done, criminal and *punishes* such action. (ii) Every law that *aggravates* a crime, or makes it greater than it was when committed. (iii) Every law that *changes* the punishment and inflicts a *greater punishment*, than the law annexed to the crime when committed. (iv) Every law that alters the legal *rules of evidence*, and receives less, or different testimony, than the law required at the time of commission of the offence, in order to convict the offender.

To the above 4 rules, *Cooley*⁴ adds two others:

(v) Every law which, assuming to regulate *civil* rights and remedies only, in effect imposes a penalty or the deprivation of a right for something which when done was lawful. (vi) Every law which *deprives* persons accused of crime of some *lawful protection* to which they have become entitled: such as the protection of a former conviction or acquittal, or the proclamation of amnesty; or takes away a defence.^{5a}

But the prohibition against *ex post facto* law—(a) does not apply against retroactive laws which may operate to the *advantage* of the accused, e.g., by modifying the procedure or reducing the punishment;⁵ (b) does not apply against laws which merely change the *practice*, without affecting the *substantial* rights⁶ or the defence^{7a} of the accused; or which takes away merely technical privileges;⁷ (c) does not invalidate a statute permitting punishment to be enhanced on proof of

(1) Art. 14 of the Covenant on Human Rights, 1950 says—

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."

Art. 11 (2) of the Universal Declaration of Human Rights is identical.

(2) *Harisiades v. Shaughnessy*, (1952) 342 U.S. 580 (594).

(3) *Calder v. Bull*, (1798) 3 Dall. 386.

(4) *Cooley*, Constitutional Law, p. 357.

(4a) *Beazell v. Ohio*, (1925) 269 U.S. 167.

(5) *Rooney v. N. Dakota*, (1906) 196 U.S. 319.

(6) *Duncan v. Missouri*, (1894) 152 U.S. 377.

(7) *Commonwealth v. Hall*, 97 Mass. 570.

a previous conviction, even though the *previous conviction* took place before the passing of the statute;⁸ (d) does not invalidate a statute declaring that no person after conviction of a felony shall carry on a business (e.g., practice of medicine), even though the person was convicted before the passage of the law;⁹ (e) does not apply to deportation, since deportation is not a criminal punishment¹⁰ or to extradition proceedings;¹¹ similarly, it does not apply to detention of the insane¹² or to forfeiture for non-payment of taxes.¹²

(B) *England*.—Under the English Constitution, there is no *legal* bar to the power of Parliament to enact any law whatsoever, and Parliament is competent to give retrospective effect to any of its laws.

Nevertheless, *Blackstone*¹³ denounced this method of legislation as 'unreasonable':

"There is a still more unreasonable method.....which is called making laws *ex post facto*; when after an action (indifferent in itself) is committed, the Legislature then for the first time declares it to be a crime, and inflicts punishment upon the person who committed it."

So, though it is within the competence of the English Parliament to enact *ex post facto* legislation, Courts are loth to give such an interpretation to a statute unless such effect is clearly intended and expressed by the Legislature.¹⁴ As observed by our Supreme Court.^{14a}—

"In the English system of jurisprudence repugnance of such laws to universal notions of fairness and justice is treated as a ground 'not' for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it."

The rule of interpretation is that a new Act which penalises what otherwise is not an offence must be so construed as to make it strike at future acts or commissions, unless the Legislature has clearly said so.¹⁵ If, however, the Legislature expressly gives retrospective effect to the penal provision, the Court would be powerless to protect the subject from the operation of the law on the ground that it is *ex post facto*.¹⁶ In fact, during World War II, statutes were passed increasing the penalty for offences committed before the passing of such statutes, and their validity was upheld.¹⁷

(C) *Dominions*.—Like the English Parliament, the Dominion Parliaments are competent to pass *ex post facto* laws.¹⁸

In *Australia*, thus, it has been held¹⁸ that the legislative power of the Commonwealth Parliament under s. 51 (xxxix) of the Constitution Act is not fettered by any prohibition against *ex post facto* legislation and that the Courts cannot add any such limitation to the Constitution Act. In the result, it is competent for the Legislature to make a past act unlawful and penalise it, retrospectively.¹⁸⁻¹⁹

(D) *Eire*.—Art. 15 (5) of the Constitution of 1937 says—

"The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission."²⁰

(E) *Japan*.—Art. XXXIX of the Japanese Constitution of 1946 says—

"No person shall be held criminally liable for an act which was lawful at the time it was committed....."

(8) *McDonald v. Massachusetts*, (1901) 180 U.S. 311.

(9) *Hawker v. N. Y.*, (1898) 170 U.S. 189.

(10) *Harisiades v. Shaughnessy*, (1952) 342 U.S. 580 (594); *Galran v. Press*, (1954) 347 U.S. 522.

(11) *Neely v. Henkel*, (1901) 180 U.S. 109 (123).

(12) Willis, *Constitutional Law*, 1936, p. 516.

(13) *Blackstone, Commentaries*, Vol. I, p. 46; see also *Phillips v. Eyre*, (1870) 6 Q.B. 1 (23).

(14) *Moon v. Durden*, (1848) 2 Ex. 22.

(14a) *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188.

(15) *Butchers, Hide Co. v. Seacome*, (1913) 2 K.B. 401.

(16) Allen, *Law in the Making*, 6th Ed., p. 451.

(17) *Director of P. P. v. Lamb*, (1941) 2 K.B. 89; *Buckman v. Button*, (1943) K. B. 405.

(18) *R. v. Kidman*, (1915) 20 C.L.R. 425.

(19) *Millner v. Raith*, (1942) 66 C.L.R. 1.

(20) Cf. Kohn, *Constitution of the Irish Free State*, 1932, pp. 169-171, as to the interpretation of corresponding provision in the Constitution Act of 1922.

(F) *Government of India Act, 1935*.—There was no prohibition in this Act or in any law prior to the commencement of this Constitution, against *ex post facto* laws. So the Legislature was competent to pass such laws.²¹ The Courts, however, used to lean against a retrospective interpretation.²²

INDIA

Scope of Cl. (1) : Prohibition of retroactive criminal laws.

A sovereign Legislature has the power to enact prospective as well as *retrospective* laws (see, further, under Art. 245, *post*). But the present Article sets two limitations upon the law-making power of every legislative authority in India as regards retroactive *criminal* legislation. The present clause thus follows the American precedent but it does not use the expression "*ex post facto*" laws; it goes beyond that and enumerates the two consequences which a *criminal law* must avoid. These are—

(I) No person shall be *convicted* of any offence under any law not in force at the time of the commission of the offence.

(II) The penalty for an offence shall not be greater than that which might be inflicted for the offence under the law which was in force when the offence was committed.

(I) NO CONVICTION UNDER RETROACTIVE LAW.

I. The Clause prohibits the Legislature from making an act a *crime* for the first time and then applying it to an act which had been committed before such law came into force. In other words, a person cannot be convicted for an act which was *not* an *offence* under the law which was in force when that act was committed.²³

Illustrations.

1. The Petitioner-landlord took a selami for settling a tenant in 1948 when the Calcutta Rent Control Ordinance, 1946 was in force. The penalty prescribed by the Ordinance for this act of the landlord was only a statutory fine to be imposed by the Rent Controller. The West Bengal Premises Rent Control Act, 1950, which replaced the Rent law, made the act an 'offence' punishable by a Court of law. After that Act came into force, the Petitioner was prosecuted for his act of taking selami in 1948. *Held*, he could not be *prosecuted* for an act which was not an 'offence' when it was committed.^{23a}

On the other hand,—

2. The appellants were prosecuted for certain offences which were alleged to have been committed in 1949; the trial continued after commencement of the Constitution, leading to the conviction of the Appellants in 1951. The charges were under certain sections of the I.P.C., as adapted by the Vindhya Pradesh Ordinance XLVIII of 1949, and the trial was held by a special Court under the Vindhya Pradesh Criminal Law Amendment (Special Court) Ordinance V of 1949. It was contended that the acts for which the appellants had been convicted were committed before the V. P. Ordinance XLVIII of 1949 had adapted the I.P.C., and that the Ordinance hit the alleged acts by retrospective operation which is prohibited by Art. 20 (1).

To this, the Court pointed out by an analysis of the law prior to the passing of the Ordinance that the alleged acts were already offences under the pre-existing law in the State. Of course, the impugned Ordinance had added a definition to the effect that a Minister was a 'public servant', but this proposition had been laid down by a decision of the Privy Council long before the impugned Ordinance. *Held*, there was no violation of Art. 20 (1), since no *new* offence had been created by the retrospective adaptation.²⁴

II. The words 'convicted' and 'offence' make it clear that the limitation applies to a *criminal* proceeding and to a judicial punishment therein.²⁴ It

(21) *Chumilal v. Corporation of Calcutta*, (1933) 37 C.W.N. 737; *Jnan Prasanna v. W.*

Bengal, A. 1949 Cal. 1.

(22) *Gadai v. Emp.*, A. 1943 Pat. 361.

(23) *Chief Inspector v. Thapar*, A. 1961 S.C. 838 (845).

(23a) *Pulin v. Satyaranjan*, A. 1953 Cal. 599.

(24) Cf. *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188.

follows, therefore, that the guarantee has no application to retrospective legislation—

(a) Affecting *civil* rights or liabilities with respect to property or contract.²⁵ Even where a statute imposes a civil obligation, the failure to discharge it is not an 'offence' unless the statute expressly makes it so.^{25a} Hence, the insertion of s. 25FFF (1) in the Industrial Disputes Act, 1947, with retrospective effect, does not constitute a violation of Art. 20 (1) because the failure to pay the compensation required to be paid by the section is not made an 'offence' though the money may be recovered by a coercive process, and the person may be imprisoned for failure to pay, under the revenue law for coercive recovery of the amount.^{25a} Art. 20 (1) avails only against *punishment* for an act which is treated as an 'offence', which when done was not an offence.^{25a}

(b) Imposing any sanction other than a *judicial punishment*, such as preventive detention¹ or externment² or deprivation of business or forfeiture of property³ by an administrative authority or cancellation of a naturalisation certificate by reason of an act committed prior to the operation of the penal law in question.

In the U.S.A., it has been held that the deprivation of civil or political rights⁴ also comes within the purview of the prohibition against *ex post facto* legislation. But that view cannot be taken under *our* Constitution owing to the presence of the word 'convicted'. If, however, a 'civil law' creates an 'offence', Art. 20 (1) will come into operation in relation to conviction for that offence.

III. Another important consequence follows from the present clause being worded differently from the American clause. The prohibition under the present clause is not confined to the passing or the validity of the law, but extends to the conviction or the sentence based on its character as an *ex post facto* law.⁵ The clause, therefore, must be taken to prohibit all convictions or subjections to penalty after the Constitution in respect of an *ex post facto* law whether the same was a *post-Constitution* or a *pre-Constitution* law.²⁴ The result is that the future operation of the fundamental right declared in Art. 20 may also in certain cases result from acts and situations which had their commencement in the pre-Constitution period. This, however, does not in any way affect the general principle that the fundamental rights conferred by the Constitution have no retrospective operation (see Vol. I, p. 129),²⁴ for, Art. 20 (1) does not authorise the re-opening of pre-Constitution convictions;⁵ what it does is to hit all post-Constitution convictions and sentences, under whatever law they might take place.

IV. What is prohibited under cl. (1) is only conviction or sentence under an *ex post facto* law and *not* the *trial* thereof. Hence, trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at that time cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.⁶

The above prohibition would not, therefore, prevent the Legislature from altering matters of *procedure*,⁷ which do not make an act which was not an offence to be an offence, nor increase the penalty.⁸

(25) *Mukandi v. Executive Engineer, A.* 1956 Pepsu 40.

(25a) *Hathising Mfg. Co. v. Union of India, A.* 1960 S.C. 923 (932).

(1) *Prahlad v. State of Bombay, A.* 1952 Bom. 1.

(2) *Rameschandra v. State, A.* 1955 Bom. 346.

(3) *State of W.B. v. S. K. Ghose, A.* 1963 S.C. 255.

(4) *Cummings v. Missouri*, (1867) 4 Wall. 333.

(5) *Satwant v. State of Punjab*, (1960) S.C.I. 863 (875).

(6) *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188: (1952-4) 2 C.C. 269 (272): A. 1953 S.C. 394.

(7) *Thompson v. Utah*, (1898) 170 U.S. 343.

(8) Cf. *Public Prosecutor v. Ayyappan, A.* 1953 Mad. 337.

The general rule is that an accused person is triable under the procedural law which is in force at the time of the trial and not when the offence was committed and that no person has any vested right in a form of procedure.^{7,9} But there may be cases where the change in the procedure may make the penalty more onerous,¹⁰ by taking away a "substantial" protection with which the existing law surrounds the person accused."¹⁰

(A) *U.S.A.*—As to what changes in procedure will come under the inhibition against *ex post facto* legislation, the American Supreme Court has observed—

"Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation.....and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance."¹¹

Thus, in the *U.S.A.*, it has been held that there is no violation of the *ex post facto* Clause where the Legislature, with retrospective effect, merely

- (a) changes the place of trial;¹² or
- (b) abolishes courts and creates new ones;¹² or
- (c) confers upon the State a right of appeal;¹³
- (d) provides for joint trial of persons accused of committing the same offence both before and after the enactment;¹¹
- (e) changes the qualifications for jurors;¹⁴ or
- (f) enlarges the classes of admissible witnesses, even where it means admitting witnesses who were previously *disqualified* by law;¹⁵ or
- (g) renders admissible evidence which was previously inadmissible;¹⁶ or
- (h) provides for a longer period of incarceration between conviction and execution;¹⁷

On the other hand, the American Supreme Court has annulled legislation as violative of the *ex post facto* Clause—

(i) where the change in the law of evidence takes away a substantial advantage from the accused, e.g., where the change results in requiring less evidence than was required when the offence was committed;¹⁶ or takes away a defence^{11,18} which was available to the accused at the time when the offence was committed;

(ii) where the number of the jury was reduced from twelve to eight, even for offences committed prior to the enactment.¹⁹

(B) *India*.—In *Shiv Bahadur v. State of V. P.*,²⁰ our Supreme Court has observed—

"What is prohibited under Art. 20 is only conviction or sentence under an *ex post facto* law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence.....cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial.....by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."²⁰

Hence, it has been held that Art. 20 (1) does not prohibit a law from retrospectively changing—

- (a) the place of trial;²¹

(9) *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188 (1200).

(10) *Duncan v. Missouri*, (1894) 152 U.S. 377.

(11) *Beazell v. Ohio*, (1925) 269 U.S. 167.

(12) *Duncan v. Missouri*, (1894) 152 U.S. 377 (382).

(13) *Mallett v. N. Carolina*, (1901) 181 U.S. 589.

(14) *Gibson v. Mississippi*, (1896) 162 U.S. 565.

(15) *Hopt v. Utah*, (1884) 110 U.S. 574.

(16) *Thompson v. Missouri*, (1898) 171 U.S. 380.

(17) *Raoncy v. Dakota*, (1906) 196 U.S. 319.

(18) *Kring v. Missouri*, (1882) 107 U.S. 221.

(19) *Thompson v. Utah*, (1898) 170 U.S. 343.

(20) *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 118.

(21) *State of V. P. v. Shiv Bahadur*, A. 1951 V. P. 17.

(b) the mode of execution or carrying out of the sentence.²²

But while it is true that owing to the use of the word 'convicted' in Art. 20 (1), our Courts may not interfere with a retroactive procedural law merely on the ground that it operates to the disadvantage of the accused in some substantial matter; it should, nevertheless, be the duty of the Courts to be watchful if the Legislature, in the guise of changing the procedure, is seeking to penalise what was innocent when committed or to create a new offence²³ or to increase the penalty as it existed at the commission of the offence.

V. The gist of the guarantee is that a person may be penalised only for conduct which is *subsequent* to the coming into operation²⁴ of the penal law. In the case of continuing²⁵ or recurring wrongs, however, some acts may constitute 'subsequent' conduct, even though some part of the same transaction took place prior to the enforcement of the penal law. Thus, a law may penalise the continued possession of liquor even though it might have been acquired prior to the coming into operation of that law;¹ or penalise the continued performance of a contract which had been entered into prior to the enforcement of that law.² In such cases, what the law penalises is a course of conduct, if continued after the enactment.³

In other words, an innocent act cannot be made criminal by a law made after the commission of the act, but the guarantee does not prohibit the Legislature from drawing *part* of the requisites for an offence from a time antecedent to the passing of the law, for, such law, which is prospective in its direct operation cannot be said to be retrospective.⁴ Hence, while prescribing the punishment for an offence, the Legislature is not debarred from prescribing a higher punishment for 'old offenders'; it is, in essence, not prescribing a higher penalty for an offence committed prior to the law, but laying down an effective punishment for an offence committed after the enactment.⁵

'Offence'.

None of the clauses of Art. 20 applies unless there is an 'offence'.

There being no definition of 'offence' in the Constitution, the definition in s. 3 (37) of the General Clauses Act is to be applied. It, therefore, means an act or omission which is punishable by any law by way of fine, imprisonment or death. But unless there is a law forbidding the doing or the omission to do something, no question of 'punishment' comes.⁶

Hence, where a law of irrigation provides for the levy of a special rate for 'unauthorised use', with retrospective effect, it cannot be held that the Legislature was imposing a higher penalty in contravention of Art. 20 (1), inasmuch as there was no law prohibiting the use of water and no 'punishment' for an 'offence'.⁶

What this Clause prohibits is the creation of a new *offence* with retrospective effect. It does not prohibit the creation of a rule of evidence or a presumption for an existing 'offence'.⁷

'Laws in force'.

1. This expression refers to the law *factually in operation* at the time when the offence was committed and does not relate to a law 'deemed to be in force' by

(22) *Public Prosecutor v. Ayyappan*, A. 1953 Mad. 337.

(23) Cf. *Randhira v. State*, A. 1954 M.B. 83.

(24) *Ex parte Medley*, (1889) 134 U.S. 160.

(25) *Abu v. Chief Secretary*, A. 1952 Sau. 98.

(1) *Samuels v. McCurdy*, (1925) 267 U.S. 188.

(2) *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U.S. 86.

(3) *Chicago R. Co. v. Tranbarger*, (1915) 238 U.S. 67.

(4) Cf. *R. v. St. Mary Whitechapel*, (1848) 116 E.R. 811 (814).

(5) *Hawker v. N. Y.*, (1898) 170 U.S. 189.

(6) *Jawala Ram v. State of Pepsu*, A. 1962 S.C. 1246 (1248).

(7) *Sajjan Singh v. State of Punjab*, A. 1964 S.C. 464 (468).

(8) *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188: (1952-4) 2 C.C. 269 (271): A. 1953 S.C. 394.

the retrospective operation of a law subsequently made.⁸ Art. 20 (1), in fact, controls the power of the Legislature to enact such retrospective legislation so far as the punishment for crimes is concerned.

2. The law for the violation of which a person is sought to be convicted must 'have been' in force at the time when the act with which he is charged was committed. It follows, therefore, that a person cannot be convicted for an act which was *not an offence* under the law which was in force when that act was committed.⁹⁻¹⁰

3. But rules and regulations made under a statute which is repealed but continued in force under s. 24 of the General Clauses Act is a 'law in force' within the meaning of Art. 20 (1).¹¹

(II) THE PENALTY NOT TO BE MADE HIGHER BY RETROACTIVE LEGISLATION.

I. The second part of Cl. (1) lays down that a person may be subjected to only those penalties which were prescribed by the law which was in force at the time when he committed the offence for which he is being punished. If an additional¹² or higher¹³ penalty is prescribed by any law made subsequent to the commission of the offence, that will not operate against him in respect of the offence in question.

II. Owing to the use of the word 'penalty' in the latter part of Art. 20 (1), a question has been raised in some cases as to whether the prohibition extends to penalties other than punishments awarded in a judicial proceeding. No such question will arise if the word 'penalty' is read with the word 'convicted' in the earlier part of the Clause. While the first part bars the conviction, the second part relates to the punishment or sentence that may be inflicted upon such conviction.¹² A 'penalty', therefore, comes within the purview of Art. 20 (1) only if the earlier part of the Clause is satisfied.¹⁴ Hence—

(A) The Clause does not bar retrospective legislation imposing the following penalties—

(i) Forfeiture of property for a statutory offence, ordered by an *administrative* authority.¹⁵

(ii) Summary eviction of landlord who has contravened the provisions of a Rent Control law.¹⁶

(iii) Liability to pay an enhanced water rate in case of an unauthorised use of water.¹⁷

(iv) Loss or deprivation of any business¹⁸ or cancellation of naturalisation certificate¹⁹ by reason of act committed prior to the operation of the penal law in question.

(v) Eviction from unauthorised occupation of public property.²⁰

(vi) Externment of habitual criminals.²¹

(vii) Preventive detention.²²

(viii) Heavier penalties for failure to pay taxes.²³

(9) *Pulin v. Satyaranjan*, A. 1953 Cal. 599.

(10) *Randhira v. The State*, A. 1954 M.B. 83.

(11) *Chief Inspector v. Thapar*, A. 1961 S.C. 838 (845).

(12) *Kedar Nath Bajoria v. State of West Bengal*, (1953) S.C.A. 835 (852); (1954) S.C.R. 30.

(13) *Mohari Lall v. Corporation of Calcutta*, A. 1953 Cal. 561.

(14) *Sajjan Singh v. State of Punjab*, A. 1964 S.C. 464 (468).

(15) The decision to the contrary in *Hurdut v. State of Bihar*, A. 1957 Pat. 1 (3) does not appear to be sound.

(16) *Fathima v. State of Madras*, A. 1953 Mad. 257.

(17) *Mukundi v. Executive Engineer*, A. 1956 Pepsu 40 (46).

(18) *Hawker v. N. Y.*, (1898) 170 U.S. 189; *Reetz v. Michigan*, (1903) 188 U.S. 505.

(19) *Johannessen v. U. S.*, (1912) 225 U.S. 227.

(20) *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 346.

(21) *Ramshchandra v. State*, A. 1955 Bom. 346.

(22) *Pralhad v. State of Bombay*, A. 1952 Bom. 1.

(23) *Bankers' Trust Co. v. Blodgett*, (1923) 260 U.S. 647.

(B) On the other hand the following are 'penalty' for the purposes of this Article—

(i) Forfeiture of property under s. 53, I.P.C., ordered by a Court trying an offence.²⁴

(ii) Compensatory fine under s. 9 (1) of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949.²⁵

II. A law which *enhances* the punishment for an offence shall not be retrospective.

(a) If an additional²⁵ or higher¹ penalty is prescribed by any law made *subsequent* to the commission of an offence, that will not operate against a person prosecuted for that offence.

Illustrations.

(i) A was charged under the Prevention of Corruption Act, 1947, for an offence which was committed in 1947. The punishment prescribed by that Act was 'imprisonment or fine or both.' During the pendency of the trial, in 1949, the West Bengal Criminal Law Amendment Act was passed which provided for the imposition of an additional fine 'equivalent to the amount of money or value of other property found to have been procured by the offender by means of the offence'. A was convicted (after the commencement of the Constitution), and in addition to imprisonment and the ordinary fine under the Prevention of Corruption Act, he was sentenced to an additional fine of Rs. 47,000/- under the Criminal Law Amendment Act, on account of the money procured by him by means of the offence. *Held*, the imposition of the additional fine contravened Art. 20 (1) and the sentence of fine to the extent of Rs. 47,000/- was accordingly set aside. It was further pointed out that the fact that the prosecution was pending from before the Constitution did not prevent the application of Art. 20 (1) of the Constitution since the penalty was being imposed after the Constitution had come into force.²⁵

(ii) Where the law makes obligatory a punishment which was previously the maximum, it cannot be given retrospective effect.²

(b) A change in the law which provides that the date of execution shall not be disclosed to the person condemned to death increases his mental worry³ or provides that prior to execution of the death sentence the condemned man shall be in solitary confinement instead of imprisonment imposes additional punishment,³ and cannot, therefore, be given retrospective operation.

On the other hand, the imposition of a heavier penalty upon habitual criminals is not an increase of punishment as regards *past* offences committed by the person, but is a heavier penalty for the offences committed by the person *subsequent* to the operation of the statute in question.⁴

In other words, a statute which provides for a more severe penalty for an offence in the case of a habitual offender, previously convicted of the same crime, cannot be impeached as *ex post facto*, even though the previous conviction had been for an offence committed prior to the passing of the statute; for, the heavier penalty is not an additional punishment for the earlier offence, but a punishment for the *new* offence,—“but is heavier if he is a habitual criminal”.⁴ “It is a stiffened penalty for the latest crime, which is considered to be an aggravated offence because a repetitive one.”⁵

Again, where the penalty is not greater, any change in the mode of execution or of the penalty itself is not bad for its being *ex post facto*.⁶⁻⁷

III. But the Article does not prohibit the substitution of a penalty which is not higher or greater than the previous one.⁸⁻⁹

Thus, it does not prohibit the mollification of the rigour of the law, e.g., by providing for probation of a juvenile offender, retrospectively.⁹

(24) *State of W. B. v. S. K. Ghose*, A. 1963 S.C. 255.

(25) *Kedar Nath v. State of W. B.*, A. 1953 S.C. 404; (1954) S.C.R. 30.

(1) *Mohari Lall v. Corporation of Calcutta* A. 1953 Cal. 561.

(2) *Lindsey v. Washington*, (1937) 301 U.S. 397.

(3) *Ex parte Medle*, (1890) 134 U.S. 160.

(4) *McDonald v. Commonwealth*, (1901) 180 U.S. 311.

(5) *Gryker v. Burke*, (1948) 334 U.S. 728 (732).

(6) *Holden v. Minnesota*, (1890) 137 U.S. 483;

(7) *Rooney v. N. Dakota*, (1905) 196 U.S. 319.

(8) *Public Prosecutor v. Ayyappan*, A. 1953 Mad. 337.

(9) *Rattan Lal v. State of Punjab*, A. 1965 S.C. 444 (446-7).

Whether the substituted penalty is greater or lesser than that imposed under the pre-existing law may not always be easy to answer. In the U.S.A., it has been held that—

- (a) Imprisonment for life is a lesser penalty than a sentence of death¹;
- (b) Imprisonment is lesser penalty than whipping¹;
- (c) Electrocution is *not* a higher penalty than hanging.²

In India, similarly, it has been held that—

Where under the law in force at the time of commission of the offence the fine could be *unlimited*, the penalty is not greater, if the subsequent law prescribes a *minimum* fine to be imposed in any case.³

IV. The prohibition is against the legislation which enhances the penalty and then seeks to give retrospective effect and it is immaterial what punishment is actually imposed by the Court under it, in a particular case.⁴ The prohibition is against legislation and not against judicial decisions, *i.e.*, judge-made law.⁵

“Offence”.

Cf. definition in s. 3 (38) of the General Clauses Act, *quoted* at p. 646 of Vol. I.

‘Law in force’.

1. This expression refers to the law *factually in operation* at the time when the offence was committed and does not relate to a law ‘deemed to be in force’ by the *retrospective operation* of a law subsequently made.^{6,7} The law for the violation of which a person is sought to be convicted must ‘have been’, in fact, in force at the time when the act with which he is charged was committed.⁸ Art. 20 (1), in fact, controls the power of the Legislature to enact such retrospective legislation so far as the punishment for crimes is concerned.

2. But rules and regulations made under a statute which is repealed but continued in force under s. 24 of the General Clauses Act is a ‘law in force’ within the meaning of Art. 20 (1), even though they are kept alive by a *legal fiction*.¹⁰

CLAUSE (2).

OTHER CONSTITUTIONS

(A) U.S.A.—The Fifth Amendment to the Constitution of the U.S.A. says—

“Nor shall any person be . . . subject for the same offence to be twice put in jeopardy of life or limb.”

The protection has been held to be not only from punishment but also from a second *trial*, which commences when a man is *charged* before a competent tribunal.¹¹ Conviction or acquittal at the previous trial will equally bar a second prosecution. A verdict of acquittal, even when not followed by a judgment, is a bar to subsequent prosecution for the same offence.¹² Trial by a court-martial bars prosecution in a federal Court.^{12a}

(1) Rottschaefer, Constitutional Law, 1939, pp. 772-3.

(2) *Malloy v. S. Carolina*, (1915) 237 U.S. 180.

(3) *Satwant v. State of Punjab*, (1960) S.C.J. 863 (875-6).

(4) *Lindsey v. Washington*, (1937) 301 U.S. 397.

(5) *Ross v. Oregon*, (1913) 227 U.S. 150.

(6) *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188: (1952-4) 2 C.C. 269 (271): A. 1953 S.C. 394.

(7) *Ramashankar v. State*, A. 1954 All. 562.

(8) *Pu'in v. Satyaranjan*, A. 1953 Cal. 599.

(9) *Ram Rattan v. State*, A. 1959 Punj. 69.

(10) *Chief Inspector v. Thapar*, A. 1961 S.C. 838 (845). [The Court made a distinction between a retrospective law itself making an act an offence under the law in force, and the General Clauses Act keeping alive the effect of the act which was, in fact, an offence under the law which was in force at the time when it was committed, but which has been subsequently repealed].

(11) *Kepner v. United States*, (1904) 195 U.S. 100.

(12) *U. S. v. Ball*, (1896) 163 U.S. 662 (672).

(12a) *Grafton v. U. S.*, (1907) 206 U.S. 333.

But—

(a) A person is not put in jeopardy (i) by prosecution in a Court which has no jurisdiction to try the case,¹¹ (ii) by a fresh trial after discharge of jury before it gives its verdict.¹²

On the same principle, it has been held that a soldier is not put in double jeopardy by being tried by a second court-martial, after a first court-martial had to be dissolved, owing to technical reasons, before it could reach a decision.¹⁴ In this case,¹⁴ the Court observed—

“The double-jeopardy provision.....does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.”¹¹

(b) A *re-trial* does not come within the rule.¹⁵ When a person appeals¹² from conviction in a lower Court, he *waives* his protection, and he may be tried again, at the direction of the Appellate Court,¹⁵ but *not* for an offence of a *higher degree* of which was acquitted at the former trial.¹⁶

(c) In the U.S.A., Government cannot appeal from an order of *acquittal*, because of the present rule,^{12, 17} even though Government may have secured new evidence, not previously available.

But Government may appeal from a sentence of conviction for a *higher sentence*, and a retrial may be ordered in such appeal; this is not double jeopardy.¹⁷

(d) When the same act or transaction involves *separate offences*, under different provisions of the same statute¹⁸ or under different¹⁹ statutes, separate prosecution lies for the separate offence, e.g., conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy.^{17a} But where a person was acquitted on a charge of conspiracy, his subsequent conviction for the substantive offence was quashed.²⁰ The test for determining whether the offences are identical is whether the same evidence is required to substantiate them.¹⁻²

Thus, where a statute makes it an offence to transport a woman for purposes of prostitution, the transportation of more than one woman in a *single transaction*, constitutes a single offence.³

In some recent cases,^{2, 4} this exception has been extended to justify separate prosecutions and trials for the same offence, say, murder, committed against several persons and at the same transaction, though not without dissent.

(e) Nor does the doctrine extend to the *execution* of the sentence. Thus, a fresh warrant for electrocution may be issued after a former attempt to electrocute the convict failed owing to mechanical defect in the apparatus.^{4a}

(f) The provision prohibits a person from being punished *criminally*, more than once, for the same offence; it does not debar the Legislature from imposing both a criminal and a *civil* sanction in respect of the same act or omission.⁵ A provision for forfeiture of property to recover fiscal dues,⁶ or for the recovery of liquidated or penal damages for breach of a statutory obligation⁷ is not to be treated as a criminal punishment, for the application of this clause.

(13) *U. S. v. Perez*, (1824) 9 Wh. 579.

(14) *Wade v. Hunter*, (1948) 336 U.S. 684.

(15) *United States v. Josef*, (1824) 9 Wh. 579; *Forman v. U. S.*, (1960) 361 U.S. 416.

(16) *Green v. U. S.*, (1957) 355 U.S. 184 (193).

(17) *Pulko v. Connecticut*, (1937) 302 U.S. 319.

(17a) *United States v. Rabinowich*, (1915) 238 U.S. 78; *Green v. U. S.*, (1957) 365 U.S. 165.

(18) *Blockburger v. U. S.*, (1932) 284 U.S. 299.

(19) *Gore v. U. S.*, (1957) 357 U.S. 386.

(20) *Selfron v. U. S.*, (1948) 332 U.S. 575.

(1) *Morgan v. Devine*, (1915) 237 U.S. 632.

(2) *Hoag v. New Jersey*, (1957) 356 U.S. 164 (467).

(3) *Bell v. U. S.*, (1955) 349 U.S. 81.

(4) *Ciucci v. Illinois*, (1958) 356 U.S. 571.

(4a) *Louisiana v. Resweber*, (1947) 329 U.S. 459.

(5) *Helvering v. Mitchell*, (1938) 303 U.S. 391 (399).

(6) *In re Chapman*, (1897) 166 U.S. 661 (672).

(7) *Rex Trailer Co. v. U. S.*, (1955) 350 U.S. 148 (153).

(g) There is no second 'punishment' for an earlier offence when the law prescribes a *higher* punishment for old offenders; it is the repetition of criminal conduct which aggravates the subsequent offence and justifies a heavier penalty.⁸

(B) *England*.—The above provision of the United States Constitution is indeed founded on the English Common Law rule '*nemo debet bis vexari*', which means that a man may not be put twice in peril for the same offence.⁹ Blackstone¹⁰ referred to "this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

It enables an accused to raise a plea not only of *autrefois convict* but also of *autrefois acquit*.¹⁰

"The plea of '*autrefois convict*' or '*autrefois acquit*' avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned.....The question for the jury on the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials.

A plea of '*autrefois acquit*' is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter."¹¹

I. The principle upon which *autrefois acquit* is founded is sometimes stated as different from that of double jeopardy, viz., that of finality of judgment:

"Where an offence has already been the subject of judicial investigation and adjudication, and there has been an acquittal, the acquittal is conclusive and it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the accused."¹²

In some cases, the principle has been applied to cases of *constructive* acquittal as well. Thus, where the Court refused to amend a charge by insertion of the word 'recklessly' on the ground that the prosecution had failed to discharge the burden of proving 'recklessness', a fresh prosecution on the same charge with the addition of the word 'recklessly' was held barred by the plea of *autrefois acquit*.¹³ Even an *erroneous* acquittal, standing unreversed, is a sufficient foundation for this plea.¹⁴ But where the appellate Court simply quashes a conviction, without expressly ordering an acquittal, there is nothing to prevent a retrial.¹⁵

A previous acquittal will be in bar to a subsequent indictment only—(i) if the acquittal was for the exact offence charged in the subsequent indictment; or (ii) if the subsequent indictment is based on the same acts and omissions in respect of which the previous acquittal was made. In other words, when a man has been tried for an offence and acquitted, he cannot again be indicted for the same offence, if the first indictment were such that he could have been lawfully convicted therein.¹⁶ Whether the facts are the same or not is not the true test: the test is whether the acquittal on the first charge necessarily involves an acquittal on the second charge.¹⁷ It is the identity of the offence, not of the evidence, which constitutes the bar.¹⁸ Where the offence is the same, subsequent prosecution would not lie for the same offence, simply because aggravated circumstances are added to the charge.¹⁹

But if the crimes were so distinct that the evidence necessary to prove the one will not prove the other, the plea will not be available.²⁰

(8) *Graham v. West Virginia*, (1912) 224 U.S. 616 (623).

(9) *R. v. Barron*, (1914) 2 K.B. 570.

(9a) IV Bl. Comm., 335.

(10) Archbold on Indictments, pp. 135-142; *R. v. Miles*, (1890) 24 Q.B.D. 423.

(11) Halsbury, Hailsham Ed., Vol. IX, para. 212, pp. 152-3.

(12) *R. v. Plummer*, (1902) 2 K.B. 339.

(13) *Halstead v. Clark*, (1944) K.B. 250

(14) 2 Hale 247.

(15) *Kannangra v. The King*, (1950) 55 C.W.N. 37 (40) (P.C.).

(16) *Wemyss v. Hopkins*, (1875) 10 Q.B. 378.

(17) *R. v. Barron*, (1914) 2 K.B. 570.

(18) *R. v. Kendrick*, (1931) 144 L.T. 748.

(19) *R. v. Miles*, (1890) 24 Q.B.D. 423.

(20) *R. v. Vandercomb*, (1796) 2 East P.C. 519.

Illustrations.

1. An acquittal upon an indictment for murder may be pleaded in bar to an indictment for manslaughter on the same facts, and, vice versa.²¹
2. A person acquitted for robbery cannot afterwards be indicted for an assault with intent to rob; a person acquitted for embezzlement cannot afterwards be indicted for larceny, and vice versa.²²
3. If the first indictment were for burglary, with intent to commit larceny, an acquittal on it would not bar a subsequent indictment for larceny.²³
4. An acquittal upon a charge of murder is no bar to indictment for arson arising from the same facts.²³
5. An acquittal on a charge of possession of stolen goods does not bar a subsequent charge for larceny of the same goods.²⁴

But an acquittal upon an insufficient indictment is no bar to another indictment for the same offence. In other words, where, by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the accused was not lawfully liable to suffer judgment in the first indictment, he has not been in jeopardy, so as to be entitled to plead the former acquittal or conviction in bar to a subsequent indictment.²⁵

II. A previous conviction can be effectively pleaded in bar (*autrefois convict*) to a subsequent indictment only in the following cases:

(i) Where the conviction was for the exact offence charged in the subsequent indictment, and was sufficient in law. A reversed judgment of conviction is no bar.²⁵

(ii) Where the subsequent indictment is based on the same acts or omissions as those in respect of which the previous conviction was made. Thus, a conviction for obtaining credit for goods under false pretence is a bar to a subsequent indictment for larceny on the same facts;² again, where on an indictment for inflicting grievous harm, unlawful wounding, assault occasioning bodily harm, and common assault, the jury convicted of common assault, but disagreed on the other charges, *held*, the conviction for common assault barred a fresh indictment or retrial on the other charges.³

But a conviction for assault does not bar a subsequent prosecution for murder if the assaulted person dies subsequently.^{3a}

(iii) Where the previous trial was before a Court of competent jurisdiction.⁴

On the other hand, the plea is available where the person was convicted, though not sentenced⁵ or even where the accused pleaded guilty but there was no sentence.⁵

(C) *Japan*.—Art. 39 provides—

"No person shall be held criminally liable for an act.....of which he has been acquitted nor shall he, in any way, be placed in double jeopardy."

(D) *Government of India Act, 1935*.—There was no provision in that Act itself relating to this matter, but the existing law of Criminal Procedure (s. 403 of the Code of Criminal Procedure) already embodies the principles of *autrefois convict* and *autrefois acquit*.

But the provisions of this section are somewhat different from the English rule, in respect of *autrefois acquit*. Under the English law, in order to raise the plea of *autrefois acquit*, the accused must show that (a) he was previously *tried*, and also that (b) he was *acquitted* at that trial. But under the Criminal Procedure Code,—

(i) There are certain cases where statutory acquittal without trial is sufficient to sustain the bar of *autrefois acquit* under sec. 403. These cases are:

(21) *Holcroft's case*, (1578) 2 Hale 246.
 (22) *R. v. Gorbett*, (1856) D. & B. 166.
 (23) *R. v. Serne*, (1888) 107 Cent. Crim. 418.
 (24) *Flatman v. Light*, (1946) K.B. 414.
 (25) *R. v. Drury*, (1848) 3 C. & K. 193; *R. v. Maesham*, (1912) 2 K.B. 362.
 (1) 2 Hale 215.

(2) *R. v. King*, (1897) 1 Q.B. 214.
 (3) *R. v. Grimwood*, (1896) 60 J.P. 809.
 (3a) *R. v. Thomas*, (1949) 2 All E.R. 662 (C.A.).
 (4) *Wemyss v. Hopkins*, 10 Q.B. 378.
 (5) *R. v. Sheridan*, 26 Cr. App. R. 1.

(a) Acquittal for non-attendance of the complainant (Sec. 247). (b) Composition of an offence [Sec. 345 (6)]. (c) Withdrawal of prosecution by the Public Prosecutor in cases where no charge is required by the Code; or, where charge is required,—after the framing of the charge [Sec. 494 (b)].

(ii) On the other hand,—certain cases are excluded from the scope of the plea by the *Explanation* to sec. 403, even though these cases are rather analogous to the cases above-mentioned:

1. Dismissal of the complaint under sec. 203. In this case, though there has been no trial, the complainant has failed to substantiate his case, *prima facie*, on his own evidence. 2. 'Discharge' of the accused; and in this respect no distinction is made between a discharge where all the evidence for the prosecution has been heard and a discharge where it has not been heard. Thus, 'discharge' of the accused takes place under the Code, in the following cases:

(a) Discharge of accused in a warrant-case which is compoundable, or non-cognizable, for non-appearance of complainant (Sec. 259). (b) Discharge of the accused in a warrant case when the evidence for the prosecution has failed to make out a case [Sec. 253 (1)]. (It is to be noted that in this case, the discharge takes place after hearing *all* the evidence for the prosecution). (c) Discharge at the enquiry stage, in cases triable by a Court of Sessions or the High Court [Sec. 209 (1)]. (d) Discharge on entry of *nolle prosequi* (Sec. 333).

INDIA

Scope of Cl. (2) : Bar against double prosecution and punishment.

The object of this clause is to protect an individual from being subjected to prosecution and conviction more than once for the same offence.

It is now settled by the Supreme Court⁶⁻⁷ that there should be not only a 'prosecution' but also a 'punishment' in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence. In other words, the constitutional guarantee embodies the principle only of '*autrefois convict*' and does not include the principle of '*autrefois acquit*'.⁷⁻⁸ The present clause of our Constitution is thus narrower than the American doctrine of 'double jeopardy' as well as the English common law rule which comprise both '*autrefois convict*' and '*autrefois acquit*'. According to the Supreme Court 'and' in the clause is used in the conjunctive and not in the disjunctive sense.⁷⁻⁸

Hence, the conditions for the application of this clause are—

(a) There must have been a previous proceeding before a Court of law or a judicial tribunal.⁶

(b) The person must have been 'prosecuted'⁶ in the previous proceeding.

(c) He must have been 'punished' in the previous proceeding.⁷

(d) The 'offence' which is the subject-matter of the second proceeding must be the same^{8a} as that of the first proceeding, for which he was 'prosecuted and punished'.

(e) The 'offence' must be an offence as defined in s. 3 (38) of the General Clauses Act, that is to say, 'an act or omission made punishable by any law for the time being in force'. It follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes.⁷

(6) *Maqbool Hossain v. State of Bombay*, (1953) S.C.R. 730.

(7) *Venkataraman v. Union of India*, (1954) S.C.R. 1150; *Kalawati v. State of H. P.*, A. 1953 S.C. 131.

(8) As to the omission to include '*autrefois acquit*' within the ambit of the constitutional guarantee, the Supreme Court observed—

"It seems that our Constitution makers did not think it necessary to raise one part of the Common Law to the level of a fundamental right and thus make it immune from legislative interference. This has been left to be regulated by the general law of the land" [*Venkataraman v. Union of India*, (1954) S.C.R. 1150].

(8a) *State of Bombay v. Apte*, A. 1961 S.C. 578 (583).

(f) The second proceeding must be a proceeding where he is, for the second time, sought to be 'prosecuted and punished' for the same offence. Hence, the clause has no application where the subsequent proceeding is a mere continuation of the previous proceeding, e.g., in the case of an appeal against acquittal.⁹ In other words, a second punishment for the same offence does not attract the operation of the clause unless the second punishment is awarded in a fresh proceeding. Thus, to provide that a person who would be convicted of an offence shall not only be punished under the law but also be removed from the country, does not offend against the guarantee offered by the present clause.

The bar provided by this clause does not apply unless *all* the above conditions are satisfied.¹²

For instance, even if proceedings have been taken for an 'offence', Art. 20 (2) will not be attracted if the proceedings do not constitute a 'prosecution',¹⁰ e.g., a proceeding for confiscation of contraband property, such as smuggled goods.¹⁰

The present clause applies also where the prosecution and punishment in the previous proceeding took place prior to the commencement of the Constitution. It cannot be urged that the prohibition of double jeopardy applies only when both the occasions arise after the Constitution, for the prohibition in Art. 20 (2) hits the punishment in the second proceeding. This does not really affect the general principle that the fundamental rights conferred by the Constitution have no retrospective operation.¹¹

Guarantee in Art. 20(2) is narrower than the corresponding American doctrine.

As pointed by our Supreme Court in *Venkataraman v. Union of India*,¹² the provision in Art. 20 (2) is narrower than the American doctrine of 'double jeopardy', according to which there may be jeopardy even though the person was not actually punished in the previous proceeding. The American principle is thus explained by Willis (Constitutional Law, 1936, p. 528)—

"Jeopardy, it might be thought, should occur when a man has once been found guilty, and this also is the position of Blackstone (IV Bl. Com. 335). But this is not the United States rule.

Under the United States rule, to be put in jeopardy there must be a valid indictment or information duly presented to a court of competent jurisdiction, there must be an arraignment and a plea, and a lawful jury must be impaneled and sworn. It is not necessary to have a verdict. The protection is not against a second punishment but against the *peril* in which he is placed by the jeopardy mentioned."

In other words—

"The fundamental principle of law that no one shall be put twice in jeopardy for the same offence applies not only against the peril of second punishment for the same offence, but forbids a second trial for the same offence, whether the accused has suffered punishment or not, or whether in the former trial he has been acquitted or convicted."¹³

Secondly, as stated already (p. 12, *ante*) our Supreme Court has excluded the plea of 'autrefois acquit' from the protection of the present clause.

'Prosecuted and punished'.

I. These words indicate that both the proceedings referred to by the clause must be proceedings before a *Court of law or a judicial tribunal*.^{12, 14}

(9) *Kalawati v. State of H. P.*, (1953) S.C.R. 543 (550).

(10) *Thomas Dana v. State of Punjab*, A. 1959 S.C. 375 (383).

(11) *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 118.

(12) *Venkataraman v. Union of India*, (1954) S.C.R. 1150.

(13) Annotation in 92 L. Ed. 186-7.

(14) *Magbool Hossain v. State of Bombay*, (1953) S.C.R. 730; A. 1953 S.C. 325 (328; 332).

In this context, the tests of a Court or judicial tribunal are the same as laid down in the *Bharat Bank* case,¹⁵ viz.—

(1) The presentation (not necessarily orally) of their case by the parties to the dispute.

(2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence.

(3) If the dispute between them is a question of law, the submission of legal argument by the parties.

(4) A decision upon the facts in dispute and application of the law of the land to the facts of the case so found, including where required a ruling upon any disputed question of law.¹³

Hence, a tribunal which entertains a departmental or administrative inquiry, even though set up by a statute, cannot be regarded as a judicial tribunal unless it is required to proceed on legal evidence given on oath.¹³

II. 'Prosecution' in this context, thus, means an initiation or starting of proceedings of a criminal nature before a Court of law¹⁶ or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the punishment.¹⁴ In other words, it means a proceeding either by way of indictment or information in the Criminal Courts in order to put an offender upon his trial.¹⁶

Institution of the following proceedings would not, accordingly, constitute a 'prosecution' within the meaning of this clause:

(i) Proceedings before the Customs Authorities under s. 167 (8) of the Sea Customs Act, 1878, for awarding penalty¹⁶ or confiscation.¹⁶

(ii) Proceedings under s. 34 of the W. B. Premises Rent Control (Temporary Provisions) Act, 1950.¹⁷

(iii) Levy of penalty under s. 16 (3) of the Andhra Pradesh Sales Tax Act, 1957.¹⁸

Such proceedings do not, accordingly, bar a criminal prosecution for the same offence.¹⁸

Where the previous prosecution was null and void,—e.g., for absence of proper sanction,¹⁹ or for want of jurisdiction of Court,²⁰ a fresh trial upon the same facts would not be barred, even though the accused might have served out a part of his sentence before he could obtain his acquittal on appeal, on the ground of want of sanction or jurisdiction.²¹

Similarly, where there was no punishment in the previous proceeding, e.g., owing to dismissal for default of the complainant,²² a fresh prosecution would not be barred. Where a conviction is set aside and a retrial ordered, the retrial is a continuation of the same proceedings and not a second prosecution.²³

III. 'Punishment' means a judicial penalty and would not include other penalties, such as—

(i) disciplinary action in the case of public servants²⁴ including penalty imposed under s. 22 of the Public Servants (Inquiries) Act,²⁵ 1850; or

(ii) action against a lawyer under the Legal Practitioner Act;² or

(15) *Bharat Bank v. Employees of Bharat Bank*, (1950) S.C.R. 459 (477); (1950-51) C.C. 255 (259).

(16) *Thomas Dana v. State of Punjab*, A. 1959 S.C. 375 (383).

(17) In view of the Supreme Court decision in *Thomas Dana v. State of Punjab*, A. 1959 S.C. 375, the view taken in *Jhabermal v. Govindram*, A. 1952 Cal. 121 should be preferred to that in *Pulin v. Sishupati*, A. 1953 Cal. 85.

(18) *Seetharamaswami v. Commercial Tax Officer*, A. 1960 A.P. 451 (455).

(19) *Baijnath v. State of Bhopal*, A. 1957 S.C. 494; (1957) S.C.R. 650.

(20) *Upendra v. State*, A. 1954 Assam 106.

(21) *Dattu v. Advya*, A. 1956 Hyd. 127.

(22) *Ram Ghei v. Ram Kishan*, A. 1952 All. 642.

(23) *Mithailal v. State*, A. 1954 All. 680.

(24) *Suresh v. Himangshu*, (1951) 55 C.W.N. 605 (611).

(25) *Maqbool Hossain v. State of Bombay*, (1953) S.C.R. 730.

(1) *Thomas Dana v. State of Punjab*, A. 1959 S.C. 375.

(2) *Re Devanugraham*, A. 1952 Mad. 725.

- (iii) penalties for *jail offences* under disciplinary rules of jails²⁵ or under the Prisons Act;^{25,3} or
- (iv) penalties under s. 167 (8) of the Sea Customs Act, 1878;^{25,1} or
- (v) penalties prescribed by Rules of a Legislature for breach of privilege;⁴ or
- (vi) removal under the Influx from Pakistan (Control) Act;⁵ or
- (vii) binding down for good behaviour under s. 110⁶ or taking security under s. 107 of the Criminal Procedure Code.⁷

Illustrations.

1. Though the 'offence' under s. 167 (8) of the Sea Customs Act and under s. 23 of the Foreign Exchange Regulation Act, 1947, is the same, *viz.* importation of gold in contravention of Government notification, proceedings before the Sea Customs Authorities do not constitute a 'prosecution' of the person nor does the order of confiscation made under s. 167 (8) of the Sea Customs Act constitute 'punishment'. Hence, a prosecution under s. 23 of the Foreign Exchange Regulation Act before a Magistrate is not barred by reason of the previous order of confiscation of the gold by the Customs authorities.²⁵

2. In an inquiry under the Public Servants (Inquiries) Act, 1850, there is neither any question of investigating an 'offence' in the sense of an act or omission 'punishable' by any law for the time being in force, nor is there any question of imposing 'punishment' prescribed by the law which makes that act or omission an offence. The Commissioner under the Act is not judicial tribunal though he may have some of the 'trappings' of a judicial tribunal, and the proceedings before the Commissioner are nothing more than a mere fact-finding enquiry which enables the Government to determine provisionally the departmental punishment which should be imposed upon him before giving him a reasonable opportunity of showing cause under Art. 311 (2) of the Constitution. The report made by the Commissioner to Government is also a mere expression of opinion. Hence, there is no contravention of Art. 20 (2) when a public servant is prosecuted for an offence under the Indian Penal Code or the Prevention of Corruption Act after he has been dismissed in pursuance of an inquiry under the Public Servants (Inquiries) Act, 1850.⁸

It is the nature of the Authority which imposes the penalty and not the nature or gravity of the penalty imposed that determines whether there has been a 'prosecution' or 'punishment' within the meaning of this clause.¹

'Same offence'.

The previous conviction for one offence (e.g. hurt) does not bar a subsequent trial and conviction for a separate offence (say, affray) even though the two offences arise out of the same acts.⁹ What is necessary to determine is whether two offences are distinct is to see whether their *ingredients* are identical.¹⁰⁻¹² The following have been held to be distinct sets of offences—

- (a) Possession of firearms without licence and dacoity.¹³
- (b) Offence under s. 353 I.P.C. and under s. 26 (1) (b), Bihar Sales Tax Act.¹⁴
- (c) Offence under s. 167 (8) of the Sea Customs Act and the offence of conspiracy under s. 120B of the Penal Code.¹⁵
- (d) Every fresh act of refusal to take food by a prisoner on hunger strike constitutes a fresh offence under s. 52 of the Prisons Act, 1894.¹⁶
- (e) Offence under s. 5 (2) of the Prevention of Corruption Act, 1947 and under s. 409, I.P.C.¹⁷

(3) *Prithish v. The State*, A. 1952 Cal. 319.

(4) *Raj Narain v. Atmaram*, A. 1954 All 319 (334, 339).

(5) *Ebrahim Vazir v. State of Bombay*, A. 1954 S.C. 229 (232).

(6) *Arumugham v. State of Madras*, A. 1953 Mad. 664 (668).

(7) *Subeg v. Emp.*, A. 1942 Lah. 84.

(8) *Venkataraman v. Union of India*, (1954) S.C.R. 1150.

(9) *Kariappa v. Somanna*, A. 1955 Mys. 138.

(10) *State of Bombay v. Apte*, A. 1961 S.C. 578 (581).

(11) *Manipur Administration v. Bira Singh*, A. 1965 S.C. 87 (90).

(12) *Sardul Singh v. State of Maharashtra*, (1964) 2 S.C.R. 378 (395).

(13) *Ishodanand v. State*, A. 1955 Pat. 396.

(14) *Shyam Lal v. State*, A. 1954 Pat. 247.

(15) *Leo Roy v. Supdt., District Jail*, A. 1958 S.C. 119 (121).

(16) *Lakshminarayan v. State*, A. 1959 All 164 (166).

(17) *State of M. P. v. Veereshwar*, A. 1957 S.C. 592 (594).

- (f) An offence and the conspiracy to commit that offence.¹⁵
 (g) Offences under s. 409, I.P.C. and under s. 105 of Indian Insurance Act.¹⁸
 (h) Offence under s. 7, Essential Supplies (Temporary Powers) Act and ss. 332 and 392, I.P.C.^{18a}

'More than once'.

I. As has been pointed out already, there is no double punishment to attract the operation of the present clause unless there is a fresh judicial proceeding for the same offence. Hence, the clause is not attracted—

(i) Where the sentence provides for imprisonment in default of payment of the fine awarded.¹⁹

(ii) Where the sentence is for fine and also for recovery of arrears of sales tax as if it were a fine.²⁰

II. Appeal is a continuation of the original proceeding.²¹

The plea of *autrefois acquit*.

In view of the Supreme Court decisions²² that Art. 20 (2) applies only where the person had been both prosecuted and punished at the former trial, it follows that the constitutional guarantee or protection given by Art. 20 (2) is only against double conviction. It is thus limited to the plea of *autrefois convict*.²²

The other part of the doctrine, viz., *autrefois acquit*, is left to the ordinary law, without any constitutional limitation. The rule against *autrefois acquit* is to be found in s. 403 (1) of the Criminal Procedure Code, 1898 (see p. 12, ante), which says—

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237."

The word used in the above section is 'tried'. It has been held that a person has been 'tried' within the meaning of s. 403 when proceedings have been commenced in Court against the accused, e.g., (a) In a summons-case, when process has been issued under s. 247, whether such process is served or not.²³⁻²⁴ (b) In a warrant-case, after the charge is framed under s. 254 and the accused is called upon to plead (s. 255). (c) In a Sessions case, after a charge is framed by the Magistrate, under s. 210, for committing the accused 'for trial'.

Where the previous prosecution and trial was null and void, e.g., owing to absence of proper sanction,²⁵ or want of jurisdiction of Court,²⁵⁻¹ a fresh trial upon the same facts would not be barred. Unless the earlier trial was a lawful one, the accused was never in jeopardy.²²

"The whole basis of s. 403 (1) is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal. If the Court was not so competent it is irrelevant that it could have been competent to try other cases of the same class, or indeed the case against the particular accused in different circumstances, for example, if sanction had been obtained."²³

The Explanation to s. 403 says that (a) the dismissal of a complaint (s. 203), (b) the stopping of proceedings under s. 249, (c) the discharge of the accused (ss. 209, 253); or (d) an entry made upon a charge under s. 273, is not an 'acquittal' for the purposes of s. 403 (see p. 12, ante).

(18) *State of Bombay v. Apte*, A. 1961 S.C. 578.

(18a) *Kunjilal v. State of M. P.*, A. 1955 S.C. 280.

(19) *Loomchand v. Official Liquidator*, A. 1953 Mad. 595.

(20) *Ramadosh, in re*, A. 1958 A.P. 707.

(21) *Kalavati v. State of M. P.*, A. 1953 S.C. 131; (1953) S.C.R. 546.

(22) *Maqbool Hossain v. State of Bombay*, (1953) S.C.R. 730 (738); *Venkataraman v. Union of India*, (1954) S.C.R. 1150.

(23) *Dudekuta*, (1917) 40 Mad. 976.

(24) *Bhupati v. Amyo*, 39 C.W.N. 260; *Kansi v. Golap*, (1952) 7 D.L.R. 186 (Cal).

(25) *Yusofalli v. King*, A. 1949 P.C. 264.

(1) *Sardara v. Nivaz*, A. 1950 Lah. 40; *Upendra v. State*, A. 1954 Assam 106.

'Offence'.—The definition in s. 3 (38) of the General Clauses Act (see p. 24, *post*) applies by reason of Art. 367 (1), *post*.

'Same Offence'.—The Constitution bars double punishment for the same offence. But where the same act constitutes offences under different laws or different sections of the same Act or where the consequence following from one act constitutes a separate offence, there is nothing under the Constitution to bar separate trial and punishment. But there are some limitations under the *existing law*:

I. S. 26 of the General Clauses Act (X of 1897) lays down—

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."²

II. Clauses (2)-(4) of s. 403 of the Criminal Procedure Code (V of 1898) provide—

"(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged."

The result of the above provisions is—

(i) When the same act or omission constitutes an offence under different enactments, he cannot be punished under both the enactments for the *same* offence.²

(ii) Previous acquittal or conviction of an offence does not bar trial for any *distinct* offence for which a separate *charge* might have been made against the accused in the former trial, under s. 235 (1) of the Criminal Procedure Code. Thus,—

(a) Conviction under s. 121 of the Motor Vehicles Act (driving a defective vehicle) does not bar a subsequent trial for offences under ss. 279, 338 or 304-A, Indian Penal Code (rash driving, causing grievous hurt or death by such driving).³

(b) Conviction in respect of possession of stolen revolver (ss. 411 and 414, I.P.C.) is no bar to conviction for unlawful possession of arms [s. 19 (1) (f), Arms Act].⁴

(c) Conviction under s. 75 of the Madras City Police Act is no bar to subsequent trial for an offence under ss. 323 and 352, I.P.C.⁵

(d) Acquittal under s. 353 of the Indian Penal Code is no bar to a subsequent prosecution for offences under s. 26 (1) (a) or (h) of the Bihar Sales Tax Act, 1947.²

(e) Acquittal under s. 211 I.P.C. bars a subsequent trial on the same facts under s. 182 I.P.C.⁶

(iii) If, however, the other offence is one for which a separate charge could have been made under s. 236 or for which he might have been convicted under s. 237 of the Criminal Procedure Code, the accused cannot be tried again for the other offence which was not dealt with under s. 236 or s. 237 in the former trial.

(a) S. 236 provides that if a single act or series of acts is of such nature that it is *doubtful* which of several offences the facts will constitute, the accused

(2) Cf. *Shyamlal v. State*, A. 1954 Pat. 247 (249) *Ramautar v. Emp.*, A. 1948 Pat. 32.

(3) *State of Bihar v. Mangal Singh*, (1952) 7 D.L.R. 157 (Pat.).

(4) *Reoti v. Emp.*, A. 1933 All. 461.

(5) *Thanammal v. Alamelu*, A. 1940 Mad. 224.

(6) *Ganapathy v. Emp.*, (1913) 36 Mad. 308.

may be charged with all of such offences or he may be charged in the alternative with having committed some one of such offences. Hence.

Previous conviction or acquittal on a charge under s. 352, I.P.C. (criminal force) bars subsequent trial on a charge under s. 323, I.P.C. (hurt).⁷

(b) S. 237 of the Criminal Procedure Code provides that if in a case mentioned in s. 236, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under s. 236, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

It is to be noted that though sub-sec. (3) of s. 403, Cr. P.C. deals with *autrefois convict*, it refers to a distinct offence. Hence, it is not in conflict with Art. 20 (2) which refers to the *same* offence. Similarly, sub-sec. (4) is not in conflict with Art. 20 (2), inasmuch as though the question of 'jurisdiction' is not expressly mentioned in Art. 20 (2), the very word 'prosecuted' has been held to mean 'prosecuted by a competent Court' (see p. 14, *ante*).

The principle of *res judicata* in criminal proceedings.

The constitutional rule against double jeopardy must be distinguished from the analogous principle of *res judicata* which also applies to criminal proceedings.^{8,9}

While the rule under Art. 20 (2) of the Constitution is that when a person is acquitted he cannot be *tried* again for the same offence, the rule of *res judicata* means that the verdict of acquittal shall be conclusive as between the prosecution and the accused in all subsequent proceedings,¹⁰ so far as the acquittal may be relevant to the defence of the accused in such subsequent proceedings.¹¹ If the order of acquittal was passed by a competent Court, though wrongly, it would be "binding unless set aside in appeal".¹²

Illustration.

S was arrested and charged with two offences,—(a) being in possession of ammunition and (b) being in possession of firearms. He was tried on charge (a) and acquitted. Subsequently he was tried on charge (b). In that trial, his acquittal on charge (a) was tendered in defence. *Held*, the evidence was relevant and the correctness of the acquittal on charge (a) could not be questioned by the prosecution.

"Here the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of the verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearms charge is plain, but it undoubtedly *reduced* in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other."¹³

Our Supreme Court has held that the application of the above rule of *res judicata* in India is not excluded by the fact that the rule against double jeopardy has been codified in s. 403 of the Cr. P.C. and also guaranteed by Art. 20 (2) of the Constitution,¹³ because the scope of the two principles is not identical. While the rule against double jeopardy is not applicable unless the offence involved in the subsequent proceeding is not the same as that in the former proceeding, the rule of *res judicata* applies even though the offence for which the subsequent proceeding has been brought is a different one.¹³

For, the rule of *res judicata* rests on the principle that where an issue of fact has been tried by a competent Court on a former occasion and the finding of that

(7) *Kanai v. Golap*, (1952) 7 D.L.R. 186 (Cal.).

(8) *Sealfon v. U. S.*, (1948) 332 U.S. 575 (578).

(9) *N. R. Ghose v. State of W. B.*, A. 1960 S.C. 239 (246). Sarkar J.

(10) *Pritam Singh v. State of Punjab*, A. 1956 S.C. 415.

(11) *Sambasivam v. P. P., Federation of Malaya*, (1950) 54 C.W.N. 695 P.C: (1950) A.C. 458.

(12) *Yusofalli v. King*, A. 1949 P.C. 264.

(13) *Manipur Administration v. Bira Singh*, A. 1965 S.C. 87 (92).

Court has been in favour of the accused, such finding would constitute an estoppel against the prosecution,—not as a bar to the trial but as precluding the reception of evidence to disturb the finding of fact when the accused is tried subsequently even for a different offence, which might be permitted by s. 403 (2) of the Cr. P.C.¹³ In the result—

"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."¹⁴

But the general rule relating to *res judicata* that a judgment is not conclusive upon in the case in which the judgment was given, also applies to criminal cases. On this principle, an acquittal on a charge of conspiracy to commit a particular crime does not operate as a bar to trial for the substantive offence or *vice versa*.¹⁴ But acquittal on a charge of *conspiracy to defraud* the Government was held to constitute a bar to subsequent prosecution for *aiding or abetting* a co-conspirator in the commission of the substantive offence of fraud, on the ground that the allegation of *agreement* between the accused and the co-conspirator which was essential also for the offence of aiding and abetting had been negatived by the judgment on the charge of conspiracy.⁸

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England*.—It is a fundamental principle of the English system of criminal justice (which differs from the inquisitorial procedure obtaining in France and some other Continental countries), that it is for the prosecution to prove the guilt and the accused need not make any statement against his will.

There was a time when even in England an accused could be questioned and this rule of common law was abused by the Star Chamber, and by the ecclesiastical courts in the 16th century, by resorting to inquisitorial methods.

As a protest against such inquisitorial methods, the maxim came to be asserted:

"No man is bound to accuse himself" (*nemo tenetur prodere or nemo tenetur seipsum accusare*).

"It is the business of the Crown to prove him guilty, and he need not do anything but stand by and see what case has been made out against him.....He is entitled to rely on the defence that the evidence, as it stands, is inconclusive, and that the Crown is bound to make it conclusive without any help from him."¹⁵

The principle of immunity from self-criminating evidence is thus founded on the 'presumption of innocence' which characterises the English system of criminal trial. The principle is now embodied in statute,—the Criminal Evidence Act, 1898, which says that though the accused is competent to be a witness on his own behalf, he *cannot be compelled* to give evidence against himself. If he gives evidence on his own behalf, the prosecution may comment upon such evidence, but his failure to give evidence cannot be commented upon.

The protection is extended also to witnesses other than the accused on the principle that a witness in any proceeding, civil or criminal, has the privilege of not answering a question on the ground that the answer might make him liable to a criminal charge.¹⁶ Again, if a witness who claims the privilege is improperly compelled to answer, such answer cannot be used against him in a subsequent trial on a criminal charge based on the incriminating statement.¹⁷

(14) *Pinkerton v. U. S.* (1946) 328 U.S. 640 (643).

(16) *Ex parte Reynolds*, 20 Ch. D. 294.

(15) *Mayne, Criminal Law*.

(17) *R. v. Coote*, L.R. 4 P.C. 599.

(B) U.S.A.—The Fifth Amendment to the Constitution of the U.S.A. adopts the above principle by laying down—

"No person.....shall be compelled in any criminal case to be a witness against himself."

So, an accused is permitted to give evidence on his own behalf if he so elects. But if he elects not to give evidence, that fact cannot be used to his prejudice.¹⁸ Nor can a man be convicted on testimony obtained by compulsory discovery; "Any compulsory discovery by extorting the party's oath is contrary to the principles of free government";¹⁹ it is "shocking to the universal sense of justice and offensive to the common and fundamental ideas of fairness and right."²⁰

This guarantee against testimonial compulsion "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objectives of a free society should not be sacrificed."²¹

For, the makers of the Constitution had the bitter experience of the use of inquisitorial methods by an arbitrary government:

"Having had much experience with a tendency in human nature to abuse of power, the Founders sought to close the doors against like future abuses by law-enforcing agencies".²²

In the United States, judicial interpretation has enlarged the scope of the privilege. Thus,—

(i) The privilege has been held to include not only oral evidence but also documentary evidence which is self-incriminating.¹⁹

(ii) The privilege has been extended to any disclosure including the production of chattels, sought by legal process against a witness.²³⁻¹⁹

(iii) The privilege has been used to protect a witness as fully as it does apply to protect a party defendant to a cause of the person accused.²⁰

(iv) The privilege extends not only to answers which by themselves support a criminal conviction but also to answers which might furnish a link in the chain of evidence needed to convict the witness for an offence.²¹

(v) Above all, though the Fifth Amendment refers to a 'criminal case', it has been held to extend to any²² proceeding, civil²⁰ or criminal, 'wherever the answer might tend to subject to criminal responsibility him who gives it'.²⁰

Thus, the principle has been extended to evidence even before legislative committees²³⁻²⁴ and other tribunals, which are not regular Courts,²⁰ but have power to compel a person to testify, and where the answer given may put the witness to criminal liability.^{20, 25}

But the provision against self-incrimination has been held to be subject to the following limitations:

(a) It is open to the accused to waive the privilege. If he waives the privilege and gives testimony on any point, he must give the whole of it.¹⁻² When an accused waives this privilege by entering into his defence, he may be cross-examined upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness.³ The privilege must be invoked when the question is first asked.²

The principle is that the constitutional prohibition against self-incrimination, being solely for the personal benefit of a witness, it is deemed to be waived unless it is specifically invoked at the time of his examination.⁴ An accused may

(18) *Wilson v. United States*, (1911) 149 U.S. 60; *Shapiro v. U. S.*, (1948) 335 U.S. 1.

(19) *Boyd v. United States*, (1886) 116 U.S. 616.

(20) *Betts v. Brady*, (1942) 316 U.S. 455.

(21) *Feldman v. U. S.*, (1944) 322 U.S. 487 (489).

(22) *Ullmann v. U. S.*, (1956) 350 U.S. 422 (428).

(23-19) *U. S. v. White*, (1944) 322 U.S. 694.

(20) *McCarthy v. Arndstein*, (1924) 266 U.S. 34 (40).

(21) *Blau v. U. S.*, (1950) 341 U.S. 159; *Hoffman v. U. S.*, (1951) 341 U.S. 479 (486).

(22) *Counselman v. Hitchcock*, (1892) 142 U.S. 547.

(23) *U. S. v. Bryan*, (1950) 339 U.S. 323.

(24) *Marcello v. U. S.*, (1952) 196 F. 2d. 437; *Emspak v. U. S.*, (1955) 349 U.S. 190.

(25) *U. S. v. Kahrigier*, (1953) 345 U.S. 22.

(1) *Brogn v. Walker*, (1896) 161 U.S. 591.

(2) *Rogers v. U. S.*, (1951) 340 U.S. 367.

(3) *Sawyer v. U. S.*, (1906) 202 U.S. 972.

(4) *U. S. v. Murdock*, (1931) 284 U.S. 141 (148).

waive this privilege by voluntarily 'taking his stand'⁵ in which case he renders himself to the position of an ordinary witness, in all respects.⁶ He may also be deemed to have waived the privilege if he testifies freely in a way to incriminate himself before trying to invoke the privilege.⁷

Even after claiming the privilege against self-incrimination, a witness may withdraw his claim as to all or any part of his testimony,⁴ but such waiver should not be lightly inferred from vague and uncertain evidence.⁷

Voluntary waiver should, however, be distinguished from a legislative abrogation of the privilege. Thus, a provision requiring dismissal of municipal employees who invoked the privilege against self-incrimination, has been declared unconstitutional.⁸

(b) Where an accused has been pardoned or otherwise given immunity from prosecution, he may be compelled to give evidence. But before the accused may so be compelled, he must be given complete immunity, not only from the criminal charge directly in question but also from the liability for other criminal offences that may be revealed by his evidence.⁹ To be valid, a statutory enactment which compels a person to testify after claim of privilege against self-incrimination must afford *complete*¹⁰ and *absolute immunity* from criminal prosecution for any offence disclosed by the evidence,¹¹ and the immunity offered by the statute must be as broad as the constitutional immunity,¹² including immunity from prosecution by both the federal and State Governments.⁹

Apart from a statute giving immunity directly,¹³ where the possibility of a prosecution is removed indirectly, e.g., by a statute of limitation⁹ barring prosecution, the constitutional privilege is not available.

(c) The immunity is merely from giving evidence against the consent of the accused. The *prosecution is not* debarred from *exhibiting the person* of the accused to the Jury, comparing his finger-prints, photographs, etc.¹⁴

(d) The protection is only against *State* action. Hence, where a private person steals incriminating paper from the accused, Government, having had no part in the theft, is not debarred from using such stolen paper in support of the prosecution.¹⁵

(e) The immunity is against disclosure of incriminating facts only, that is, against answers which would expose the witness to *criminal* liability.¹⁵ He cannot refuse to answer on the ground that it would expose him to civil liability of any kind¹⁶ or lower his reputation.¹⁷

(f) Nor would it protect a witness against disclosure of incriminating facts when an earlier testimony by the witness has already established his violation of the law constituting the same offence.¹⁸

(g) The privilege against self-incrimination is intended only for the protection of a *natural* person either by his own testimony or by the production of his *personal* records.¹⁹ It does not accordingly, extend to the production of public records²⁰ or the collective records of an association, whether unincorporated such as a labour union¹⁹ or incorporated,²⁰ in the custody of the accused.

Where a corporation is not immune from producing books, the custodian of such books cannot withhold them on the ground that he personally might

(5) *Brown v. U. S.*, (1957) 356 U.S. 148 (155).

(6) *Powers v. U. S.*, (1912) 232 U.S. 448.

(7) *Smith v. U. S.*, (1949) 337 U.S. 135 (150).

(8) *Slochower v. Board of Higher Education*, (1956) 350 U.S. 551.

(9) *Brown v. Walker*, (1896) 161 U.S. 591.

(10) *Adams v. Maryland*, (1954) 347 U.S. 179.

(11) *Smith v. U. S.*, (1949) 337 U.S. 135 (150).

(12) *Counselman v. Hitchcock*, (1892) 142 U.S. 547.

(13) *Ullmann v. U. S.*, (1955) 355 U.S. 422 (431).

(14) *Holt v. United States*, (1910) 218 U.S. 245; *Bram v. U. S.*, (1899) 168 U.S. 532.

(15) *Burdean v. McDowell*, (1921) 256 U.S. 465.

(16) *Hale v. Henkel*, (1906) 201 U.S. 43.

(17) *Smith v. U. S.*, (1949) 337 U.S. 137 (147).

(18) *Rogers v. U. S.*, (1951) 340 U.S. 367.

(19) *U. S. v. White*, (1944) 322 U.S. 694 (699).

(20) *Wilson v. United States*, (1911) 221 U.S. 361.

be incriminated by their production.²⁰ But even where such custodian unlawfully refuses to produce the corporate records, he cannot be compelled to answer questions as to the whereabouts of the records not produced, if such answers may tend to incriminate him; in the absence of the grant of adequate immunity from prosecution, he cannot be compelled to condemn himself by his oral testimony.²¹

(h) It does not include any immunity from criminal liability for perjury committed while giving evidence.²²

(i) The privilege conferred by the constitutional provision is of the witness himself and a witness cannot claim the privilege not to answer on the ground that the answer would incriminate some other person¹⁸ even though the witness were the latter's agent.²³

As has been already stated, books kept in a 'representative' capacity cannot be withheld by him even though production of such papers might incriminate him 'personally'.¹⁹

(j) For the purpose of the effective administration of a law,²⁴ the Legislature may require a person to keep a record²⁵ or to submit a report¹ as to whether he has complied with it.

The Court seems to have liberalised this exception in the case of taxing statutes. It has been laid down that a law requiring a person to submit an income-tax return and penalising a person for his refusal to submit the return does not violate the immunity from self-incrimination² and even though such person may legitimately object to disclose facts as to *past*³ acts as might incriminate him, he could not refuse to make any return at all,² even where the activity which is sought to be taxed is itself illegal.³

Where a statute requires certain papers to be maintained as a condition of carrying on some business, the constitutional immunity cannot be availed of for withholding such documents, even when such records are sought to be used in criminal proceedings for the violation of the statute.¹

(k) The constitutional guarantee does not protect witnesses from disclosing offences against the law of other countries.⁴

(C) *Japan*.—Art. XXXVIII of the Japanese Constitution, 1946, provides—

"No person shall be compelled to testify against himself....."

INDIA

Cl. (3) : Rationality of the immunity against self-incrimination.

This clause gives protection—

- (i) to a person 'accused of an offence';
- (ii) against compulsion "to be a witness";
- (iii) against himself.⁵

The principle upon which the immunity from being compelled to give incriminating evidence against oneself rests is, as explained by the Supreme Court of the United States, "a protection to the innocent, *though a shelter to the guilty*, and a safeguard against heedless, unfounded, or tyrannical prosecutions".⁶

(21) *Curcio v. U. S.*, (1957) 354 U.S. 118.

(22) *Glickstein v. U. S.*, (1911) 222 U.S. 139.

(23) *Hale v. Henkel*, (1906) 201 U.S. 43; *Gencecco v. Fed. Petroleum Bd.*, (1944) 324 U.S. 806; *Oklahoma Press Co. v. Walling*, (1946) 327 U.S. 186.

(24) *Baltimore R. Co. v. I. C. C.*, (1911) 221 U.S. 612.

(25) *U. S. v. Darby*, (1941) 312 U.S. 100 (125).

(1) *Shapiro v. U. S.*, (1948) 335 U.S. 1 (32).

(2) *U. S. v. Sullivan*, (1927) 274 U.S. 259.

(3) *U. S. v. Kahriger*, (1953) 345 U.S. 22.

(4) *U. S. v. Murdock*, (1931) 284 U.S. 141 (149).

(5) *Sharma v. Satish*, (1954) S.C.R. 1077; (1952-4) C.C. (291).

(6) *Twining v. New Jersey*, (1908) 211 U.S. 78.

In *Brown v. Walker*, the Court observed—

"The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of the additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoners, when voluntarily made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to brow-beat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier State trials,..... made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand.

But, however adopted, it has become firmly imbedded in English as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a *denial of the right to question an accused person* a part of their *fundamental law*, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment".⁷

But the immunity is, obviously, an impediment against a proper investigation of crime, and, therefore, ever since its genesis, doubts have been expressed by responsible critics as to whether the security given by it to the individual is more valuable than the social interests which are jeopardised by it.⁸ Thus, even the American Supreme Court⁹ has observed, holding that the Fifth Amendment is not extended to the States through the Fourteenth Amendment, inasmuch as it is not an indispensable condition of justice—

"Indeed, to-day as in the past, there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry."¹⁰

But whatever be the merits of the principle or its practical disadvantages, once the principle has been embodied in our Constitution, we are bound to apply it so far as the language of Cl. (3) of Art. 20 warrants, though we may not allow any zealous extension of the principle beyond the accepted meaning of the words used in that Clause. As Justice Douglas observed in his dissenting judgment in *Rochin v. California*¹¹:

"As an original matter it might be debatable whether the provision in the Fifth Amendment that no person "shall be compelled to be a witness against himself" serves the ends of justice. Not all civilized legal procedures recognize it. But the choice was made by the Framers, a choice which sets a standard for legal trials in this country.....They are inadmissible because of the command of the Fifth Amendment".¹²

In short, the constitutional protection cannot be abridged on the ground of the possibility of its being abused or because of any practical inconvenience:

"If this result adds to the burden of diligence and efficiency resting on enforcement authorities, any other conclusion would seriously compromise an important constitutional liberty".¹³

"The immediate and potential evils of compulsory self-disclosure transcend and difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."¹⁴

Just as a wider construction is not legitimate, it is equally not permissible to make a narrow construction of a constitutional command on grounds of policy,¹⁵

(7) *Brown v. Walker*, (1896) 161 U.S. 596.

(11) *Hoffman v. U. S.*, (1951) 341 U.S. 479.

(8) Vide observations in *Sharma v. Satish*, (1954) S.C.R. 1077 (1085-6).

(12) *U. S. v. White*, (1944) 322 U.S. 694 (698).

(9) *Palko v. Connecticut*, (1937) 302 U.S. 319.

(10) *Rochin v. California*, (1952) 342 U.S. 165.

(13) *Adamson v. California*, (1947) 332 U.S. 46, Murphy J. dissenting.

or on the ground that the historical reason which led to the adoption of the constitutional prohibition against self-incrimination, namely, the 'inquisitorial practices', cannot possibly exist today.¹⁴

Scope of Cl. (3).

The present Clause follows the language of the Fifth Amendment to the American Constitution, but the rule laid down in *our* Constitution is narrower than the American rule as expanded by interpretation. Thus,

(i) While, notwithstanding the words 'criminal case' in the Fifth Amendment to the *American* Constitution, it has been held to extend to incriminating statements in civil proceedings as well (p. 20, *ante*), the words 'accused of an offence' in the present Clause make it clear that the privilege under *our* Constitution is confined to an accused in a criminal proceeding, and does not apply to civil proceedings,¹⁵ (see p. 24, *post*) even though a criminal prosecution may arise out of such proceedings.¹⁵

(ii) While both in the *U.S.A.*,¹⁶ as well as in *England*,¹⁷ not only the accused but also any witness to a proceeding is protected from answering incriminating questions, a mere witness has no constitutional protection under the present Clause of *our* Constitution.

It is to be noted that under s. 132 of *our* Evidence Act, no witness is excused from answering any question on the ground that it would expose him to criminal liability or penalty or forfeiture; but at the same time, the law gives him indemnity from any criminal liability for such evidence except for perjury. It should be noted that the privilege conferred by Art. 20 (3) of the Constitution does not touch the existing law relating to a witness.¹⁸

(iii) The present Clause gives protection—

- (i) to a person 'accused of an offence';
- (ii) against compulsion "to be a witness";
- (iii) against himself.

The words other than 'accused of an offence' being identical with those of the Fifth Amendment of the American Constitution (p. 19, *ante*), the American interpretation has been generally followed in the interpretation of these other words in this Clause. But the words 'accused of an offence' have been interpreted in such manner as to narrow down the scope of the protection in India than that in the *U.S.A.*, not only as respects the proceedings in which the protection is available, but also as to the stage from which it is available (see *post*), in a criminal proceeding.

In what proceedings the immunity under Art. 20 (3) may be claimed.

The answer to the question is offered by the expression 'accused of an offence'. It has already been stated that though in the *U.S.A.*, notwithstanding the words 'criminal case' in the Fifth Amendment, by a wide interpretation, proceedings other than criminal have been brought within the protection of the Fifth Amendment, *our* Supreme Court has held that this is not possible under Art. 20 (3) of *our* Constitution, by reason of the words 'accused of an offence'.¹⁹

These words indicate that the protection of this clause is confined to criminal proceedings or proceedings of that nature before a Court of law²⁰⁻²² or other *judicial* tribunal before whom a person may be accused of an 'offence'.¹⁹

(14) *Rogers v. U. S.*, (1951) 340 U.S. 367, dissenting opinion of Black, Frankfurter & Douglas JJ.

(15) *Narayanlal v. Maneck*, A. 1961 S.C. 29 (36-8).

(16) *McCarthy v. Arndstein*, (1924) 266 U.S. 34 (40).

(17) Taylor on Evidence, 1453.

(18) This view, expressed at p. 149 of the Second Ed. of this commentary, has been

affirmed by the Supreme Court in *Sharma v. Satish*, (1954) S.C.R. 1077 (1085-8).

(19) *Magbool v. State of Bombay*, (1953) S.C.R. 730.

(20) *Narayanlal v. Maneck*, A. 1961 S.C. 29 (38-9), affirming *Narayanlal v. Maneck*, A. 1959 Bom. 320 (330).

(21) *Suryanarayana v. Vijaya Commercial Bank*, A. 1958 A.P. 756 (759).

(22) *In re Central Calcutta Bank*, A. 1957 Cal. 520 (523).

In short, the proceeding in which the constitutional immunity may be invoked must be a proceeding before a Court of law or judicial tribunal where a person is 'accused' or charged with having committed an act which is *punishable* under the Penal Code or any special or local law.

It would not, therefore, extend to proceedings other than criminal,²⁰ e.g., a proceeding for public examination of a director etc. under s. 45G of the Banking Companies Act, 1949,²¹⁻²² or s. 240 of the Companies Act, 1956;²⁰ or s. 33 (3) of the Insurance Act;²³ or s. 45G (6) of the Banking Companies Act, 1949.²⁴

In such proceedings, a person cannot refuse to give an answer on the plea that it might tend to subject him to a criminal prosecution at a future date.²⁰ In short, Art. 20 (3) is not attracted unless a proceeding "*starts with an accusation*" for an offence and cannot extend to a *general inquiry* or investigation from which an accusation *may or may not result*.²⁰

Proceedings for contempt being *sui juris*, an alleged contemner is not 'accused of an offence' within the meaning of Art. 20 (3). He can, therefore, be cross-examined on his affidavit.²⁵⁻¹

What is an 'offence' under Art. 20 (3).

S. 3 (38) of the General Clauses Act, 1897 defines an 'offence' as "any act or omission made punishable by any law for the time being in force".

The word 'punishable' in this definition is used in the ordinary sense of being visited with a penalty, including a fine or forfeiture, by any authority competent to impose that punishment. The definition would, therefore, *include* statutory offences which are punishable with fine or forfeiture by an administrative authority² and not merely 'criminal' offences for which a prosecution lies in a Court.

The question is whether the protection under Art. 20 (3) is available in a proceeding before an administrative authority who is competent to impose a monetary penalty or forfeiture.

Under Art. 367 (1) of the Constitution, the definition in the General Clauses Act is applicable to the interpretation of the word 'offence' in Art. 20 (3), "unless the context otherwise requires". The question is, whether there is anything in the context of Art. 20 (3) to exclude statutory offences punishable by an administrative officer.

In *Maqbool Hussain's case*,³ the Supreme Court was concerned with the interpretation of cl. (2) of Art. 20, but the Court made certain general observations as to the scope of Art. 20 as a whole, as follows:

"The very wording of Art. 20 and the words used therein—'convicted', 'commission of the act charged as an offence', 'be subjected to a penalty', 'commission of the offence', 'prosecuted and punished', 'accused of any offence', would indicate that the proceedings therein contemplated are in the nature of Criminal proceedings before a Court of Law or a Judicial Tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of Law or Judicial Tribunal in accordance with the procedure prescribed in the Statute which creates the offence and regulates the procedure."

It is evident that the word 'prosecuted', which appears in cl. (2), is absent from cl. (3); but the word 'accused' has been used in cl. (3). If accusation means the levelling of a formal charge, 'accused of an offence' would certainly refer only to offences for which *prosecution* lies in a Court and would exclude proceedings before an administrative authority who is entitled to impose a fine or a monetary penalty, say, under s. 167 (8) of the Sea Customs Act.⁴⁻⁵

(23) *Dalmia v. Delhi Administration*, A. 1962 S.C. 1821 (1870).

(24) *Joseph v. Narayanan*, A. 1964 S.C. 1552 (1556).

(25) *State v. Padma Kant*, A. 1954 All. 523 (F.B.).

(1) In the matter of Basanta Chandra Ghosh, A. 1960 Pat. 430 (441).

(2) Cf. *Pulin v. Pashupati*, (1951) 56 C.W.N. 585 (588); *Calcutta Motor & Cycle*

Co. v. Collector of Customs, A. 1956 Cal. 253; *Thomas Dana v. State of Punjab*, A. 1959 S.C. 375 (385).

(3) *Maqbool Hussain v. State of Bombay*, A. 1953 S.C. 325.

(4) *Shankerlal v. Collector, Central Excise*, A. 1960 Mad. 225 (230).

(5) Cf. *Dana v. State of Punjab*, A. 1959 S.C. 375.

This view appears to have been reiterated by the Supreme Court in *Narayanlal v. Maneck*⁶—

"Similarly, for invoking the constitutional right against testimonial compulsion guaranteed under Art. 20 (3) it must appear that a *formal accusation* has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in *prosecution*."

It follows, therefore, that the application of the definition of 'offence' in s. 3 (38) of the General Clauses Act, 1897 to Art. 20 (3) is excluded by its context and that the immunity is not available in a proceeding before an administrative authority who is entitled only to impose a statutory penalty.

Stage from which the protection is available.

Two questions which arise in the first instance under the Clause are—
(a) in what proceedings the protection is available; (b) from what stage the protection is available.

It has been already explained that the words 'accused of an offence' answers the first question and confines the application of the Clause to criminal proceedings.

It has further been held that the same words 'accused of an offence' also answer the second question, namely, whether the immunity attaches to self-incriminatory statements made from the point when the accusation is made in the criminal proceeding or extends to earlier statements, say, in the proceedings for investigation of that offence for which the person is 'accused' subsequently.

The proposition formulated by our Supreme Court in the early case of *Sharma v. Satish*,⁷ which is adhered to in subsequent decisions,⁶ is that the protection is available—

(a) to a person against whom a *formal accusation* has been made;

(b) if such accusation relates to the commission of an offence which in the normal course may result in prosecution (see p. 24, ante).

The words 'formal accusation' were not, however, explained in this case. Nor is the word 'accusation' defined in either the Constitution or the Code of Criminal Procedure. In *Sharma's case*,⁷ the Court held that the protection was available to a person against whom "a First Information Report has been recorded as an accused therein". It is, therefore, obvious that formal accusation does not require the issue of a process against the person as an accused,⁷ nor is the immunity confined to statements made within the Court room, at the trial.⁷

It is next to be seen whether the protection extends to any period earlier than the First Information Report or to statements made in proceedings earlier than the proceeding in which the accusation has been made. On this point, there are certain observations in *Sharma's case*⁷ which have led to speculation in later cases:

"Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20 (3) is "to be a witness" and not to "appear as a witness." It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him."²

The above observation clearly suggests that pre-trial evidence may be inadmissible against an accused person if it had been given under compulsion.

I. But does the immunity commence only from the time of the First Information Report?

Under the Criminal Procedure Code, there is, of course, a definite accusation against a person when a First Information Report is lodged with the Police⁷ or a complaint^{7a} is made. But, apart from such Information Report, a Police Officer

(6) *Narayanlal v. Maneck*, A. 1961 S.C. 29 (38).

(7) *Sharma v. Satish*, (1954) S.C.R. 1077 (1088).

(7a) *Rajangam v. State of Madras*, A. 1959 Mad. 294; *Subedar v. State*, A. 1957 All. 396 (398).

may, under s. 54 arrest a person on a mere *suspicion* that he has been concerned in the commission of a cognizable offence, and, under s. 156, the Police officer specified therein may investigate into a cognizable case, without the order of a Magistrate. Suppose the arrested person makes an incriminating statement before the Police Officer. Ordinarily, such statement is inadmissible at the trial of such person, but it would be admissible, under s. 27 of the Evidence Act, if such statement (or so much of it as) relates to a relevant fact and leads to its discovery, in course of the investigation. What happens if the statement which leads to the discovery is proved to have been obtained under compulsion?

(a) It is interesting to note that *prior to the Constitution*, when there was no question of any constitutional immunity, the question was answered against the accused, under the ordinary law. It was held that while s. 24 excludes confession caused by any 'inducement, threat or promise', there were no such words in s. 27, which operated as an *exception to s. 24*, so that an information or confession, which satisfied the other conditions of s. 27, was admissible under that section, even though induced by threat etc.⁸⁻⁹

But, the Allahabad¹⁰ and Andhra¹¹ High Courts¹² have held that the position has changed after the Constitution, that information given to the Police is a pre-trial evidence within the dictum of the Supreme Court in *Sharma v. Satish*¹³ and, if such information is obtained by compulsion, it must be excluded from the evidence in Court in the subsequent prosecution of such person, by reason of Art. 20 (3).

The facts in the Allahabad¹⁰ case were as follows:

Upon information that a murder had been committed, the Police started an investigation and, upon suspicion, arrested A. While in the custody of the Police, A made a statement which led to the discovery of certain articles showing that he had committed the murder. At the trial against A, the statement together with the articles discovered were sought to be used. Upon the evidence, the High Court came to the conclusion that the statement had been obtained by physical torture and that, accordingly, the incriminating testimony was inadmissible by reason of Art. 20 (3).

It is evident that there was no First Information Report against the accused when he had made the statement and also that he had been arrested on *suspicion*. Nevertheless, the Allahabad High Court held that the mention of the name of a person to the First Information Report was not an essential condition of being 'accused' within the meaning of Art. 20 (3): "Where evidence, whether oral or circumstantial, points to the guilt of a person and he is taken in custody and interrogated on that basis, he becomes a person accused of an offence",¹⁰ so that any self-incriminatory statement made by such person, after that stage, would be inadmissible against him at the subsequent trial, if obtained under compulsion.¹⁰

It has already been stated that the ordinary law would not help such person even though compulsion had been used, for s. 27 of the Evidence Act has been taken as an exception to s. 24. If, therefore, the Constitution also keeps him out of its protection, he would be without any relief even though he is convicted upon such coerced testimony, whether there is other evidence or not. At the same time, it is clear that up to this stage, there has been no 'formal accusation' against the person within the meaning of the dictum in *Sharma's case*¹³ nor can it be said that there is already a proceeding which has 'started' with an accusation¹⁴ against the person who made the statement. Formal accusation, in fact, started only after the incriminating statement had been made and the Police

(8) *Emp. v. Misri*, (1909) 31 All. 592 (F.B.); *R. v. Christian*, A. 1947 Pat. 152 (155); *Durlav v. Rex*, (1932) 59 Cal. 1040; *Chinna, in re*, A. 1940 Mad. 136.

(9) It is to be noted that in *Ramakrishna v. State of Bombay*, A. 1955 S.C. 104, the Supreme Court stated that s. 27 was an exception to ss. 25 and 26. It is not clear whether the omission to mention was due to oversight or intentional.

(10) *Amin v. State*, A. 1958 All. 293 (303).

(11) *Madugula, in re*, A. 1957 A.P. 611.

(12) A single Judge of the Bombay High Court has expressed similar view in *Amrut v. State of Bombay*, A. 1960 Bom. 488.

(13) *Sharma v. Satish*, A. 1954 S.C. 300.

(14) *Narayanlal v. Maneck*, A. 1961 S.C. 29 (38).

officer, after completing his investigation, sent his report to the Magistrate, under s. 173, Cr. P.C.

Let us now take up the facts of the Supreme Court case, *Dastagir v. State of Madras*:¹⁵

D went to the bungalow of the Deputy Superintendent of Police to offer him a bribe which was in a closed envelope, with a request that the Officer might drop the action registered against him. The Officer threw the envelope at D, who took it up. While D was still in the bungalow, the Officer called his Orderly, and in his presence asked D to produce the envelope. D took out from his pocket some currency notes without the envelope and placed them on the Officer's table. The notes were then seized by the Police Officer after having them stamped by his Orderly with his office seal. D was later convicted of the offence under s. 165A of the I.P.C. for attempting to bribe the Officer. D contended that the conviction violated Art. 20(3) since it was based upon the evidence of compelled production of the notes from him. Rejecting this contention, the Supreme Court held that, apart from the fact that D had not been 'compelled' to produce the notes, though the offence of attempting to bribe the Officer had already been committed by D at the time when he had been asked to produce the notes, he had not been 'accused' of it at the stage when the currency notes were produced by him.¹⁶

It is to be noted that in the case before the Supreme Court, it was held that *no compulsion had been used*. The other observation that the person was not an 'accused' at the stage of the recovery was, accordingly, unnecessary. Supposing, however, compulsion had been proved, the *obiter* suggests that, nevertheless, the recovered notes would have been admissible inasmuch as the person had not been 'accused' of an offence at that time. It is, however, clear that when D was required to produce the notes, the offence of attempting to bribe the Officer had already been committed, and, therefore, the Officer, who was himself a Police Officer, asked D to produce the notes on the clear assumption that D had committed the offence and that he would be prosecuted for that offence, upon the basis of the recovered notes. There was no formal accusation in this case until prosecution was actually launched against D. On the other hand, the stage when the notes were recovered from D cannot be said to be a stage of 'general investigation' to ascertain whether D or anybody else had committed an offence.¹⁶ The officer who required D to produce the notes was definitely of the view that D was guilty of the offence (not even a mere suspicion). Nevertheless, the evidence would have been admissible according to the Supreme Court, even if the notes had been forcibly recovered from D.

In the Allahabad case,¹⁷ Art. 20 (3) would have been attracted, according to the decision in *Sharma's case*,¹⁸ if the investigation had started in pursuance of a First Information Report. Does it make any material difference, because, instead of acting upon a First Information Report, the Police started the investigation and arrested the person upon a reasonable suspicion that he was concerned with the offence? To take the strict view, there is no accusation unless either a First Information Report or a complaint or a Police Report is made 'charging' a person of an offence before an officer or a Court entitled to take cognisance of the offence and proceed upon the information.¹⁹ Further clarification by the Supreme Court is, therefore, needed as to the moment of time when a person may be said to be 'accused of an offence' within the meaning of Art. 20 (3), in order to be entitled to the protection of that provision, particularly because the Court, in the later case of *Narayanlal*,¹⁶ refused to disturb the Calcutta decision in *Collector of Customs*¹⁹ on the ground that "it proceeded on the finding that accusations of criminal offences could be held *in substance* to have been made against the person concerned" when they were asked to produce the incriminating documents. The Court did not definitely say that Art. 20 (3) could not be attracted except where there had been a 'formal accusation' before the compelled testimony was obtained (see also p. 31, *post*).

II. The position is, of course, clearer where the investigation takes place not

(15) *Dastagir v. State of Madras*, A. 1960 S.C. 756 (761).

(16) Cf. *Narayanlal v. Maneck*, A. 1961 S.C. 29 (38-39).

(17) *Amin v. State*, A. 1958 All. 293.

(18) *Sharma v. Satish*, A. 1954 S.C. 300.

(19) *Collector of Customs v. Motor & Cycle Co.*, A. 1958 Cal. 682.

under the Criminal Procedure Code but under some general statute and prosecution takes place as a result of such investigation.

S. 235 of the Companies Act, 1958 empowers the Central Government to "appoint . . . inspectors to investigate the affairs of any company and to report thereon . . ." Under s. 240, the officers of a company of which the affairs are thus investigated are under an obligation to produce all books and papers of the company which are in their custody, to the investigating Inspector and, in case of refusal to produce such books etc., they are liable, on the report of the Inspector, to be punished by the Court "as if they had been guilty of contempt of court" [s. 240 (3)]. The Inspector reports to the Central Government on the results of his investigation, under s. 241; and s. 242 provides—

"If, from any report made under s. 241, it appears to the Central Government that any person has, in relation to the company . . . whose affairs have been investigated . . . been guilty of any offence for which he is criminally liable, the Central Government may . . . prosecute such person for the offence".

It is obvious that a person who is asked to produce the papers under s. 240 is, under pain of penalty, bound to produce them. The testimony is thus 'compelled' and such testimony may lead to a prosecution. The question is whether the use of such compelled testimony at the trial is barred by Art. 20 (3). The Supreme Court has answered the question in the negative,¹⁶ on the ground that

(a) In the proceedings under ss. 235-240 in which the officers of a company are required to produce their papers, "there is no accused person, no accuser and no accusation against anyone that he has committed an offence. The proceedings do not start with an accusation as is contemplated by Art. 20 (3)".

(b) Of course, the investigation may lead to a prosecution under s. 242. "But the fact that a prosecution may ultimately be launched against the alleged offender will not retrospectively change the complexion or character of the proceedings held by the inspector when he makes the investigation". The investigation carried on by the inspectors is no more than the work of a "fact finding commission", the object being to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. "In such a case, there is no allegation against any specific individual; there may be a general allegation that the affairs are irregularly . . . managed, but *who* would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry".

In short, Art. 20 (3) cannot be invoked in a proceeding which is in the nature of a *general* investigation, as distinguished from an accusation against a *specified* individual, even though as a result of the general investigation, there may be a specific accusation against the individual who has been compelled to be a witness at the stage of the general investigation.²⁰ In other words, Art. 20 (3) will not be attracted unless the person who seeks its protection was already an 'accused person' at the time when he was compelled to make the statement,²¹ by reason of a complaint or F.I.R. having been lodged against him.^{20,22}

On this principle, it has been held that—

(i) There is no immunity under Art. 20 (3) available where a person is required by a directive of the Reserve Bank, under s. 19 (2) of the Foreign Exchange Regulation Act, 1947, to produce his books, under pain of penalty, nor would such evidence be inadmissible at the subsequent prosecution, for, when the directive of the Reserve Bank is issued, there is no specific accusation against the individual concerned, even though the Bank may have proceeded upon the information that he had committed an offence under the statute.²³

(ii) Similar view has been taken about the public examination of the promoters of a banking company under s. 45G of the Banking Companies Act, 1949, even

(20) *Narayanlal v. Maneck*, A. 1961 S.C.

(21) *Joseph v. Narayanan*, A. 1964 S.C. 1552 (1956).

(22) *Dalmia v. Delhi Administration*, A. 1962 S.C. 1821 (1870).

(23) *Bhagwandas v. Union of India*, A. 1961 Mad. 47 (53).

though the High Court itself may, under s. 45H take cognizance of and try an offence disclosed by such examination.²⁴ S. 45G is as follows:

"(1) Where an order has been made for the winding up of a banking company, the official liquidator shall submit a report whether in his opinion any loss has been caused to the banking company.....

(2) If, on a consideration of the report submitted under sub-sec. (1), the High Court is of opinion that any person who has taken part in the promotion or formation of the banking company should be publicly examined, it shall hold a public sitting on a date to be appointed for that purpose and direct that such person shall attend thereat and be publicly examined as to the promotion or formation or the conduct of the business of the banking company....."

The Kerala High Court²⁵ has, however, held that where the public examination under s. 45G takes place *after* the official liquidator has made specific allegations against specific persons and also *prayed for their summary punishment* by the High Court under s. 45J, there has already been an 'accusation', and that, consequently, the public examination itself is hit by Art. 20 (3). In this case, the official liquidator, in his petition to a Single Judge of the High Court, accused the office-bearers of the bank of offences punishable under the Act, such as falsification of accounts, prayed for their publication under s. 45G and also for their trial and punishment under s. 45H, and the Single Judge, upon the petition, ordered a public examination under s. 45G (*treating the petition as a report under s. 45G (1)*). The order of public examination was quashed on appeal, on the ground that the petition, which was pending on the record, made *specific* accusations of offences punishable under the Act against these persons so that, thereafter they could not be compelled to make self-incriminating statements.²⁵

The distinction between the two cases under s. 45G of the Banking Companies Act is, indeed, slender. When an official liquidator makes a report to the High Court under s. 45G, he may not make specific allegations against the promoters of the company or ask for their punishment, but, in the normal course, while pointing out the loss caused to the company he is bound to make an allegation or suggestion that the promoters of the company are responsible for the loss and it is upon a perusal of such report that the High Court directs the public examination. The first case²⁴ holds that the public examination, in such a case, is a general investigation so that Art. 20 (3) is not attracted. In the second case,²⁵ no doubt, the official liquidator made specific allegations and sought the punishment of the named promoters, and also prayed for their public examination, but the Court did not immediately proceed to take cognizance of the offence under s. 45J, but *treated the petition of the official liquidator as a report under s. 45G*, thus, keeping its mind open until the general investigation under s. 45G was over. Nevertheless, it was held that Art. 20 (3) is attracted.

(iii) The picture is more blurred when we come to the Calcutta case of *Collector of Customs v. Motor & Cycle Co.*¹

S. 171A of the Sea Customs Act, 1878, empowers a Customs Officer to summon any person and to require him to produce any documents as may be directed, on pain of the penalties prescribed by the Act.

In a notice issued under s. 171A, it was stated that "there were reasonable grounds to believe" that the goods seized from the Petitioners earlier, had been imported into India without payment of customs duty, in breach of specified provisions of the law. The Court held that in a notice under s. 171A, normally, there is no specific accusation against any person.¹ It would thus follow that Art. 20 (3) is not attracted when a notice to produce documents is issued under s. 171A of the Sea Customs Act, 1878, even though the production may eventually lead to a prosecution of the person by the Customs Officers.² But, the High Court held, that in the facts of the cases, there had already been an 'accusation'

(24) *Suryanarayana v. Vijay Commercial Bank*, A. 1958 A.P. 756.

(25) *Madhava v. Popular Bank Ltd.*, A. 1961 Ker. 14.

(1) *Collector of Customs v. Motor & Cycle Co.*, A. 1958 Cal. 682.

(2) See also *Basanta v. Collector*, A. 1961 Cal. 86.

According to the High Court (p. 687 of AIR), 'formal' accusation was not necessary to attract Art. 20 (3).

"If a man has been named as a person who has committed an offence, particularly by officials who are competent to launch a prosecution against him, he has been accused of an offence within the meaning of Art. 20(3)."

In short, in the instant case,¹ the mention of the offences 'reasonably believed' to have been committed, in the notice, was held to constitute sufficient 'accusation' to invoke the protection of Art. 20 (3).

In a Madras case,² it has been held by a Single Judge that where the notice under s. 171A alleges that there is reason to believe that the goods mentioned in the schedules attached to the notice have been imported without payment of customs duty, thus making the Petitioners liable to imposition of the penalties under s. 167 (8) of the Act, the Petitioners are not persons accused of an offence. The reasoning by which the facts of this case were distinguished from those of the Calcutta case¹ is not very clear. For, in the Madras case² also, "the allegations ... set out in the notices ... amount to an accusation that they have contravened s. 3 (2) of the Imports and Exports (Control) Act. Such a contravention is punishable ... with imprisonment ... The proceedings instituted against the petitioners may in the normal course lead to their being placed on their trial for offences under this section." It cannot, therefore, be said that the allegations in the notice only made the Petitioners liable to a statutory penalty to be imposed by the Customs authorities. It might lead to a prosecution by the Customs authorities themselves, who, the learned Judge observed, were in the position "*analogous to that of police officers before whom information relating to cognisable offences has been laid*". Furthermore, in answer to the Court the Advocate-General had stated that the Customs authorities who had issued the notice *had not yet determined* whether they would rest with the statutory penalty or *prosecute* the Petitioners. In spite of all this, the learned Judge left it to the *intention* of the Authorities themselves to determine whether the protection under Art. 20 (3) would be available to the Petitioners. The learned Judge expected that the Authorities should, before putting questions to the Petitioners, express their intention, namely, whether they were going only to award the monetary penalty or to prosecute the Petitioners. In the former case, there would be no protection; but if the authorities expressed their intention to prosecute, the Petitioners might refuse to answer incriminating questions. Unfortunately, nothing is said as to whether the Petitioners were bound to produce the *documents* called for before the Authorities expressed their intention. Further, as the Advocate General had stated, it was not possible for the authorities to make up their minds as to prosecute until they had inspected the Petitioners' papers and also heard his answers.

With respect, the Madras decision² leaves the position worse confounded.

The Supreme Court could have, in *Narayanlal's case*,⁴ removed this uncertainty since the Calcutta decision³ was directly cited before their Lordships. In *Narayanlal's case*,⁴ the Court reiterated that 'formal accusation' was an essential condition for the application of Art. 20 (3). If that be so, the Court should have clearly disapproved of the Calcutta decision,³ inasmuch as there was no 'formal' accusation of the persons upon whom the notices under s. 171A of the Sea Customs Act has been served; nevertheless, the Supreme Court refused to 'consider' the Calcutta decision on the ground that "it proceeded on the finding that accusations of criminal offences could be held *in substance* to have been made against the persons concerned". But this, it is submitted, is begging the question, for, the question to be solved is whether a formal accusation is essential or a substantial accusation is sufficient for the application of Art. 20 (3). In *Narayanlal's case*⁴ the Supreme Court relied upon *Sharma v. Satish*^{5a} as authority for the

(3) *Shanker Lal v. Collector of Central Excise*, A. 1960 Mad. 225.

(4) *Narayanlal v. Maneck*, A. 1961 S.C.

29.

(5) *Collector of Customs v. Motor & Cycle Co.*, A. 1958 Cal. 682.

(5a) *Sharma v. Satish*, (1954) S.C.R. 1077.

proposition that a 'formal' accusation was an essential condition. But in *Sharma's case*,⁶ the Court did not close the doors against 'substantial' accusation. The observations in *Sharma's case*⁶ were—

"It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."⁶

In this state of affairs, a more definite pronouncement is necessary from the Supreme Court on the question whether the protection under Art. 20 (3) is available in respect of statements made at a stage where there has as yet been no complaint or First Information Report.

Constitutionality of s. 176, Criminal Procedure Code ; s. 54A, Calcutta Police Act, 1866.

I. S. 176 (1) of the Cr. P. C. empowers a Magistrate to hold an inquiry into the cause of death when a person dies in police custody and vests him with all powers which he would have 'in holding an inquiry into an offence'. A Magistrate holding an inquiry under this section is further vested with the power of compelling the attendance of witnesses, under s. 2 of the Madras Revenue Enquiries Act, 1893. The Magistrate used these powers in obtaining the evidence of the Police Officers in whose custody the deceased had died, and as a result of his inquiry, a complaint was made against these Police Officers under ss. 330-1 of the Penal Code.⁷

The question was whether the provisions of s. 176 (1) violated Art. 20 (3). Ramaswami J. held⁴ that Art. 20 (3) was not attracted to a proceeding under s. 176 (1), because at that stage it could not be said that any person whose evidence was taken was 'accused of an offence'. There was an 'accused' only after a complaint was made to a Criminal Court.

This view finds support from the observation in *Sharma v. Satish*⁶ that the immunity under Art. 20 (3) starts from the moment a person is named as an accused in a First Information Report or in a petition of complaint. The immunity would not, therefore, extend to any proceedings prior to the making of the complaint. The inquiry under s. 176 (1), Cr. P. C. is also in the nature of a 'general investigation' within the meaning of the dictum in *Narayanlal's case*⁴ (p. 29, ante), to find out whether anybody is responsible for the death of the prisoner.

II. More debatable is the position under subsec. (2) of s. 54A of the Calcutta Police Act, 1866 and s. 33A of the Calcutta Suburban Police Act, 1866. The provisions in the two sections being identical, it would suffice to reproduce one of them. S. 54A of the Calcutta Police Act, 1866 says—

"(1) Whoever has in his possession, or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe to have been stolen or fraudulently obtained, shall, if he fails to account for such possession or act to the satisfaction of the Magistrate, be liable to fine"

(2) If any person charged under sub-section (1) in respect of anything declares that he received such thing from some other person, or that he was employed as a carrier, agent or servant to convey such thing for some other person,

the Magistrate, after such further inquiry (if any) as he may deem necessary, may summon such other person, and any former or pretended purchaser or other person through whose possession such thing is alleged to have passed, to appear before him, and may examine such person and any witness who are produced to testify to such receipt, employment or possession; and if it appears to the Magistrate that any such person had possession of such thing and had reasonable cause to believe that it was stolen or fraudulently obtained, the Magistrate may punish him with fine"

Sub-sec. (1) deals with the person in whose possession stolen property may be found. If such person, in his statement, implicates some other person, such other person may be summoned, under compulsory process, to testify before the Magis-

(6) *Sharma v. Satish*, (1954) S.C.R. 1077 (1088).

(7) *Rajangam v. State of Madras*, A. 1959 Mad. 294 (307).

trate, and if, from his evidence it appears that he was the principal offender in obtaining stolen goods, the Magistrate may convict such *other person*, under sub-sec. (2). Sub-sec. (2), thus, provides for the conviction of a person on his own testimony, obtained under compulsory process. The question is whether such other person is a witness or an accused person. If he is a mere 'witness', it is clear that the Proviso to s. 132 of the Evidence Act shall be attracted, so that the incriminating statements made by such person cannot be used for convicting him of the offence, in which case the object of sub-sec. (2) might be defeated. It is to be noted that there is nothing corresponding to sub-sec. (2) in s. 54A of the Calcutta Police Act in the analogous provisions in ss. 124 of the Bombay Police Act, 1951 and 65 of the Madras City Police Act, 1888. The question is whether such other person may be said to be an 'accused' within the meaning of Art. 20 (3). It is obvious that there has been no 'formal accusation' (p. 26, *ante*) against such person as yet, if it means the levelling of a formal charge. But the fact remains that summons is issued against him by the Magistrate only after the Magistrate is informed of the complicity of such other person from the statement of the person charged under sub-sec. (1); further, the Magistrate summons other person only 'after such further inquiry (if any) as he may deem necessary'. In other words, the summons is issued only after the Magistrate is *prima facie* satisfied that a case under sub-sec. (2) lies against such person, and the Magistrate is empowered to convict such person in that very proceeding. Can it be said to be a 'substantial accusation' as in the *Calcutta Cycle Co. case*,⁸ referred to by the Supreme Court in *Narayanlal's case*?⁹ The implication of 'formal accusation', thus requires further elucidation.

✓ When is a person 'compelled' to be a witness.

1. Compulsion is an essential ingredient of the clause. The clause does not, accordingly, prohibit the admission of confession which is made without any inducement, threat or promise, even though it may be subsequently retracted.¹⁰

2. When under the provisions of any law a person is, under a *legal sanction*, bound to give oral or documentary evidence, it is obvious that he is 'compelled to be a witness'.⁸ Liability to be punished for contempt of Court is legal compulsion.¹¹

3. But a person cannot be said to have been *compelled*, where he is *not bound* to answer the question or to produce the document¹² asked for.

This was the *rationale* of the decision in the *Dastagir case*¹² which has been already referred to. The person who was asked to produce the notes produced them voluntarily, without any force or threat being applied (see *ante*).

4. In *Sharma v. Satish*,¹³ the Supreme Court made a distinction between a person being compelled to do a *volitional act* and something being obtained from him without involving any volitional act on his part and held that the immunity offered by Art. 20 (3) is confined to the former case and is not available in the latter. In the words of Jagannadhadas J.,—

"Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the *positive* volitional evidentiary acts of the person, as opposed to the *negative* attitude of silence or *submission* on his part".

It is on this principle that the Court held that the immunity is available to an accused person when a compulsory process or *notice to produce* a document is issued, directing him, under pain of penalty, to produce a document, but not when a document is recovered from him by search and seizure by a police officer, without involving any volitional act on the part of the accused from whose possession the document is recovered:

(8) *Collector of Customs v. Calcutta Motor & Cycle Co.*, A. 1958 Cal. 682 (687).

(9) *Narayanlal v. Maneck*, A. 1961 S.C. 29 (38).

(10) *Kalawati v. State of H. P.*, (1953) S.C.R. 546.

(11) *Ram Swarup v. State*, A. 1958 All. 119 (121).

(12) *Dastagir v. State of Madras*, A. 1960 S.C. 756.

(13) *Sharma v. Satish*, (1954) S.C.R. 1077 ((1088)).

"A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20 (3) as above explained. But a search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, not his testimonial acts in any sense."

5. On the other hand, it should be noted that the above constitutional bar would not affect the existing law as to approvers contained in ss. 337 and 339 of the Cr. P. C. For, the bar is against being 'compelled'. There is no bar to the accused's voluntarily giving evidence, in lieu of a pardon or immunity of the offence with which he has been charged.¹⁴ As the effect of the pardon is a complete immunity from conviction for the offence, the testimony of the pardoned man cannot be said to be also 'against himself'. Hence, Art. 20 (3) is not attracted.

The pardon is, however, granted on condition that such person makes a full disclosure. So, once an accused has accepted a tender of pardon, he is bound to make a full disclosure, or he may be tried for the original offence,—having forfeited the benefit of the pardon.

Whether the accused can be witness on his own behalf.

The law on this point should be considered under two heads—

(i) The accused voluntarily offering himself to be a witness on his own behalf;

(ii) The accused being examined by the Court under the law of procedure.

(I) *The accused as a witness.*

(A) In *England*, the accused is a competent witness on his own behalf since the Criminal Evidence Act, 1898, and may examine himself on application.

Once the accused examines himself, he may be cross-examined and his evidence may be commented upon by the prosecution, but his failure to give evidence cannot be commented upon by the prosecution [s. 1(b)], though it is permissible for the Judge, in his discretion, to refer to it.^{14a}

(B) *U.S.A.*—Under a federal statute of 1878, it is competent for the accused to give evidence of his own behalf, but his failure to do so shall not be the subject of any unfavourable inference against him.

(C) *India*.—In India, until the amendment of the Criminal Procedure Code in 1955, the accused could not examine himself as a witness on oath. It is gratifying to note that this anomaly, disabling an accused to testify on his own behalf, which was pointed out at p. 260 of Vol. I of the Third Edition of this Commentary, with a suggestion for amendment, has been removed by the insertion of s. 342A by the Amendment Act 26 of 1955. The new section deserves to be noticed—

"342A. Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

Provided that—

(a) he shall not be called as a witness except on his own request in writing; or

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial."

It is to be noted that an accused can be examined as a witness under the above section only if he so requests in writing. Hence, there is *no compulsion* to obtain the testimony. Once, however, he offers himself as a witness, his evidence will be liable to be used like the evidence of any other witness. S. 5 of the Indian Oaths Act, 1873 has been simultaneously amended to make it permissible to administer oath to an accused person when he examines himself as a witness for the defence, under s. 342A of the Cr. P. C.

(14) *Rajangam v. State of Madras*, A. 1959 Mad. 294 (307).

(14a) *R. v. Rhodes*, (1899) 1 Q.B. 77. *R. v. Jackson*, (1953) 1 All E.R. 872.

II. Examination of the accused.

(A) *England*.—The Court is not competent to ask the accused any question unless it is incidental to the trial, e.g., whether he wishes to cross-examine a witness and no use can be made of the answers of the accused or his refusal to answer. There is no provision in England, corresponding to s. 342 of the Cr. P. C.^{14b}

(B) *India*.—S. 342 (1) of the Criminal Procedure Code enables the Court to put any questions to the accused “for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him”. No oath can be administered to the accused for the purpose of his examination under this section [s. 342 (4)].

The object of sub-sec. (1) of this section is thus laudable. It seeks to give the accused an *opportunity* of explaining any circumstances which may tend to incriminate him if he does not speak or of stating in his own way anything which he may be desirous of stating.¹⁵ The object thus is not inquisitorial¹⁶ and sub-sec. (2) says that the accused shall not render himself liable to punishment either for refusing to answer the questions put by the Court under sub-sec. (1) or by giving false answers. But the question is, what use should be made of his answers if he avails himself of the opportunity offered to him. Sub-sec. (3) says that “the answers may be *taken into consideration* at such inquiry or trial”.

Being an unsworn testimony, it is *not evidence*.¹⁷

Nevertheless,

(i) So far as it goes in favour of the accused, there is no difficulty in accepting it, for, because of the presumption of innocence, the onus lies upon the prosecution to prove the guilt. Hence, the version of the accused under s. 342 should be accepted if it is reasonable and accords with probabilities, unless the prosecution can prove beyond reasonable doubt that it is false.¹⁸

(ii) As to its permissible use for conviction,—where there is prosecution evidence on a point, and the accused's statement *supports* that evidence, under the case law as it stands, there is no objection to the Court's accepting such evidence as a corroboration of the prosecution evidence,¹⁹ by way of an admission.²⁰

But where there is no evidence on a point on behalf of the prosecution, a conviction cannot be based solely on the unsworn testimony of the accused under s. 342.¹⁹ In view of this pronouncement of the Supreme Court,¹⁹ it seems that the view taken in *Emp. v. Abdul Gani*²¹ to the effect that the accused can be convicted on his unsworn testimony “when neither the prosecution nor the accused is able to procure direct evidence and the case hangs upon circumstantial evidence” is not sound. For the same reason, the view taken in *Holia v. Emp.*²² is preferable to that in *Banwarilal v. State*.²³

There is no conflict with Art. 20 (3) in so far as Art. 342 (1) gives an opportunity to the accused to explain circumstances which may go against him.²⁴⁻¹ Art. 20 (3) is not attracted unless the statement of the accused is used ‘against’ him.²

But sub-sec. (3) of s. 342 says that “the answers given by the accused may be *taken into consideration* in such inquiry or trial”. If any use of the answers is made to convict the accused, it is patent that the statement of the accused given in answer to the Court question is being used ‘against’ the accused. Much of

(14b) Williams, *The Proof of Guilt*, 1955. p. 47.

(15) *Tara Singh v. State*, (1951) S.C.R. 729.

(16) *Banwarilal v. State*, A. 1956 All. 341.

(17) *Vijendrajit v. State of Bombay*, A. 1953 S.C. 468.

(18) *Hate Singh v. State of M. P.*, A. 1953 S.C. 468.

(19) *Vijendrajit v. State of Bombay*, A. 1953 S.C. 247.

(20) *Hanumant v. State of M. P.*, (1952) S.C.R. 1091 (1111); *Karnail Singh v. State of Punjab*, (1954) S.C.R. 904.

(21) *Emp. v. Abdul Gani*, A. 1926 Bom. 71 (76).

(22) *Holia v. Emp.*, A. 1949 Nag. 163.

(23) *Banwarilal v. State* A. 1956 All. 341 (346).

(24) Cf. *Rajangam v. State of Madras*, A. 1959 Mad. 294 (308).

(25) Govinda Reddy, in re, A. 1958 Mys. 150.

(1) *Banwarilal v. State*, A. 1956 All. 385.

(2) *State v. Lakhnamal*, (1958) 60 Bom. L.R. 403 (406).

the criticism³ against the provision has, of course, been taken away by the Supreme Court⁴ ruling that the unsworn testimony of the accused under s. 342 is not 'evidence' (vide also definition in s. 3, Evidence Act) and, therefore, an accused cannot be convicted on the sole basis of his answers to the questions put under s. 342. Nevertheless, the Court has held that such answers may be used against the accused by way of corroborating the prosecution evidence:

"As the appellant admitted that he was in charge of the godown further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under s. 342 as supporting the prosecution case concerning the possession of the godown".⁴

Presumably, the Court was treating the answers as 'confession' within the meaning of s. 29 of the Evidence Act. The mere existence of these provisions on the statute book does not answer the question of constitutionality, for, these provisions had been enacted at a time when there was no constitutional limitation. It is true that the accused is not bound to answer the Court questions and "shall not render himself liable to punishment by refusing to answer such questions" [sub-sec. (2)] and to this extent the accused is not 'compelled' to testify, within the meaning of Art. 20 (3).⁵ If, however, the permissibility of adverse inference from a refusal to answer [sub-sec. (2)] constitutes indirect compulsion to answer (see under next caption), it would follow that the use of the answer, given under such compulsion, to convict the accused, even by way of corroborating the prosecution evidence would come within the mischief of Art. 20 (3). The contravention cannot be explained away by the maxim '*de minimis non curat lex*', for in a case like that of *Vijendrajit*,⁴ there might not have been a conviction without the aid of the answers of the accused under s. 342.

Whether the silence of the accused can be the subject of comment.

(A) U.S.A.—In the United States, the Supreme Court has, in a rather dubious decision,⁶ held that a State statute which authorised the Court to comment upon the failure of an accused to explain or deny the evidence adduced against him did not violate 'due process'. The reasons advanced by the Court were that the provision in question did not alter the presumption of innocence of the accused and the onus of the prosecution, nor constituted the failure of the accused to testify as an admission of his guilt, but merely enabled the Court to make inferences from the proved facts and weigh the strength of the prosecution evidence by commenting upon the failure of the accused to explain such facts as were necessarily within his knowledge.

In the foregoing case,⁶ however, the majority of the Court considered the implications of the Fourteenth Amendment,—and not of the Fifth Amendment (immunity from self-incrimination), which was held to be not applicable to the States.

Nevertheless, while the majority assumed,⁶ the strong minority of four Judges (Black, Douglas, Murphy and Rutledge JJ.) expressly held that a comment upon the failure of the accused to testify would violate the Fifth Amendment, in any case to which it extends. The reasoning offered by Justice Murphy is illuminating:

"1. If he does not take the stand, his silence is used as the basis for drawing unfavourable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself. And silence can be as effective in this situation as oral statements.

2. If he does take the stand, thereby opening himself to cross-examination, so as to overcome the effects of the provision in question, he is necessarily compelled to testify against himself. In this case, his testimony on cross-examination is the result of the coercive pressure of the provision rather than his own volition."

Much can be said *pro* and *con* as to the desirability of allowing comment on the failure of the accused to testify. But policy arguments are of no avail in the face of a clear constitu-

(3) Cf. C3, Vol. I, p. 261.

(4) *Vijendrajit v. State of Bombay*, A. 1953 S.C. 247.

(5) *Ranjit v. State*, A. 1952 H.P. 81; *Ramakrishna*, in re, A. 1955 Mad. 101.

(6) *Adamson v. California*, (1947) 332 U.S. 46.

tional command We are obliged to give effect to the principle of freedom from self-incrimination. That principle is as applicable where the compelled testimony is in the form of silence as where it is composed of oral statements.”⁷

It may be noted in this connection, that as regards the federal Courts, there is, apart from the constitutional prohibition, a federal statute of 1878 providing that the jury must be instructed that the accused's failure to testify creates no presumption against him and it has been held that it is improper for the prosecution to comment upon such failure of the accused.⁸

(B) *England*.—Though the accused may offer himself as a witness, the failure of the accused to testify cannot be commented upon by the *prosecution* [s. 1 (b), Criminal Evidence Act, 1898]. But the Judge is competent to comment upon the failure of the accused to testify [p. 35, *ante*] and it has been rightly pointed out⁹ that this lacuna in the law often compels the accused to testify, in order to prevent the unfavourable comment from the Court itself.

(C) *India*.—Whatever be the merits of the *Adamson*⁷ decision, there is no scope for the introduction of such a provision in India.

It has already been noted that s. 342A of the Criminal Procedure Code, inserted in 1955, which makes it possible for the accused to testify on his own behalf, specifically provides [Proviso (b)] that “his failure to give evidence shall not be made the subject of comment by any of the parties or the Court.....”. It is, obvious, therefore, that under the general law of evidence, the problem in *Adamson's* case¹⁰ cannot arise at all.

It is to be noted that even in the special law embodied in the Prevention of Corruption Act, 1947, a similar prohibition against comment upon silence is embodied in s. 7, Proviso (b).

But while the Legislature was careful to include Proviso (b) while inserting s. 342A in the Criminal Procedure Code in 1955 (p. 35, *ante*), the Legislature left sub-sec. (2) of s. 342 untouched. S. 342 (2) says—

“(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; *but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.*”

To the Author it seems that it is due to oversight that the Legislature did not omit the italicised words, while inserting s. 342A in 1955; for, after the insertion of s. 342A, the italicised words have, at least, become anomalous. They are inconsistent with Proviso (b) of s. 342A; for, the object of both ss. 342 and 342A, as already explained, is to offer an *opportunity* to explain anything incriminating in the evidence recorded against him. If, therefore, no inference may be made from the failure of the accused to take hold of the opportunity offered under s. 342A by volunteering to testify on his own behalf, why should such inference be permissible when the Court questions him for the same purpose? Secondly, if the answers recorded under s. 342 be not ‘evidence’, being unsworn and the accused cannot be convicted on the basis of such statement as the sole substantive evidence, how can any incriminating inference be made from the mere fact that the accused has refused to answer or make a statement?

Apart from the above statutory considerations, there is a constitutional implication if we take into account the observations of the dissenting Judges in *Adamson v. California*¹⁰ (see p. 37, *ante*). If you cannot compel an accused to make a statement against himself, you cannot draw any inference against him because he remains silent, because that would obviously oblige him to speak, rather than remain silent.

To draw an adverse inference from the refusal to testify is indeed to punish a person who seeks to exercise his right under Art. 20 (3). Just as no inference of guilt can be made from the fact that the accused is invoking the protection

(7) *Adamson v. California*, (1947) 332 U.S. 46.

(8) *Bruno v. U. S.*, (1939) 308 U.S. 287; *Grunewald v. U. S.*, (1957) 353 U.S. 391.

(9) Williams, *The Proof of Guilt*, 1955, p. 57.

(10) *Adamson v. California*. (1947) 332 U.S. 46.

of Art. 20 (3), so no inference of guilt can be made from the mere fact that he refuses to answer or to make a statement. As the American Supreme Court¹¹ has observed—

"Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. The privilege serves to protect the innocent who might otherwise be ensnared by ambiguous circumstances".¹¹

To what kinds of evidence the immunity extends.

The words 'to be a witness' in the present clause has been interpreted by our Supreme Court¹² in the American way, so as to include not only oral but also documentary evidence. The result is that a compulsory process for the production of evidentiary documents against a person who has been accused of an offence contravenes Art. 20 (3) of the Constitution, if the documents are reasonably likely to support the prosecution against such person.¹²

It has been pointed out by our Supreme Court that the expression used in the clause is 'to be' and not 'to appear' as a witness. It follows, therefore, that the immunity given by the clause extends to immunity against being compelled to furnish *any kind of evidence* which is reasonably likely to support a prosecution against him.¹²

"To be a witness" is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by the production of a thing or of a document or in other modes¹³

Compulsory Production of Documents.

As has been stated earlier, the word 'witness' in the present clause has been interpreted by our Supreme Court¹³ to include not only oral but also documentary evidence. The result is that a compulsory process for the production of evidentiary documents (e.g., under s. 94, Cr. P. C.¹⁴) against a person who has been accused of an offence contravenes Art. 20 (3) of the Constitution, if the documents are reasonably likely to support the prosecution against such person.¹²⁻¹³ It has, accordingly been held¹³ that s. 94 is not applicable against an accused person.

Applicability to corporations.

In the U.S.A., it has been held that a corporation, being an artificial person, is not entitled to the privilege against self incrimination (p. 21, *ante*).

But in our Supreme Court case of *Sharma v. Satish*,¹⁵ no question to this effect was raised and the Court assumed that the constitutional provision extended also to corporations when they were accused of an offence. The Bombay High Court^{15a} has held that a corporation being a 'person' under the General Clauses Act, Art. 20 (3) should be applicable to corporations and that the English decision in *Triplex Glass Co. v. Lancegave Glass Ltd.*, (1939) 2 All E. R. 613, rather than the American decisions, should be followed in India.

Search and Seizure.

(A) *England*.—In England, the power to issue search warrants is given by various statutes, such as the Larceny Act, 1916, Criminal Law Amendment Act,

(11) *Grunewald v. U. S.*, (1957) 77 S. Ct. 963 (982).

(12) *Sharma v. Satish*, (1954) S.C.R. 1077 (1087-8).

(13) *State of Gujarat v. Mohanlal*, (1964) S.C. [unreported].

(14) *Gupta v. State*, A. 1959 All. 219.

(15) *Madan Lal v. State*, A. 1958 Orissa 1 (3).

(15a) *State of Maharashtra v. Nagpur Electric Co.*, (1960) 63 Bom. L.R. 559 (561).

1885, Incitement to Disaffection Act, 1934, Official Secrets Act, 1911, Obscene Publications Act, 1857, Criminal Libel Act, 1819, Public Order Act, 1936, Firearms Act, 1937.

But from very early times, Courts have condemned 'general warrants' except in the case of search for stolen goods. In the case of search for stolen goods, it is provided by the Common Law as well as by the Larceny Act, 1916, that upon information by a complainant that he has reason to suspect that property of his, not specified, has been stolen and is in the possession of another person, a Magistrate may issue a general warrant for the search of the premises of that other person for search and seizure of *any* property believed to be stolen.

In *Entick v. Carrington*,¹⁶ Lord Camden held that except in the case of stolen goods, there was no common law power to issue a general warrant (i.e., without specifying the papers or objects to be searched and seized) for the search of premises on the ground of State necessity or otherwise. This decision and two others¹⁷ which preceded it, put a stop to the use of the machinery of search for *political* purposes, by laying down that unspecified papers of a named or an unnamed person could not be searched and seized. The decision rested on the ground that every invasion of a man's premises, without proper legal authority, constituted a trespass.

An exception to the above principle has been acknowledged in the later case of *Elias v. Pasmore*,¹⁸ in the case where a person has been *arrested* under a lawful process upon a *criminal* charge. In such a case, it has been held that the police can search the premises where the prisoner is arrested and seize *any* material which is relevant to the prosecution for *any* crime committed by *any* person, even other than the prisoner himself.

The illegality of a search does not render inadmissible the evidence obtained by it.¹⁹

(B) U.S.A.—The Fourth Amendment to the Constitution of the United States provides—

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Though the Fourth Amendment was the result of a reaction²⁰ against those possibilities which *Entick v. Carrington*²¹ sought to resist, the American provision was, in fact, adopted in wider language. It gives to the Court power to determine, in every case, whether a search and seizure has been 'unreasonable', besides providing that no 'general' warrant should be issued. What constitutes an unreasonable search is to be determined on the facts and circumstances of each case.²²

Firstly, it has been held under this clause that the search of one's person or premises and the seizure of his papers or effects, without his consent,²³ or without a warrant issued by a proper judicial authority is 'unreasonable' even though no force is actually used.²⁴ This Amendment, thus, guarantees "the security of one's *privacy* against arbitrary intention by the police."²⁵ It has thus formed the basis for the assertion of a *basic constitutional right to privacy*.¹

The object behind this principle is to interpose a Magistrate between the citizen and the Police "so that an objective mind might weigh the need to invade the privacy in order to enforce the law".²

(16) *Entick v. Carrington*, (1765) 19 St. Tr. 1030.

(17) *Wilkes v. Wood*, (1763) 19 St. Tr. 1153; *Leach v. Money*, (1765) 19 St. Tr. 1002.

(18) *Elias v. Pasmore*, (1934) 2 K.B. 164.

(19) *Jones v. Owen*, (1870) 34 I.P. 759; *Kuruma v. R.*, (1955) 1 All. E.R. 236 (P.C.).

(20) Cf. *Henry v. U. S.*, (1959) 361 U.S. 98 (101).

(21) *Entick v. Carrington*, (1765) 19 St. Tr. 1030.

(22) *Go-Bart Importing Co. v. U. S.*, (1931) 282 U.S. 344 (357).

(23) *Amos v. U. S.*, (1921) 255 U.S. 313.

(24) *Weeks v. U. S.*, (1914) 232 U.S. 383.

(25) *Wolf v. Colorado*, (1949) 338 U.S. 25.

(1) *Mapp v. Ohio*, (1961) 367 U.S. 643.

(2) *McDonald v. U. S.*, (1948) 335 U.S. 451 (455).

It has been held that the same immunity follows from the guarantee of 'Due Process' in the Fourteenth Amendment:

"The security of one's privacy against arbitrary intrusion by the police which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the State through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, *without authority of law but solely on the authority of the police*, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples".²⁵

There is no power to search a premises without a search warrant issued in conformity with the constitutional requirement, save in exceptional circumstances, e.g., where the person was seeking to escape;³ or where the officer has probable cause to believe that an offence has been committed;⁴ or where the offence was being committed in his very presence.⁵

Secondly, a search warrant may be issued only on 'probable cause', and not on mere suspicion without any statement of adequate facts to support the suspicion.⁶ But it may be issued on information if there was a basis for accepting the informant's story⁷ and evidence required to establish guilt is not necessary.⁴

'Probable cause' for belief that certain articles subject to seizure are in a home does not of itself justify a search *without* warrant.⁸

But inspection by a *health official* has not been treated as a 'search' within the meaning of this Amendment.⁹

Thirdly, it has further been held that, read with the Fifth Amendment, the present clause also ensures that a man's private papers cannot be seized for the purpose of using it in evidence to incriminate him,¹⁰ and that documents obtained by unreasonable search and seizure are inadmissible in evidence.¹¹⁻¹²

An exception is, of course, admitted when a person has been arrested¹³ under a *lawful* warrant on a charge of crime. In such a case, the person and premises of the arrested person may be *contemporaneously* searched in order to find and seize weapons or other objects connected with the crime,¹⁴ even without a separate warrant for the search.¹⁵ A seizure is lawful even where it is made during a lawful entry to arrest for *another*¹³ crime. But the exception does not extend to any premises other than where the crime was committed or the arrest made and would not permit 'exploratory' searches being made for the sole purpose of obtaining evidence against the arrested person.¹⁶ Probable cause for arrest exists if the facts and circumstances known to the officer would warrant a prudent man in believing that an offence has been committed.¹⁷ Where there is no such probable cause for the arrest, any search and seizure made in course of the arrest (without a separate warrant for the search) is illegal and the seized goods cannot be used as evidence against the arrested person.¹⁷

Evidence secured by unreasonable search and seizure is *inadmissible* in the federal Courts.¹⁸

(C) *Japan*.—Art. 35 of the Japanese Constitution exactly reproduces the language of the Fourth Amendment to the American Constitution which has been quoted above. Hence, the same interpretation of the clause is likely to be adopted in Japan as in the U.S.A.

(D) *India*.—In *our* Constitution, there is no guarantee to any fundamental right to privacy analogous to the Fourth Amendment to the American Consti-

(3) *Johnson v. U. S.*, (1947) 333 U.S. 15.

(4) *Brinegar v. U. S.*, (1948) 338 U.S. 160.

(5) *Carroll v. U. S.*, (1925) 267 U.S. 132.

(6) *Nathanson v. U. S.*, (1933) 290 U.S. 41.

(7) *Jones v. U. S.*, (1960) 362 U.S. 257.

(8) *Harris v. U. S.*, (1947) 331 U.S. 145.

(9) *Frank v. Maryland*, (1958) 359 U.S. 360 (373).

(10) *Boyd v. U. S.*, (1886) 116 U.S. 616.

(11) *Giordenello v. U. S.*, (1957) 357 U.S. 480.

(12) *Weeks v. U. S.*, (1914) 232 U.S. 383.

(13) *Jones v. U. S.*, (1957) 357 U.S. 493 (497).

(14) *Agnello v. U. S.*, (1925) 269 U.S. 20.

(15) *U. S. v. Rabinowitz*, (1950) 339 U.S. 56, overruling *Trupiano v. U. S.*, (1948) 334 U.S. 699.

(16) *U. S. v. Lefkowitz*, (1932) 285 U.S. 452.

(17) *Henry v. U. S.*, (1959) 361 U.S. 98.

(18) *Wolf v. Colorado*, (1949) 338 U.S. 25; *Elkins v. U. S.*, (1960) 364 U.S. 206.

tution, and *our* Supreme Court has refused to import any prohibition against search and seizure of a person's premises and effects, without his consent, by any liberal interpretation of Art. 20 (3) of *our* Constitution.¹⁹ The Court observed¹⁹—

"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law."

There is, thus, no constitutional protection in India against 'unreasonable searches'. The entire matter has been left to the Legislature. The provisions of the existing law relating to the subject may be summarised as follows:

I. Any place may be searched by a Police-officer when he has reason to believe that a person against whom he has got a warrant of arrest has entered into such place (s. 47, Cr. P. Code).

II. S. 94 (1) of the Cr. P. Code empowers a Court or any Police-officer in charge of a Police-station (outside Calcutta and Bombay) to issue a summons against any person for the production of any document in his possession or power which the Court or the Police-officer considers to be necessary or desirable for the purposes of any 'investigation, inquiry, trial or other proceeding'.

S. 96 (1) then provides—

"Where any Court has reason to believe that a person to whom a summons or order under s. 94 or a requisition under s. 95, sub-s. (1), has been or might be addressed will not or would not produce the document or thing as required by such summons or requisition,

or where such document or thing is not known to the Court to be in the possession of any person,

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a *general search* or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained."

III. Ss. 165-6 of the Cr. P. Code also empower a Police-officer to search any place within the limits of the Police-station to which he is attached, when he has reasonable grounds for believing that "anything necessary for the purposes of an investigation into an offence which he is authorised to investigate may be found" in such place.

IV. Provision similar to that contained in the English Larceny Act (see p. 38, *ante*) is to be found in s. 98 of the Cr. P. Code which empowers a Magistrate to issue a *general warrant* for the search of stolen goods and obscene objects. There is also provision in s. 100 of the Code for search for persons wrongfully confined.

V. Besides, the power to search is conferred by various other statutes, for the purposes of those statutes, e.g., ss. 22-4 of the Dangerous Drugs Act (II of 1930); s. 7, Indian Explosives Act (IV of 1884); s. 11 of the Official Secrets Act (XIX of 1923); s. 169, Sea Customs Act (VIII of 1878).

As stated above, in *Sharma v. Satish*,¹⁹ *our* Supreme Court has held that no immunity from search and seizure can be predicated from Art. 20 (3), because the immunity under Art. 20 (3) is confined to *testimonial* compulsion, that is to say, where an accused person is compelled to give oral or documentary evidence against himself, while in search, the documents or other articles are recovered from his premises by *another* person, namely, the police officer. Thus observed the Court—

"It is, therefore, clear that there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20 (3) as above explained. But a search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are not his testimonial acts in any sense."¹⁹

(19) *Sharma v. Satish Chandra*, (1954) S.C.R. 1077.

Following this decision,¹⁹ it was held by the High Courts that it would not be unconstitutional to issue a search warrant under s. 96 of the Cr. P. C.²⁰⁻²¹ or a notice to show cause why a search warrant should not be issued²¹ or to use in evidence against the accused articles obtained by search.

Constitutionality of s. 94 of the Criminal Procedure Code.

It is interesting to note that in *Sharma v. Satish*,²⁰ though the Court held that any compulsory process directing the production of evidentiary documents, if issued against a person accused of an offence, would offend Art. 20 (3), the Court took the view that there is nothing unconstitutional in s. 96 of the Cr. P. Code which provides for 'search and seizure' of documents on failure to produce documents in compliance with a summons for production under s. 94 of the Code, inasmuch as that there is no prohibition in our Constitution against 'unreasonable search and seizure' (see p. 42, ante).

Their Lordships, however, did not express any definite opinion as to whether s. 94 itself offends against Art. 20 (3) on the ground that it is available to compel an accused person to produce a document:

"There has been some debate before us whether s. 94 applies to an accused person and whether there is any element of compulsion in it. For the purpose of this case it is unnecessary to decide these points. We may assume without deciding that the section is applicable to the accused as held by a Full Bench of the Calcutta High Court in a recent case in *Satya Kinkar Roy v. Nikhil*.^{21a} We may also assume that there is an element of compulsion implicit in the process contemplated by s. 94 because, in any case non-compliance results in the unpleasant consequence of invasion on one's premises and rummaging of one's private papers by the minions of law under a search warrant."¹⁹

There is, however, a more positive sanction compelling production of a document which is called for under s. 94 of the Code, viz., that it is punishable as contempt of court.

S. 485 of the Code provides—

"If any person called to produce a document.....before a Criminal Court refuses.....to produce.....and does not offer any reasonable excuse for such refusal, such Court may.....sentence him to simple imprisonment.....for any term not exceeding seven days, unless in the meantime such person consents to produce the document. In the event of his persisting in his refusal, he may be dealt with according to the provisions of s. 480 or s. 482....."

In view of the above, there is little doubt that s. 94 provides for a compulsory production of a document from any person including an accused, and it is difficult to sustain the validity of this section in view of the Supreme Court decision that Art. 20 (3) extends to documentary evidence as well. This view of the Author,²² that s. 94, in so far as it is applicable to the accused, contravenes Art. 20 (3), seemed to have been affirmed by the majority in *Kathi Kalu's*²³ case, but the majority in the later case of *State of Gujarat v. Mohanlal*²⁴ has saved s. 94 from unconstitutionality, by giving it a narrow construction,—holding that the words 'any person' in the section does not include the accused.

The result of *Mohanlal's case*,²⁴ therefore, is that nothing in s. 94 will enable a Court to compel an accused person to produce documents which might incriminate him.

Constitutionality of wire-tapping and interception of messages.

(A) U.S.A.—In the U.S.A., the question has been dealt with under the constitutional protection against 'unreasonable search and seizure' (Fourth Amendment). In an earlier case,²⁵ the Supreme Court held that wire-tapping did not constitute a violation of the above constitutional guarantee and that the common law did not prevent the admission of evidence secured by wire-tapping.

(20) *Sarnalingam, in re*, A. 1955 Mad. 685.

(21) *Swarnalingam v. Inspector*, A. 1956 Mad. 165.

(21a) *Satyakinkar v. Nikhil*, A. 1951 Cal. 101.

(22) At p. 262n., C3, Vol. I.

(23) *State of Bombay v. Kathi Kalu*, A. 1961 S.C. 1808 (1815).

(24) *State of Gujarat v. Mohanlal*, A. 1964 S.C.

(25) *Olmstead v. U. S.*, (1928) 277 U.S. 438.

Since then, Congress has enacted the Federal Communications Act, 1934 which makes it unlawful to 'intercept and divulge telephone communications without authorisation by the sender'. Evidence obtained by wire-tapping (whether obtained by federal or State agents¹) has thus been made inadmissible in the federal Courts.²

But the utility of this statutory provision has been minimised by the holding that it does not extend to prohibit State Courts from receiving evidence secured by State agents³ by wire tapping or eavesdropping.⁴ The situation is somewhat anomalous since it is possible to secure a conviction in a State Court on such evidence, except where it offends against some other constitutional provision. Thus, a conviction has been set aside on the ground that conversation between the accused and her lawyer had been intercepted in contravention of the right of the accused to provide consultation with his counsel.⁵ But a conviction on the basis of evidence obtained by means of eavesdropping would be invalid if the device for eavesdropping was planted by means of an unlawful physical invasion of the Petitioner's premises, which would violate the Fourth Amendment to the Constitution.⁶

Another anomalous exception, recently acknowledged, is that if the evidence is secured by the police on a 'regularly used' telephone extension of the *other party* to the conversation, with the consent of the latter (as distinguished from the sender), its use is not prohibited by the federal statute.⁷

(B) *England*.—The power of the State to intercept any communication which is prejudicial to public safety has been acknowledged in England from early times as a Prerogative of the Crown⁸ and even statutes have recognized the existence of such a power in the Executive [*e.g.*, s. 58 (1) of the Post Office Act, 1953].

As to the admissibility of evidence secured by such means, the principle of English Common Law is that if an evidence is relevant, the Court is not concerned with the means by which it has been obtained;⁹ but the Court has the discretion, in a criminal proceeding, to disallow evidence that would operate unfairly against the accused, *e.g.*, a document obtained from the accused by a trick.⁹

But though there has been no question in the Courts so far as to the admissibility of evidence obtained by wire-tapping, in 1957 a Committee of Privy Councillors was appointed to suggest safeguards against the abuse of this power by the Executive. The Committee has recommended that this power must rest with the Executive for the purposes of detection of crime and prevention of injury to national security and that the Secretary of State should remain the sole authority to issue warrants for such interception, uninterrupted by the Courts, but that the warrants should be issued for a defined period and should also specify the name, address etc. of the person who would be the subject of the warrant.

(C) *India*.—S. 5 of the Indian Telegraph Act, 1885 and s. 26 of the Post Office Act, 1908 empower the Government or any officer specially empowered by it, to intercept and disclose to the Government a telegraphic or other communication, not only on the occurrence of any 'public emergency', but also in the interest of the 'public safety', as to the existence of which, the certificate of the appropriate Government shall be 'conclusive proof'. Since it is not obtained from the party by compulsion, Art. 20 (3) is not attracted.

(1) *Benanti v. U. S.*, (1957) 355 U.S. 96 (100).

(2) *Nardone v. U. S.*, (1937) 302 U.S. 379; (1939) 308 U.S. 338.

(3) *Rea v. U. S.*, (1955) 350 U.S. 214.

(4) *Schwartz v. Texas*, (1952) 344 U.S. 199; *On Lee v. U. S.*, (1952) 343 U.S. 747; *Irvine v. California*, (1954) 347 U.S. 128.

(5) *Coplon v. U. S.*, (1952) 342 U.S. 926, denying *certiorari* from 191 F. 2d. 749.

(6) *Silverman v. U. S.*, (1961) 365 U.S. 505.

(7) *Rathbun v. U. S.*, (1957) 355 U.S. 107. [As the dissenting Justices Frankfurter and Douglas pointed out, the exception is hardly tenable on the plain language of the statute].

(8) Report of the Committee of Privy Councillors, 1957 (Cmd. 283; (1958) Public Law, 71-3.

(9) *Kuruma v. R.*, (1955) 1 All E.R. 236 (239) P.C.

The validity of the restriction has to be determined with reference to Art. 19 (2), which has been already discussed [Vol. I].

Whether accused can be compelled to exhibit his body.

(A) *U.S.A.*—It has been held in the United States that the guarantee against self-incriminating evidence does not require the exclusion of the body of an accused as evidence of his *identity*.¹⁰ An accused can, therefore, be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try a cap or a coat.¹¹ Similarly, the question whether a blouse belonged to the accused can be determined by making him put it on.¹⁰ Justice Holmes observed¹⁰—

"The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition to the use of physical or moral compulsion to extort *communications* from him, not an exclusion of his *body as evidence* when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a Court would go in compelling a man to exhibit himself. For when he is exhibited, *whether voluntarily or by order*, and even if the order goes too far, the *evidence, if material, is competent*".¹⁰

Forcible discovery of blood-stains¹² or marks and bruises¹³ on the body of the accused would not, accordingly, violate the Fifth Amendment.

(B) *England*.—Compulsory examination of the physical and mental condition of the accused is permissible.¹⁴

(C) *India*.—Applying the above American view, it has been held that the holding of identification proceedings of suspects or taking their photographs,¹⁵ or tying clothes upon their persons and the like, do not offend against Art. 20 (3),¹⁶ even if compulsion is used.

Whether an accused can be compelled to give thumb-impression or specimen writing for comparison.

(A) *U.S.A.*—As has already been stated in the *U.S.A.*, the 'Self-incrimination' Clause in the Fifth Amendment has been interpreted to be confined to a prohibition against extortion of a "*communication*"¹⁷ from the accused which would tend to incriminate him.

In *Holt v. U.S.*,¹⁷ Holmes J. observed—

"But the prohibition of compelling a man in a criminal Court to be a witness against himself is a prohibition to the use of physical or moral compulsion to extort *communications* from him, not an exclusion of his *body as evidence* when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."¹⁷

It would not, therefore, confer any immunity from being compelled to exhibit one's body or to give finger-impressions or specimen writings, which are to be used for the purpose of identification,¹⁸ just as a hat or a blouse would be.¹⁷ The reason, according to Prof. Gellhorn,¹⁸ is that these are not 'communication' but 'non-assertive conduct'.

The reason is more fully explained by Wigmore.¹⁹—

"The limit of the privilege is a plain one. From the general principle.....it results that an *inspection* of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, *i.e.*, upon his testimonial

(10) *Holt v. U. S.*, (1909) 218 U.S. 245.

(11) *Rochin v. California*, (1952) 342 U.S. 165 (179).

(12) *Mc Farland v. U. S.*, (1946) 90 L. Ed. 478.

(13) *Leeper v. Texas*, (1890) 35 L. Ed. 225.

(14) *R. v. Castleton*, (1909) 3 Cr. App. R. 74.

(15) Vide s. 5 of the Identification of Prisoners Act, 1920, at p. 44, *post*, held valid [*Ram Swarup v. State*, A. 1958 All 119].

(16) *Ram Swarup v. State*, A. 1958 All 119 (126); *Subbaya v. Bhooapala*, A. 1959 Mad. 396; *Pakhar Singh v. State*, A. 1958 Punj. 294 (298).

(17) *Holt v. U. S.*, (1910) 218 U.S. 245 (253).

(18) Gellhorn, *American Rights*, (1960), pp. 109-110.

(19) Wigmore, *Evidence* 3rd Ed., Vol. 8, pp. 374-5.

responsibility. That he may in such cases be required sometimes to exercise *muscular action*—as when he is required to take off his shoes or roll up his sleeves—is immaterial, unless all bodily action were synonymous with testimonial utterance; for, as already observed..... not compulsion alone is the component idea of the privilege, but *testimonial compulsion*. What is obtained from the accused by such action is not testimony about his body, but his *body, itself*.....

Unless some attempt is made to secure *communication*, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it.”

(B) *England*.—Under the Criminal Justice Act, 1948, a Court of summary jurisdiction can order finger-prints to be taken from an accused person, not being less than 14 years of age, without his consent.

(C) *India*.—Ss. 4-6 of the Identification of Prisoners Act, 1920 provide for the taking of finger-impressions and foot-print impressions, by the use of force, if necessary:

“4. Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his *measurements* to be taken in the prescribed manner.

5. If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or *photograph* to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the first class:

Provided further that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

6. (1) If any person who under this Act is required to allow his measurements or photograph to be taken resists or refuses to allow the taking of the same, it shall be lawful to use all means necessary to secure the taking thereof.

(2) Resistance to or refusal to allow the taking of measurements or photographs under this Act shall be deemed to be an offence under section 186 of the Indian Penal Code.”

S. 2 (a) defines ‘measurements’ as including *finger impressions* and *foot-print impressions*.

S. 73 of the Evidence Act says—

“In order to ascertain whether a *signature, writing or seal* is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger impressions.”

Upon the question whether these sections, in their application to an accused person, violate Art. 20 (3), there has been a sharp difference of opinion:

A. One view is that a direction by the Court asking the accused to give his thumb-impression^{19a} or to give his specimen writing^{19b} or the taking of such writing in the presence of the Magistrate, *amounts* to a compulsion to be a witness against himself. It is to be noted that refusal to comply with such direction may be an offence punishable under s. 186, I.P.C.

B. In another group of cases it has been held that a mere direction of the Court to take the thumb or finger impression or specimen writing of the Court *does not* offend against Art. 20 (3).²⁰⁻²³ The same view has been taken of impressions taken from the accused while in police custody,²⁴ without the use of any

(19a) *Rajamuthukoil v. Periyasami*, A. 1956 Mad. 632.

(19b) *State v. Ramkumar*, A. 1957 M.P. 73.

(20) *State v. Parameswaran*, A. 1952 T.C. 482 (F.B.).

(21) *State of Mysore v. Gopala*, A. 1954 Mys. 117.

(22) *Muhammad Hussain, in re*, A. 1957 Mad. 47; *Palani, in re*, A. 1957 Mad. 546.

(23) *Bhupendra v. Union of India*, A. 1959 H.P. 29.

(24) *Pakhar Singh v. State*, A. 1958 Punj. 294.

duress or compulsion.²⁵ If the accused voluntarily submits to the order to give his impression or writing, he may be deemed to have *waived* his privilege under Art. 20 (3).¹⁻³

C. There is another group of cases⁴⁻⁷ which hold that if the accused is *compelled* to give his thumb-impression or specimen writing, *against his objection*, whether physical force is used or not, there is a violation of Art. 20 (3).

D. In some other cases⁸⁻¹⁰ it has been held that if *physical force* is used in obtaining such impression or writing, it offends against Art. 20 (3).

E. The view has also been taken¹¹ that so far as *specimen writing* is concerned, it can hardly be taken from an unwilling person without using physical force.

In the same strain is the view that the use in evidence of a thumb-impression of the accused taken during police investigation offends against Art. 20 (3).¹²

F. In some cases,^{7,13} it has been held that though an accused person cannot be compelled to give his thumb-impression, the Court is not precluded from drawing an adverse presumption against him under s. 114 of the Evidence Act or any similar law, where he refuses to comply with the direction of the Court.

G. There are cases¹⁴⁻¹⁵ to the other extreme to hold that even the use of physical force would not involve a violation of Art. 20 (3), for, if the accused can be *compelled* to exhibit his body, by the use of force, if necessary, there is nothing wrong in obtaining thumb-impression or specimen writing from him, for the purposes of establishing his identity.

Taking *Sharma v. Satish*¹⁶ as the authority, as it stands, the question may be solved if we can determine whether the giving of a finger-impression is a positive volitional act or an act of submission. In the case of *Palani*,¹⁹ the Madras High Court took the view that—

"The taking of thumb impression or the signature of the accused *does not* stand on a different footing from the seizure of documents or articles or other facts of evidence from the person of the accused."¹⁶

If the above view be correct, Art. 20 (3) would not be attracted even if force be used in obtaining the impression. The giving of a thumb-impression really differs from making a statement⁹ or a 'communication' (p. 45, *ante*). As observed by Willis,¹⁷ it is a passive act on the part of the person whose impression is taken, as distinguished from a 'positive volitional' act, without the meaning of *Sharma v. Satish*.¹⁶ In principle, it differs little from the exhibition of one's body for the purpose of identification:

"The ridges of his thumb are not provided by him any more than the features of his countenance are provided by him; all that he is asked to do is to display these ridges for better scrutiny the ridges are inked over and an impression is made on a piece of paper".¹⁸

If so, the question whether it was given voluntarily or under compulsion or in Police custody or in Court is immaterial, for the purposes of Art. 20 (3).

The question is whether there is any material difference, from the same standpoint, where instead of a finger-impression, a specimen writing is obtained from the accused by compulsion, for the purpose of comparison or identification.

(25) *Nazirsingh v. State*, A. 1959 M.P. 411.

(1) *Shailendra v. State*, A. 1955 Cal. 247.

(2) *Ramswarup v. State*, A. 1958 All. 119.

(3) This view, of course, raises the question (p. 55, *post*) whether the fundamental right under Art. 20 can be waived at all.

(4) *Bhaluka v. State*, A. 1957 Orissa 172.

(5) *Brij Bhusan v. State*, A. 1957 M.P. 106.

(6) *Nazir Singh v. State*, A. 1959 M.P. 411 (412).

(7) *Balraj v. Ramesh*, A. 1960 All 157 (159).

(8) *Shailendra v. State*, A. 1955 Cal. 247.

(9) *State v. Abu*, A. 1959 Bom. 408 (413).

(10) *Palani, in re*, A. 1957 Mad. 546.

(11) *Farid v. State*, (1959) 63 C.W.N. 901 (904); A. 1960 Cal. 32.

(12) *Damodaran v. State*, A. 1960 Ker. 29.

(13) *Ramswarup v. State*, A. 1958 All. 119.

(14) *Pakhar Singh v. State*, A. 1958 Punj. 294.

(15) *Govinda Reddy, in re*, A. 1958 Mys. 150.

(16) *Sharma v. Satish*, (1954) S.C.R. 1077.

(17) Willis, *Constitutional Law*, 1936, p. 22.

(18) *Mahal Chand v. State*, A. 1961 Cal. 123 (124).

According to the Calcutta High Court,¹⁹ where an accused person is compelled to give his thumb-impression, he merely *submits* and commits no volitional act; but when he is directed or made to give his specimen writing against his will, he is compelled to commit a 'volitional act' within the meaning of the dictum of the Supreme Court in *Sharma v. Satish*,¹⁶ for, it does not involve a merely passive act on the part of the person who is made to write.

The Calcutta decision¹⁹ is no doubt logical if the 'volitional' test mentioned in *Sharma v. Satish*¹⁶ is taken as the sole test for the application of Art. 20 (3). Ere long the Supreme Court may have to clarify the position. If, however, we follow the American interpretation given in *Holt v. U.S.*²⁰ (see p. 45, ante), the riddle may be obviated, because no 'communication' or 'testimony' is involved in giving a specimen writing for comparison or identification any more than in giving a finger-impression for the same purpose. Here the writing itself is the evidence just as in the case of a finger-impression or any other mark on the body of the person accused. As Wigmore has explained (p. 45, ante), the position is not changed where the exhibition of the body involves a 'muscular action'. It does not appear that in the U.S.A., there is any authority for making a distinction between finger-impression and specimen writing, under the Fifth Amendment. A comparison of writing stands in the same footing as the comparison of the features of the accused with his photograph.^{20a}

Admissibility of material evidence obtained from the person of the accused.

(A) *U.S.A.*—Though the immunity against self-incrimination does not protect a person from his body being used for establishing his identity, it has been held that a person cannot be convicted on physical evidence taken from his body without his consent, e.g., by the use of a stomach pump.²¹

But in a later case,²² it has been held by a majority of the Supreme Court that there is nothing wrong in convicting a person upon blood sample obtained from him by a qualified physician, by inserting a syringe into his person, while he was *unconscious*.

Both cases proceeded on the basis of the 'Due Process' Clause which condemns any procedure which is shocking to the conscience. In the *Rochin* case,²¹ Frankfurter J., speaking for the majority, observed—

"This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation".²¹

In the *Breithaupt* case,²² on the other hand, the majority held that the taking of a blood sample by a physician cannot be held as a 'brutal' act and that in the adjustment of individual liberty with the interests of society, the individual must suffer this much of hardship. Though in the facts of the case, the sample was taken while the person was unconscious, there are observations which show that the majority might come to the same conclusion even if the sample were taken while the accused was conscious and against his opposition:²³

"As against the right of the individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road".

(19) *Farid Ahmed v. State*, A. 1960 Cal. 32 (34).

(20) *Holt v. U. S.*, (1909) 218 U.S. 245.

(20a) Cf. *Ram Swarup v. State*, A. 1958 All. 119 (126).

(21) *Rochin v. California*, (1952) 342 U.S. 165 (179).

(22) *Breithaupt v. Abram*, (1957) 352 U.S. 432.

(23) This view has been taken in California [*People v. Duroncelay*, (1957) 48 Cal. 2d. 766].

A strong majority of Chief Justice Warren, Black and Douglas JJ. could not, however, agree. In the words of the Chief Justice—

".....law enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of *bruising the body, breaking skin, puncturing tissue, or extracting body fluids, whether they contemplate doing it by force or by stealth*".²³

Both in the *Rochin*²⁴ and *Breithaupt*²⁵ cases, the majority had no opportunity to consider whether the forcible extraction of material evidence from the person of the accused would constitute a violation of the Fifth Amendment (Self-incrimination Clause), because they proceeded upon the view, already established, that the Fifth Amendment did not extend to the States. That, of course, is of no help in the matter of interpretation of the Fifth Amendment itself nor a solution of the problem if it had arisen in a federal proceeding. On that point, we get light from the dissenting Judges Douglas and Black, who were in the minority, in both cases. Assuming that the Fifth Amendment is applicable to the States, through the medium of the Fourteenth Amendment (a question with which we, in India, are not concerned), the view taken by these dissenting Judges as to the sweep of the Fifth Amendment is worthy of note. It would appear from these observations, that, according to these Judges, the immunity offered by the Fifth Amendment is not confined to 'communications' or 'verbal evidence'.

In the *Rochin* case,²⁴ Black J. observed—

"I think a person is compelled to be a witness against himself *not only when he is compelled to testify, but also when as here incriminating evidence is forcibly taken from him by a contrivance of modern science*".²⁴

Douglas J. was more explicit:

"Of course, the accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat (see *Holt v. U.S.*, 218 U.S. 245 (252-3)). But I think that words taken from his lips, capsules taken from his stomach, blood from his veins, are all inadmissible because of the *command of the Fifth Amendment*".²⁴

Without expressly referring to the Fifth Amendment, Douglas and Black JJ., in a common judgment, in the *Breithaupt* case,²⁵ observed—

"Nor would I draw a line between involuntary extraction of words from his lips, the involuntary extraction of the contents of his stomach, and the involuntary extraction of fluids of his body when the evidence obtained is used to convict him. Under our system of government, police cannot compel people to furnish the *evidence necessary to send them to prison*. Yet there is *compulsion* here, following the violation by the police of the sanctity of the body of an *unconscious man*".²⁵

(B) *Canada*.—In the English common law world, there is nothing to preclude the admissibility of relevant evidence obtained from the person of the accused, even though force had been used in obtaining it, say, by emetic.¹

In Canada, thus, the rule against self-incriminating evidence has been confined to *statements*, so that it does not prevent the taking of material evidence from the accused, such as blood samples.²

(C) *India*.—There having been no statutory provision barring such evidence, the English common law applied in India, prior to the Constitution. Though a forcible medical examination of a person without his consent may make the surgeon liable in an action for assault in the absence of a lawful authority,³ there was nothing to preclude the admissibility in evidence of the results of such examination.

The question is, whether Art. 20 (3) bars such evidence when taken by compulsion, and whether a law which provides for such examination offends Art. 20 (3).

(24) *Rochin v. California*, (1952) 342 U.S. 165.

(25) *Breithaupt v. Abram*, (1956) 432 (443).

(1) Cf. *A. G. v. Begin*, (1955) S.C.R. 593 (Can.).

(2) *Ref. re Vehicles Act*, (1958) S.C.R. 608 (Can.).

(3) Cf. *Emp. v. Bhondar*, 35 C.W.N. 1212.

The question has been considered by the Bombay High Court,⁴ in connection with s. 129A of the Bombay Prohibition Act, 1949, which authorises a Prohibition Officer to have a person, suspected to be intoxicated, medically examined and have his blood tested for determining the percentage of alcohol therein. Sub-secs. (3) and (5) of the section then provide—

“(3) If any person offers resistance to his production before a registered medical practitioner under sub-sec. (1) or on his production before such practitioner to the examination of his body or to the collection of his blood, it shall be lawful to use *all means* reasonably necessary to secure the production of such person or the examination of his body or the collection of blood necessary for the test.

(5) Resistance of production before a registered medical practitioner as aforesaid, or to the examination of the body.....or to the collection of blood as aforesaid, shall be deemed to be an offence.....”

It is evident that the provision authorises the compulsory extraction of evidence from the body of a person which is likely to incriminate him. It was held by the Bombay High Court that at the stage where this medical examination etc. was to take place, the person was already ‘accused of an offence’. The only other question to be answered was whether the person was by such examination compelled ‘to be a witness’ against himself. According to the test laid down in *Sharma’s case*,⁵ offering of ‘blood’ for test is, obviously, ‘furnishing evidence’. The remaining question was, as the Bombay High Court observed,—

“whether the compulsion warranted by the section requires an accused person to do *volitional* acts to produce evidence against himself or whether the compulsion merely requires him to *submit* to evidence being collected from him (as happens when an article is seized from him under a search warrant).”⁴

It is to be recalled that, according to the Supreme Court, it must be a *positive* volitional act, in order to come within the prohibition of Art. 20 (3):

“.....every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the *negative attitude of silence or submission or his part.....*”⁵

It seems that the decision of the Bombay High Court⁴ was that the taking of blood from the body of the accused person by a medical officer was not a positive volitional act but a *negative act of submission* on the part of the accused and that, accordingly, even if he was compelled so to submit his body, there was no violation of Art. 20 (3). It was, however, held that if sub-sec. (5) of s. 129A of the Prohibition Act *above* penalised not merely active resistance but also *passive* resistance to such medical examination, it contravened Art. 20 (3), in so far as the latter part was concerned, because then the sub-section would be penalising the very act of refusing to furnish evidence likely to incriminate him, which is the right guaranteed under Art. 20 (3). We are not concerned with this latter part of the finding, for the present. The decision of the Bombay High Court⁴ on the point in question is that there is no violation of Art. 20 (3) when an accused person is compelled to submit his body for medical examination and the result of such examination or anything extracted from his body per force is sought to be used in evidence.

Similar view appears to have been taken by the Madras⁶ and Punjab⁷ High Courts.

If Art. 20 (3) is confined in its application to testimony in the nature of a communication, as held in *Kathi Kalu’s case*^{7a} medical examination or extraction would obviously lie outside its purview, just as the taking of blood-stained clothes off from his body would be.^{7b}

(4) *State v. Balwant*, (1960) 63 Bom. L.R. 88 (92-3).

(5) *Sharma v. Satish*, (1954) S.C.R. 1077 (1087).

(6) *Subbaya v. Bhoopala*, A. 1959 Mad. 396 (400).

(7) *Pakhar Singh v. State*, A. 1958 Punj. 294 (298).

(7a) *State of Bombay v. Kathi Kalu*, A. 1961 S.C. 1808 (1813-6).

(7b) *Palani, in re*, A. 1955 Mad. 495.

Coerced or involuntary Confession.

The question of immunity from conviction upon extorted confession is analogous to the rule against self-incriminating 'evidence'.

(A) *U.S.A.*—In the *U.S.A.*, conviction upon coerced or involuntary confession has been held to be repugnant to the guarantee of 'due process'.⁸⁻⁹ Coercion may be physical¹⁰ as well as psychological^{8,11} and the Court, as a rule, excludes confession obtained from the accused while in police custody, by the use of what are known as 'third degree methods',—by prolonged interrogation by relay teams of officers and without offering opportunity of legal advice.¹²⁻¹³ The same principle has been applied to reject a confession extracted by a State-employed psychiatrist from a lone defendant, unprotected by counsel.¹⁴ Various factors are taken into consideration by the Court in determining whether a confession was coerced, *e.g.*, the length of time consumed in the interrogation;¹⁵ the secret character of the inquisition;¹⁶ the kind of treatment given to the prisoner during detention;¹⁵ the age,¹⁷⁻¹⁸ race, education¹⁹ and mental condition^{9,21} of the accused,—though any one of them alone²²⁻²³ may not be sufficient to indicate that the confession was involuntary. Thus, a confession is not inadmissible merely because it was made while in police custody or under detention,²⁴ except where the custody or detention itself is illegal,²⁵ or there has been an unnecessary delay between the time of arrest and the production of the suspect before the nearest magistrate.²¹

On the other hand, none of the following circumstances, without more, would render a confession involuntary—

(i) That the examination by the police took place in private while the person was in State custody.¹

(ii) That the police gave an admonition to the accused to tell the truth.²

(iii) That the confession took place before appointment of a counsel by the State, as distinguished from a confession obtained after denying an opportunity to aid of counsel, where that caused a prejudice at the trial.³

In each case, the Court has to weigh "the circumstances of pressure against the power of resistance of the person confessing".⁴ In all such cases, the Court is forced to resolve "a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement".⁵

As to the effect of admission of coerced confession in evidence, it has been held that even though there may have been sufficient evidence apart from the coerced confession to support a conviction, the mere fact of the admission of the coerced confession, over the objection of the accused, vitiates the judgment.⁶

(8) *Payne v. Arkansas*, (1957) 356 U.S. 560 (566).

(9) *Blackburn v. Alabama*, (1959) 361 U.S. 199.

(10) *Brown v. Mississippi*, (1936) 297 U.S. 278.

(11) *Upshaw v. U. S.*, (1949) 335 U.S. 410.

(12) *Watts v. Indiana*, (1949) 338 U.S. 48; *McNabb v. U. S.*, (1943) 318 U.S. 332; *Turner v. Pennsylvania*, (1949) 338 U.S. 62.

(13) The question is dealt with, regarding proceedings in State Courts, on different principles [Cf. *Brown v. Allen*, (1953) 344 U.S. 443].

(14) *Leyra v. Denno*, (1954) 347 U.S. 556.

(15) *Ashcraft v. Tennessee*, (1944) 322 U.S. 143.

(16) *Watts v. Indiana*, (1949) 338 U.S. 49.

(17) *Haley v. Ohio*, (1948) 332 U.S. 596.

(18) *Spano v. N. Y.*, (1958) 360 U.S. 315.

(19) *Crooker v. California*, (1957) 357 U.S. 433 (438).

(20) *Fikes v. Alabama*, (1956) 352 U.S. 191.

(21) *Mallory v. U. S.*, (1957) 354 U.S. 449. (453).

(22) *Brown v. Allen*, (1953) 344 U.S. 443.

(23) *Stein v. N. Y.*, (1953) 346 U.S. 156.

(24) *Gallegos v. State of Nebraska*, (1951) 342 U.S. 55.

(25) *McNabb v. U. S.*, (1943) 318 U.S. 332; *Upshaw v. U. S.*, (1948) 335 U.S. 410.

(1) *Brown v. Allen*, (1953) 344 U.S. 443 (476).

(2) *Sparf v. U. S.*, (1895) 156 U.S. 51 (55).

(3) *Crooker v. California*, (1957) 357 U.S. 433 (438).

(4) *Thomas v. Arizona*, (1957) 356 U.S. 390 (393).

(5) *Spano v. N. Y.*, (1958) 360 U.S. 315.

(6) *Payne v. Arkansas*, (1957) 356 U.S. 360 (568); *Spano v. N. Y.*, (1958) 360 U.S. 315 (324).

The fact that the Fourteenth Amendment, instead of the Fifth Amendment, is invoked to nullify a coerced confession does not, however, imply that a confession obtained by compulsion, does not offend against the 'self-incrimination Clause'. The fact is that cases relating to coerced confessions arise out of State prosecutions and trials, to which the Fifth Amendment does not extend. Hence, the broader⁷ command of the Fourteenth Amendment is applied to invalidate a confession obtained by compulsion,⁷ as well as where it is merely *involuntary*,⁸ (not being the result of a voluntary 'choice'), without any force having been used, e.g., where a person of low mentality is interrogated in secret⁹ and intermittently,¹⁰ or the confession is obtained under official sympathy falsely aroused;¹¹ or where the person was insane at the time he confessed.¹²

(B) *England*.—Though it does not follow from any constitutional safeguard, it has been established in England^{12a} since *Felton's case*^{12b} that confession cannot be used against an accused person unless it is free and voluntary. The onus of showing that it is voluntary is upon the prosecution.^{12b-c}

The concept of voluntariness has been widened by judicial authority to mean that the confession has not been obtained either by "*fear of prejudice*" or by "*hope of advantage*" exercised or held out by a person in authority.¹⁰

(C) *India*.—Immunity from conviction upon coerced confession is already secured by the ordinary criminal law, viz., s. 164 (3) of the Cr. P. Code, which requires that a confession cannot be recorded unless it is *voluntary*. Reasonable time should be allowed to the accused to decide whether or not he should make a confession, before recording his confession.¹³

Nor can a man be convicted upon coerced confession.¹³

As the Supreme Court has observed—

"No person accused of a crime is bound to make a confession and if there is any compulsion or threat it has to be ruled out as irrelevant or inadmissible."¹⁴

The conditions of voluntariness are to be found in s. 24 of the Evidence Act, which incorporates the English principle:

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

It is evident that the protection offered by this section is wider than that offered by Art. 20 (3), because it is available not only when the confession is obtained by compulsion but also when it is obtained by an inducement or promise.¹⁵

As to the burden of proof, the law in India appears to be in an uncertain condition. In some cases^{15a} it has been held that it is for the prosecution to show that the confession was voluntary. In other cases,¹⁶ the view has been taken that once the confession has been duly recorded under s. 164 (3), it is for the accused to show that it was not voluntary, but that this onus is not a heavy one, for, the use of the word 'appears' in s. 24 of the Evidence Act suggests that the Court is bound to reject the confession if it is in any manner satisfied that it was not voluntary.

(7) *Brown v. Mississippi*, (1936) 297 U.S. 278.

(8) *Lee v. Mississippi*, (1948) 68 S. Ct. 300 (301).

(9) *Watts v. Indiana*, (1949) 338 U.S. 49.

(10) *Fikes v. Alabama*, (1956) 352 U.S. 191.

(11) *Spano v. N. Y.*, (1958) 360 U.S. 315.

(12) *Blackburn v. Alabama*, (1959) 80 S. Ct. 274 (280).

(12a) MacDermott, Protection from Power, 1957, p. 22.

(12b) *Felton's case*, (1628) Howell's St. Tr., Vol. 3, p. 367.

(12c) *Ibrahim v. R.*, (1914) A.C. 599 (609).

(13) *Sarwan Singh v. State of Punjab*, A. 1957 S.C. 637 (643).

(14) *Kalawati v. State of H. P.*, (1953) S.C.R. 546 (549).

(15) *Pyare Lal v. State of Rajasthan*, A. 1963 S.C. 1094 (1096).

(15a) *Ahmad v. Govt. of Mysore*, A. 1950 Mys. 82; *Krishna v. State*, A. 1958 Pat. 167.

(16) *Jangir Singh v. State*, A. 1952 Pepsu 19.

It is submitted that the rule as to onus should not be different in India from the modern rule in England, viz., that it is for the prosecution to show that it is voluntary before it can be used against the accused.¹⁷ This should be the position particularly if it is held that the guarantee in Art. 20 (3) includes an immunity from being convicted upon a coerced confession. S. 24 of the Evidence Act should be so interpreted as to be in conformity with the constitutional immunity.

From the observation of the Supreme Court in *Sharma v. Satish*,¹⁸ it would seem that the immunity from coerced confession being used against the accused would follow from the constitutional guarantee against self-incrimination in Art. 20 (3). There the Supreme Court said—

"... The protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to *compelled testimony previously obtained from him*."¹⁹

The applicability of Art. 20 (3) to a coerced confession was assumed in *Kalawati v. State of H. P.*,¹⁹ where it was observed that Art. 20 (3) would have no application where the confession is voluntary.¹⁹

As regards the stage from which the bar under s. 24 of the Evidence Act applies, there has been a difference of opinion. There is not much controversy on the point that a person becomes accused when either a First Information Report or a complaint is lodged against him. The controversy has arisen as to whether the condition of the person being an accused relates to the time when the confession referred to in s. 24 or s. 27 is made or when it is sought to be used in evidence in the Court.

One line of decisions hold that the person must be 'accused' of an offence at the time the confession is made.²⁰

In another group of cases it has been held that if the protection under s. 24 is restricted to persons who are already 'accused' at the time of making the confession, it would lead to great injustice because all confessions made by a person before he is formally accused would be admissible, even if it is obtained under coercion. According to this group coerced confessions are inadmissible even though they were made at a stage prior to the making of a formal accusation against such person.²¹ A Patna case²² took the view that the very fact of making a confession makes a person an accused person.

Now that the Supreme Court has held that there is no immunity under Art. 20 (3) unless the person is 'accused of an offence' at the time when the incriminating statement is made,²³ it is likely that the same interpretation should be made upon similar language under ss. 24 and 27 of the Evidence Act, so that there would be no protection, either constitutional or statutory, to a person from whom a coerced confession has been obtained, simply because a definite charge had not yet been levelled against him by a First Information Report or complaint, at the time when the statement was obtained from him by threat or compulsion. It would, no doubt, facilitate the investigation of crimes and the punishment of the guilty but the question would still remain whether such view would not "rob the (constitutional) guarantee of its substantial purpose".²⁴ (See, further, at p. 54, post).

Use of retracted confession.

The Supreme Court has held¹⁹ that Art. 20 (3) has nothing to do with the permissible use of retracted confession. Art. 20 (3) does not apply at all where a

(17) *R. v. Thompson*, (1836) 1 Mood. C.C. 465; *Ibrahim v. R.*, (1914) A.C. 509; *R. v. Hammond*, (1941) 3 All E.R. 318.

(18) *Sharma v. Satish*, (1954) S.C.R. 1077.

(19) *Kalawati v. State of H. P.*, (1953) S.C.R. 546 (549).

(20) *Kumaraswami v. R.*, (1912) 35 Mad. 397 (575); *Deonandan v. Emp.*, A. 1928 Pat. 491; *Jalla v. Emp.*, A. 1931 Lah. 278.

(21) *State v. Hussain*, A. 1959 Bom. 534; *Emp. v. Cunna*, A. 1920 Bom. 270 (F.B.).

(22) *Santokhi v. Emp.*, A. 1933 Pat. 149.

(23) *Dastagir v. State of Madras*, A. 1960 S.C. 756; *Narayanlal v. Maneck*, A. 1961 S.C. 29 (38).

(24) Cf. *Sharma v. Satish*, (1954) S.C.R. 1077 (1087).

confession is made without any inducement, threat or promise. And when a voluntary confession is retracted, the use of such retracted confession does not become repugnant to Art. 20 (3) of the Constitution, though under the ordinary law,²⁵ a retracted confession has only little value as the basis for a conviction, without independent corroboration in 'material particulars'.¹

Constitutionality of s. 27 of the Evidence Act.

S. 27 of the Evidence Act provides—

"... when any fact is discovered to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Now, the information given to the Police under the above section may be either voluntary or extracted from him by compulsion.

(A) *Prior* to the Constitution, no question could possibly arise as to the admissibility of such information on the ground that it was obtained by coercion and it was supposed that the guarantee of the truth of the information, whether voluntary or induced,² was afforded by the actual discovery of the fact made in consequence of the confession.

(B) *After* the Constitution, the question arises whether s. 27 is inconsistent with Art. 20 (3). Once it is held that s. 27 of the Evidence Act is an exception to s. 24, it follows that the statement, leading to the discovery, is admissible even if it had been obtained by coercion. If that were so, the language of s. 27 must be held to be wide enough to cover a case which offends Art. 20 (3).³

The Supreme Court⁴ has, however, saved the constitutionality of s. 27 holding that if the incriminatory information is not obtained by coercion, it would not offend against Art. 20 (3), merely because the person was in police custody, but if the information be obtained by coercion, it cannot be used against him by reason of Art. 20 (3). So observed Sinha C.J., speaking for the majority—

"If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of cl. (3) of Art. 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of s. 27 of the Evidence Act are not within the prohibition aforesaid unless compulsion had been used in obtaining the information".

It is submitted that there has been an avoidance of the constitutional issue, because, as was held by the Judicial Committee in *Pulukuri's case*,² s. 27 as its language goes, authorises the admission of information whether given voluntarily or obtained by coercion, provided only it led to the actual discovery of the fact. If that were the true interpretation, the section was wide enough to authorise the admission of even coerced information given by the accused, which was against the constitutional prohibition, as observed by the Supreme Court itself. In such cases, there was no other alternative than to strike down the section as it stands, leaving it to the Legislature to suitably amend it to confine it to cases of voluntary statements only.

Who is to decide whether the immunity is available.

(A) *England*.—A witness cannot refuse to go into the witness-box on the ground that his evidence may criminate himself. He can only claim the privilege not to answer a question after it has been put⁵⁻⁷ and he must pledge his oath that he honestly believes that the answer will or may tend to criminate him.⁸ He

(25) *Puran v. State of Punjab*, A. 1953 S.C. 459.

(1) *Muthuswami v. State of Madras*, A. 1954 S.C. 4.

(2) *Pulukuri v. K. E.*, A. 1947 P.C. 67.

(3) *Cf. State of Orissa v. Basanta*, A. 1959 Orissa 33 (37); *Dhoom Singh v. State*, A.

1957 All. 196 (203); *Govinda*, in re, A. 1958 Mys. 150.

(4) *State of Bombay v. Kathi Kalu*, A. 1961 S.C. 1808 (1815-6; 1820).

(5-7) *Beile v. Wiseman*, 10 Ex. 647.

(8) *Webb v. East*, 5 Ex. D. 108.

will be entitled not to answer only if the Court upholds his claim after being satisfied, from the circumstances of the case and the nature of the evidence the witness is called to give, that there is a *reasonable* ground to apprehend danger from his being compelled to answer.⁹ Where the question relates to a perfectly innocent act involving danger only as a link in the chain of proofs, the witness must satisfy the Court by facts outside the question that the answer would or might tend to criminate him.¹⁰ The privilege will not be sustained if the danger is of an imaginary or unsubstantial character having reference to some extraordinary or barely possible contingency so improper that no reasonable man would suffer to influence his conduct.¹¹ If, however, the Court is satisfied that the answer to a question though innocuous in itself might be used as a step towards obtaining criminating evidence, the Court would uphold the objection because the privilege is against answering a question which "tends to criminate him".¹²

(B) *U.S.A.*—The privilege under this provision is to refuse to answer questions which are 'incriminating'. But the final decision as to whether the answers to be given on a question would tend to incriminate the witness and whether the witness is justified in refusing to answer rests with the Court and not the witness.¹³ The witness who *claims* this immunity must leave it to the Court to determine the validity of his claim. If he refuses to answer without such determination by the Court, he may find himself liable for contempt of court.¹⁴

The test formulated by the Supreme Court is 'whether the witness has *reasonable* cause to apprehend danger to himself from a *direct* answer to the questions propounded'.^{15,16} The Court is, however, to consider the implications of the question in the setting in which it is asked.¹⁷

"To sustain the privilege, it need only be evident from the *implications* of the question, in the setting in which it is asked, that a responsive answers to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."¹⁸

If an answer to a question may tend to be incriminating, a witness is not deprived of the protection of the privilege merely because the witness, if subsequently prosecuted, could perhaps refute any inference of guilt arising from the answer.¹⁶ The privilege extends not only to answers which constitute an admission of guilt and would by themselves support a conviction under a criminal statute,¹⁷ but also those which may furnish *evidence* of guilt or merely supply a *lead* to obtain such evidence,¹⁵ or 'a link in the chain of evidence' needed to prosecute the witness.¹⁷

But a witness may not refuse to answer where the danger of incrimination is

"of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so *improbable* that no reasonable man would suffer to influence his conduct..... A merely remote and naked possibility, out of the ordinary course of the law and such as *no reasonable man* would be affected by, should not be suffered to obstruct the administration of justice."¹⁸

(C) *India*.—No such question has yet directly arisen in India but there is no reason why the broad principles, discussed above, should not be applicable when a witness who is interrogated thinks that he is in the position of an 'accused' and is, therefore, entitled to the protection of Art. 20 (3).

Effect of contravention of Art. 20(3).

I. If a statute directly authorises the extraction of answers or the production of documents from an accused, which will incriminate him, it is obvious that the

(9) *R. v. Boyes*, (1861) 1 B. & S. 311.

(10) *Geenese re*, 3 Morell 223 (C.A.).

(11) *R. v. Boyes*, (1861) 1 B. & S. 311.

(12) *R. v. Slaney*, (1832) 5 C. & B. 213.

(13) *Mason v. U. S.*, (1916) 244 U.S. 362.

(14) *Cf. Hoffman v. U. S.*, (1951) 341 U.S. 479.

(15) *Counselman v. Hitchcock*, (1892) 142 U.S. 547.

(16) *Emspak v. U. S.*, (1955) 349 U.S. 190.

(17) *Blau v. U. S.*, (1953) 340 U.S. 159.

(18) *Emspak v. U. S.*, (1955) 349 U.S. 190.

statute will be void.¹⁹⁻²¹ Similarly void will be a statute which seeks to penalise a person in any manner for resorting to this constitutional privilege.²¹⁻²²

II. But where a statute authorises the examination of, or the production of documents by, persons generally, and such statute when applied to certain persons or to certain kinds of evidence is likely to incriminate him, the question of annulling such statute does not arise. The question which is relevant in such a case is whether the party or the witness is bound to answer particular questions or to produce particular documents.²³

In the U.S.A. it has been held that the provision of the Fifth Amendment confers upon the witness a 'privilege of remaining silent'.²⁴ And the majority of cases which have come up to the American Supreme Court are cases where the witness has been hauled up for contempt of court²⁵ for refusing to answer questions which the witness thought would incriminate him. But an equally divided Court¹ has held that though a person cannot be *punished* for refusing to answer an incriminating question, he may be dismissed from public employment on the ground of 'insubordination' for having refused to answer questions before a Congressional Committee.

III. The constitutional prohibition in the Clause is against an accused being compelled to be a witness against himself. It, therefore, offers immunity at two stages: (a) at the stage when testimony is sought to be obtained from such person by compulsion; (b) at the stage when compelled testimony is sought to be used against him as evidence at the trial.^{1a}

(a) At the earlier stage, as we have seen, the immunity extends to the pre-trial stage and even outside the Court room,² and the accused is entitled to refuse to furnish the testimony. If such question is asked at the trial, the accused is entitled to raise the plea that he is not bound to answer the question as it is incriminating, and obtain the decision of the Court (see p. 55, *ante*),³ up to the highest stage.⁴

A person who is required to produce an incriminating document by a compulsory process, is entitled to approach the High Court under Art. 226 or the Supreme Court under Art. 32,² for quashing the process on the ground that it violates the fundamental right of the person under Art. 20 (3).

Similar would be the position if process is issued against a person to be a witness in a criminal proceeding, after an 'accusation' has already started.⁴

(b) If, however, some evidence has already been obtained from him by compulsion, he is entitled to urge at the trial that it is not admissible against him; and if a conviction has taken place on the basis of such evidence, the conviction is liable to be set aside.⁴⁻⁵

In England, it has, further, been held that anything that a person is wrongly compelled to say after he has claimed the privilege against self-incrimination will be treated as having been said involuntarily, and will be inadmissible not only in that proceeding but in all subsequent criminal proceedings brought against him.⁶

Whether a Fundamental Right may be waived.

(A) U.S.A.—Though all the provisions of the Bill of Rights contained in the First Ten Amendments operate as limitations upon the State, a distinction has been made in the U.S.A. as between those provisions which constitute limitations upon the legislative power of the State in the public interest and those which create

(19) Cf. *Boyd v. U. S.*, (1886) 116 U.S. 616.

(20) *Collector of Customs v. Calcutta Motor & Cycle Co.*, A. 1958 Cal. 682 (689).

(21) Cf. *State v. Bakwant*, (1960) 63 Bom. L.R. 88 (93).

(22) *Slochower v. Board of Higher Education*, (1956) 350 U.S. 551.

(23) Cf. *Ram Swarup v. State*, A. 1958 All. 119 (123).

(24) *Blau v. U. S.*, (1950) 340 U.S. 159.

(25) *Hoffman v. U. S.*, (1951) 341 U.S. 479.

(1) *Nelson v. Los Angeles*, (1960) 362 U.S. 1.

(1a) *Shotwell Mfg. Co. v. U. S.*, (1962) 371 U.S. 341 (347).

(2) *Sharma v. Satish*, (1954) S.C.R. 1077.

(3) *Pakhar Singh v. State*, A. 1958 Punj. 294 (297).

(4) Cf. *Subedar v. State*, A. 1957 All. 396 (397).

(5) Cf. *Dastagir v. State of Madras*, A. 1960 S.C. 756 (761), where this position was assumed.

(6) *R. v. Garbett*, (1847) 1 Den. 236.

rights in the nature of *privileges* in favour of individuals,—the public interest in the latter case being subsidiary, because such rights (e.g., the right against self-incrimination) do not rest on a “fundamental principle of liberty and justice which inheres in the very idea of free government”,⁷ unlike the ‘Due Process’ clause⁸ relating to a ‘fair trial’ of offences⁹ or the rights secured by the First Amendment.¹⁰

The principle as to waiver of statutory rights has thus been extended to fundamental rights as well, to hold that while rights which have been created in the interests of the public or in pursuance of public policy cannot be waived, a right which has been created exclusively for the benefit of an individual¹¹⁻¹² who is affected or likely to be affected, may be waived by him. Thus, it has been held that the following rights secured by different Amendments of the Bill of Rights are capable of being waived by the individuals who are entitled to claim them:

(i) The privilege against self-incrimination (5th Amendment) may be waived by voluntarily answering the question¹³⁻¹⁴ or by failure to claim the privilege at the trial.^{12,15}

(ii) The privilege against double jeopardy (5th Amendment) may be waived expressly or impliedly, e.g., by preferring an appeal against the conviction.¹⁶

(iii) The immunity against unreasonable search and seizure (4th Amendment) has been held to have been waived when the person has *voluntarily* consented to it.¹⁷

(iv) “Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him,” e.g., by receiving benefits;¹⁸ taking of property without due process of law (5th & 14th Amendments)¹⁸⁻¹⁹; taking of property without just compensation (5th Amendment).²⁰

In *Wall v. Parrot Silver Co.*,²⁰ the Court observed—

“They cannot claim the benefit of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be”.²⁰

(v) The right to counsel (6th Amendment) may be waived where the accused, aware of his rights, states in answer to the Judge’s inquiry, that he wishes to defend himself.²¹

(vi) The right to a speedy trial (6th Amendment) may be waived by requesting or willingly condoning delay in the trial.²² The right to a public trial may also be waived.^{22a}

(vii) The right to trial by jury (5th & 6th Amendments) may be waived by clearly consenting to a trial without a jury²³ or by a jury not properly constituted.²⁴

(B) *India*.—Earlier (Vol. I) we had seen that the right to challenge the constitutionality of statutes or to pursue some constitutional remedies may, in certain circumstances, be lost by conduct, including waiver. We had there indicated that the question of waiver of fundamental rights would be treated separately. If a fundamental right cannot be waived, it would follow that the right to enforce it and to challenge the constitutionality of a statute where the unconstitutionality is due to

(7) *Twining v. New Jersey*, (1908) 211 U.S. 78.

(8) *Chambers v. Florida*, (1940) 309 U.S. 227.

(9) *Cooley*, Constitutional Limitations, Vol. I, p. 371.

(10) *Palko v. Connecticut*, (1937) 302 U.S. 319.

(11) *Pierce v. Somerset*, (1898) 171 U.S. 641.

(12) *U. S. v. Murdock*, (1931) 284 U.S. 367.

(13-14) *Rogers v. U. S.*, (1951) 340 U.S. 367; *Brown v. U. S.*, (1958) 356 U.S. 148.

(15) *Emspak v. U. S.*, (1955) 349 U.S. 190.

(16) *U. S. v. Ball*, (1896) 163 U.S. 662.

(17) *Amos v. U. S.*, (1921) 255 U.S. 313; *Zap v. U. S.*, (1946) 66 S. Ct. 1277.

(18) *Shepard v. Barron*, (1903) 194 U.S. 553 (568).

(19) *Pierce Oil Co. v. Phoenix Refining Co.*, (1921) 259 U.S. 125 (128).

(20) *Wall v. Parrot Silver Co.*, (1916) 244 U.S. 407 (412).

(21) *Adams v. U. S.*, (1942) 317 U.S. 269; *Von Moltke v. Gillies*, (1948) 332 U.S. 708.

(22) *Levine v. U. S.*, (1950) 340 U.S. 921, denying cert. from 182 F. 2d. 556.

(22a) *U. S. v. Sorrentino*, (1949) 338 U.S. 868 (896).

(23) *Tompsett v. State of Ohio*, 324 U.S. 869.

(24) *Patton v. U. S.*, (1930) 281 U.S. 276.

violation of a fundamental right (as distinguished from the violation of some other constitutional provision) cannot be lost by waiver.

Waiver, as explained by the Privy Council,²⁵ is based on a unilateral agreement, not to enforce one's rights. Such agreement may be inferred from his conduct. While estoppel is a rule of evidence, waiver is a rule of the law of contract, according to which a party may intentionally and knowingly waive or abandon his rights due to a breach of contract. The rule, however, has been extended to statutory rights as well.^{25a}

It has been held that where a right has been created by a statute solely or primarily for the protection, advantage or benefit of particular individuals (as distinguished from the general public), it may be waived by such individuals.^{25a} In a case under O. 21, r. 66 of the Code of Civil Procedure, thus, the Privy Council¹ held that a judgment-debtor, who, on receipt of the notice under O. 21, r. 66, does not object as to non-compliance of the sale proclamation with the requirements of the rule, shall be deemed to have waived the irregularity and will not be allowed to raise the objection at any subsequent stage. Even the requirement of s. 80, held to be *mandatory*, may be waived by the party entitled to the notice in a particular case.² On the other hand, a right based on public policy or an illegality cannot be waived.³

The question whether a fundamental right can be waived has not yet been finally decided by the Supreme Court.

(a) In *Behram v. State of Bombay*,⁴ Venkatarama, J. had expressed the view that such of the rights as were created for the benefit of individuals (as distinguished from the interests of the public) could be waived and, according to his Lordship, even a right guaranteed by Art. 19 (1) came within this category.

But the majority, on reference (Mahajan, C.J., Mukherjea, Bose and Hasan, JJ.) *without finally deciding the question*, expressed the view that fundamental rights, though primarily for the benefit of individuals, have been put into *our* Constitution on grounds of public policy and in pursuance of the objective declared in the Preamble. Hence, *none* of them can be waived.

(b) In *Bhashar v. Commr. of I. T.*,⁵ Bhagwati and Subba Rao, JJ. held that a fundamental right being in the nature of a prohibition addressed to the State, *none* of the fundamental rights in *our* Constitution can be waived by an individual. [This view is thus in agreement with the majority view in *Behram's case*⁴].

Das, C.J. and Kapur, J. agreed with the above view only in respect of the right conferred by Art. 14 and refrained from making any observation as regards the other rights in Part III of *our* Constitution.

S. K. Das, J. opined that where a fundamental right is intended *primarily* for the benefit of an individual, it can be waived by him, but his Lordship did not exhaustively enumerate which of the rights included in Part III would come under this category.

The views expressed in *Behram's*⁴ case being *obiter*, and the decision in *Bhashar's case*⁵ not being comprehensive, a direct decision is yet to be made. As Das, C.J. observed, the only question for decision in *Bhashar's case*⁵ was whether the right guaranteed by the particular Art. 14 could be waived.

The view of S. K. Das, J. is in accord with the American view but if this view is acceptable to a future Court, an analysis of all the fundamental rights enumerated in Part III shall have to be undertaken, in order to settle the controversy.

(25) *Dawson's Bank v. Nippon Kaisha, A.* 1935 P.C. 79 (82).

(25a) *Maritime Electric Co. v. General Diaries*, (1937) A.C. 610; *Swallow v. Middlesex. C. C.*, (1953) 1 All E.R. 581 (582).

(1) *Arunachellum v. Arunachellum*, 12 Mad. 19 P.C.

(2) *Villayan v. Prov. of Madras*, A. 1947 P.C. 197 (199).

(3) *Waman v. R. B. & Co.*, A. 1959 S.C. 689 (694).

(4) *Behram v. State of Bombay*, (1955) 1 S.C.R. 613; A. 1955 S.C. 123.

(5) *Bhashar v. Commr. of I. T.*, A. 1959 S.C. 149.

We may, accordingly, examine the cases of the different fundamental rights separately:

(i) *Art. 14.*—On this point there was unanimity in *Basheshar's case*⁶ and there is no American precedent⁶ showing the possibility of waiver of the right arising out of the Equal Protection Clause. Hence, this right cannot be waived, by making payments or entering into a settlement in pursuance of a discriminatory legislation,⁶ or otherwise.

(ii) *Arts. 15-16.*—It is now settled⁷ that Arts 15 and 16 are species of the general rule of equality enunciated in Art. 14. It would, therefore, follow that the rights conferred by Arts. 15-16 cannot be waived, any more than that arising from Art. 14. All are based on clear public policy, and are intended for the benefit of the general public as distinguished from particular individuals.

The Supreme Court decision in *Nain Sukh v. State of U.P.*,⁸ however, presents some difficulty. In this case, there was an election to a Municipality on the ground of communal representation, which was conceded to have offended against Art. 157 (1). The Petitioners prayed for a writ *quo warranto* (under Art. 32), seeking to question the election of some of the respondents, contending that the Petitioners' (rate-prayers') fundamental right not to be discriminated against on the ground of religion only had been violated by the election. Without denying this substantial contention, the Supreme Court refused the writ on the ground of acquiescence:

"There is no suggestion that the petitioners actually sought to assert those rights by taking appropriate proceedings to have the bar removed and the election conducted in accordance with the Constitution. In fact, the petitioners acquiesced in the elections being conducted under the old system of separate electorates and felt no discrimination having been practised against them until a no-confidence motion was tabled recently against the former Chairman who has lost his seat as a result of that motion having been carried."

According to English common law, the right to a writ of Quo Warranto may be lost by acquiescence. The Supreme Court, in *Nain Sukh's case*,⁷ simply applied that principle, without examining whether that principle was applicable where a fundamental right had been infringed. There was a patent invasion of the fundamental right conferred by Art. 15 (1), namely, that an election had been held on a communal basis. There is no doubt that Art. 15 (1) constitutes a *prohibition* against State action, on a ground of public policy as enshrined in the Preamble to the Constitution, namely, that there should be a political equality. Even in *Nain Sukh's case*,⁷ the Court had observed—

"The constitutional mandate to the State not to discriminate against any citizen on the ground, *inter alia*, of religion clearly extends to political as well as to other rights, and any election held after the Constitution in pursuance of such a law subject to Cl. (4) must be held void as being repugnant to the Constitution. But the question is whether the petitioners are now entitled to the relief they seek in this application under Art. 32."

It is clear that though constitutional prohibition had clearly been violated by the State and the election was void, relief under Art. 32 was refused on the sole ground of loss of *locus standi*, by acquiescence.

The question is, whether in *Nain Sukh's case*,⁸ the Court had properly discharged its duty to act as the guardian of the Constitution, in refusing to interfere where a 'constitutional mandate', embodied on grounds of public policy, had been admittedly violated,—by applying a principle of English common law, based on the historical crudities appended to the 'prerogative writs'. In *Kochunni's case*,⁹ the Court was prepared to grant declaratory relief, even though that was not available under the prerogative writs specified in Art. 32, and observed that where there had been a patent invasion of a fundamental right, English technical considerations, such as the existence of an alternative remedy or the necessity for taking evidence in a writ proceeding, should not stand in the way of the Court's

(6) *Basheshar v. Commr. of I. T.*, A. 1959 S. C. 149.

(7) *Dasaratha v. State of A. P.*, A. 1961 S.C. 564 (570).

(8) *Nain Sukh v. State of U. P.*, (1953) S.C.R. 1184 (1187).

(9) *Kochunni v. State of Madras*, A. 1959 S.C. 725.

duty to give relief under Art. 32. Hence, even if *Quo Warranto* might not be available to help the Petitioners, the Court might in *Nain Sukh's case*,⁸ frame a proper order to quash the election which cut at the root of the Constitution and direct a fresh one.

Bhagwati, J. (who was a party to *Nain Sukh's case*⁸), in *Bashesar's case*¹⁰, explained cases like these with the observation that even though a particular writ might be refused on technical grounds incidental to such writ, such as estoppel, acquiescence or the like, there was the declaratory relief available to the person aggrieved, which could not be refused outright without a complete investigation of such pleas. But *Kochunni*⁹ is authority for the proposition that even declaratory relief may be given in a proceeding under Art. 32, by suitably modifying a writ. The Author has always entertained the belief that the position is not different in a proceeding under Art. 226, where a *fundamental* right has been infringed.

The fact that the ground relied upon in *Nain Sukh's*⁸ case was acquiescence and not waiver does not make any difference, because the principle involved is the same, namely, whether a fundamental right (which is undoubtedly not a privilege) can be lost by conduct. With respect, *Nain Sukh*⁸ deserves a reconsideration in the light of the decisions in *Kochunni*⁹ and *Basheshar*.¹⁰

(iii) *Arts. 17-18*.—Whatever has been stated above is applicable to Arts. 17-18, which have unquestionably been embodied on grounds of public policy. Hence, as Subba Rao, J. puts it—"A person cannot ask the State to treat him as an untouchable."¹⁰

(iv) *Art. 19*.—Art. 19 presents more difficulty inasmuch as Venkatarama Iyer, J., in *Behram v. State of Bombay*,¹¹ expressed the opinion that the right under Art. 19 (1) (f), having been created for the sole benefit of the owners of property, might be waived by them:

"The rights guaranteed under Art. 19 (1) (f) are enacted for the benefit of owners of properties and when a law is found to infringe that provision, it is open to any person whose rights have been infringed to waive it and when there is waiver there is no legal impediment to the enforcement of the law."¹¹

There is no doubt that the American decisions cited at p. 57, *ante*, lay down the proposition that the Due Process Clause, insofar as it relates to property, has been enshrined as a privilege of the property owner, which he may waive by receiving a benefit under the impugned legislation.

The question is whether the American decisions on this point are applicable in India. Whatever attitude may have been taken by the American Supreme Court as regards the other rights included in the Bill of Rights, so far as the rights included in the First Amendment are concerned,—freedom of religion, freedom of speech and freedom of assembly,—they have never been considered as personal privileges, capable of being waived by the particular individual affected in a case, for, "neither liberty nor justice would exist if they were sacrificed".¹² Freedom of association has been regarded as equally 'fundamental'.¹³ These have been considered to be the very foundation of free government,¹⁴ so that no question arises that they were enshrined in the Constitution as a matter of public policy.

Hence, even from the American decisions it would follow that the freedoms embodied in sub-cl. (a)-(c) of Art. 19 (1) of *our* Constitution have been engrafted on grounds of public policy. If so, the ordinary rules of construction will prevent any other view being taken as regards the rights secured by the *other* sub-clauses of the *same* clause of Art. 19, such as freedom of movement, residence, property and profession. It has already been held by the Supreme Court that the freedoms of movement and residence [sub-cl. (d)-(e)] were adopted in order to ensure the

(10) *Bashesar v. I. T. Commr.*, A. 1959 S.C. 149.

(11) *Behram v. State of Bombay*, (1955) 1 S.C.R. 613 (639).

(12) *Palko v. Connecticut*, (1937) 302 U.S. 319.

(13) *National Asscn. v. Alabama*, (1957) 357 U.S. 382 (393).

(14) *Schneider v. Irvington*, (1939) 308 U.S. 147 (160); *Thornhill v. Alabama*, (1940) 310 U.S. 88; *U. S. v. Cruikshank*, (1875) 92 U.S. 542 (see Vol. I).

unity of India against internal barriers.¹⁵ If that be so, these cannot be treated as personal privileges. The fact that the freedoms of property and profession against arbitrary and unreasonable restrictions by the State were included in the same Article would go to show that those two freedoms were also regarded by the framers of our Constitution in the same light of constitutional policy, as being essential for the social and economic justice, which is spoken of in the Preamble in the same strain as liberty of thought and equality of status.

(v) *Art. 20 (1).*—This is a limitation on the legislative power to legislate retroactively and the American Constitution has made this clear by including this provision in Art. I, s. 9 (3) [as a limitation on the power of Congress instead of as an individual right]. There cannot be any question of waiver of this right.

(vi) *Art. 20 (2).*—There is no doubt that the immunity against double jeopardy has been treated in the U.S.A. as a privilege, capable of being waived. But the only instance where waiver has been upheld appears to be a case of appeal by the accused. Where he appeals from his conviction in a lower Court, he is said to have waived his protection, and he may be tried again, at the direction of the Appellate Court.¹⁶

It is submitted that no such problem necessitating the application of the doctrine of waiver is likely to arise in India. Firstly, under the ordinary law of procedure, an appeal is treated as a continuation of the original proceeding and there is no disposal of a case until the appellate proceeding, including a retrial, if any, as a result of the appeal, are concluded. Secondly, the very language of Art. 20 (2) of our Constitution differs from that of the Fifth Amendment to the American Constitution, as has been already pointed out (pp. 13-14, *ante*). There is no violation of Art. 20 (2) unless a man is not only tried but also *punished* twice, for the same offence. Hence, there is no violation of Art. 20 (2) in the accused's appealing from a sentence of conviction or in obtaining a retrial, for, as he is not being *punished* twice, there is no question of his waiving any right in preferring the appeal or in obtaining the retrial.

(vii) *Art. 20 (3).*—The American decisions (p. 57, *ante*), no doubt, consistently hold that the immunity against self-incrimination is a privilege and may be waived by the person who is entitled to claim it. The question of waiver, however, arises in cases like the following—

- (a) Where the accused volunteers to give evidence;
- (b) Where an accomplice consents to give evidence, in lieu of pardon;
- (c) Where the accused does not plead the immunity when the incriminating question is put;
- (d) Where the accused expressly and unequivocally says that he would not rely on the immunity against self-incrimination;
- (e) Where the accused refuses to answer the Court question as to whether he relies on the immunity or not.¹⁷

(a), (b): Art. 20 (3) of our Constitution is not attracted at all, and no question of waiver can possibly arise, where the ingredients of the clause are not satisfied, *e.g.*, where the accused is not 'compelled' or the evidence is not used 'against' him. Hence, where the accused volunteers to give evidence of his own choice¹⁸ or gives evidence in lieu of an advantage, such as offer of pardon, there is no compulsion and no violation of the Clause at all.

(c): Real difficulty arises in the third case, namely, where the accused did not raise the plea of immunity at the proper time, namely, when the incriminating question was put.

(A) In the U.S.A., a distinction has been made between an accused in a criminal proceeding and a witness in all other proceedings,—a distinction which

(15) *Khare v. State of Delhi*, (1950) S.C.R. 519.

(16) *U. S. v. Ball*, (1896) 163 U.S. 662 (672); *Trono v. U. S.*, (1905) 199 U.S. 521.

(17) *Hutcheson v. U. S.*, (1962) 8 L. Ed.

137 (148); *Emspak v. U. S.*, (1955) 349 U.S. 190.

(18) *Cf. Das C.J. & Subba Rao J. in Bashesar v. I. T. Commr.*, A. 1959 S.C. 149 (159; 182).

is all the more important to note in India, because the guarantee under Art. 20 (3) has been interpreted to be confined to an *accused* person only.

(i) As regards an *accused* person in a criminal trial, it has been held that because of the Self-incrimination Clause, the accused cannot be required to take the witness stand and cannot be compelled to answer any question and even his failure to testify cannot be the subject of comment.¹⁹ In the result, the accused in a criminal proceeding (i.e., a person who has been indicted for a crime) may lose his immunity under the Self-incrimination Clause only in one contingency, namely, where he himself volunteers to testify as a witness on his behalf.²⁰ But he cannot be deemed to have waived the privilege by simply not claiming the privilege when a question is put, because no such case can possibly arise.²⁰⁻²¹

(ii) But in all proceedings (including proceedings against an offender up to indictment²²) other than a criminal trial, a *witness* has no such blanket protection from being compelled to take the witness stand, and questions may, therefore, be put to him.²⁰ Consequently, it is necessary for him to claim the immunity when an incriminating question is put. It is settled that though "no ritualistic formula is necessary", a *witness* must claim the privilege in any language that the tribunal "may reasonably be expected to understand as an attempt to invoke the privilege".²³ Even where the witness takes a veiled plea which gives the tribunal notice of the witness's intention to invoke the privilege, it becomes the duty of the tribunal "either to accept the claim or ask whether he was in fact invoking the privilege",²³ and then to inform the witness whether his claim was upheld or rejected.²³⁻²⁴ But in the total absence of any claim of the privilege when the question was put, the witness is deemed to have waived the privilege.²⁵⁻¹ The basis of this rule of waiver is that "the privilege against self-incrimination is *solely* for the benefit of the witness² and is purely a personal privilege of the witness;¹ and also that a witness who does not claim the privilege cannot be said to have been 'compelled' within the meaning of the Fifth Amendment.²

(B) In *India*,—it has been settled (p. 27, *ante*), that the immunity under Art. 20 (3) is confined to a person against whom a 'formal accusation' has been made. Hence, no question of application of the immunity to any person prior to the stage of formal accusation or to witnesses in any proceedings arises; and no question of waiver by not claiming the immunity may possibly arise.

Except in the case under s. 342A, Cr. P. C., where the accused person volunteers to examine himself as witness, no question can be put to him for being used as evidence against him (p. 36, *ante*). Hence, the immunity under Art. 20 (3) cannot be denied on the ground that the accused did not raise the plea when the question was put.

In the Allahabad case of *Subedar v. State*^{3,4} the Magistrate summoned and examined the accused persons in the inquiry under s. 202, Cr. P. C. The Court rightly held that the examination of the *accused persons* under s. 202, Cr. P. C. was without jurisdiction and that s. 342A of the Cr. P. C. could not be called in aid because the accused had made no written request to be examined as required by that section and, accordingly, the statements of the accused, recorded by the Magistrate, were directed to be quashed from the record.

But, incidentally, the Court⁴ observed that since the accused had made the statements, without claiming the privilege under Art. 20(3), they could be deemed to have waived their privilege under Art. 20(3), but that since the act of the Magistrate was *ultra vires*, the evidence so recorded could not be used on the basis of 'waiver'. With respect, the Author is unable to agree with this observation regard-

(19) *Grunewald v. U. S.*, (1957) 353 U.S. 391.

(20) *Brown v. U. S.*, (1958) 356 U.S. 148 (154-5; 162).

(21) Pritchett, *American Constitution*, 1959, p. 513; Antieau, *Commentaries on the Constitution of the U. S.* (1960) p. 333.

(22) *U. S. v. Monia*, (1942) 317 U.S. 424.

(23) *Quinn v. U. S.*, (1955) 349 U.S. 155.

(24) *Emspak v. U. S.*, (1955) 349 U.S. 190.

(25) *Smith v. U. S.*, (1949) 337 U.S. 137 (150).

(1) *Rogers v. U. S.*, (1951) 340 U.S. 367.

(2) *U. S. v. Murdock*, (1931) 284 U.S. 141 (148).

(3-4) *Subedar v. State*, A. 1957 All. 396.

ing waiver. It has been pointed out earlier (p. 28, *ante*), that in a complaint case, there is a formal accusation as soon as the complaint is filed. Hence, apart from the case-law under s. 202, Art. 20 (3) of the Constitution would bar the very issue of any process for the examination of the person complained against, under s. 202, Cr. P. C. Hence, except in a case where the accused volunteers to give evidence, complying with the requirements of s. 342A, Cr. P. C., the examination of the accused itself violates Art. 20 (3) and no question of waiver can be imported from the fact that the accused gave the evidence, without claiming immunity under Art. 20 (3).

(viii) *Arts. 21-22*.—These Articles have been embodied in the Constitution as a safeguard against executive tyranny and there would be an end of liberty if these rights could be waived. No American decision would warrant waiver in these cases.

(ix) *Arts. 23-24*.—As S. K. Das, J. pointed out in *Bashesar's case*,⁵ there can be no doubt that these rights were created for the benefit of the general public, so that they cannot be waived.

(x) *Arts. 25-28*.—As Subba Rao, J. observed in *Bashesar's case*⁵ these rights are obviously created in the public interest and cannot be waived by any individual.

(xi) *Arts. 29-30*.—It would appear, *prima facie*, that these cultural and educational rights of minorities have been engrafted in the Constitution in the interests of the general public in the same way as the religious rights of the minorities are protected by Arts. 25-28. Even though the members of the minority groups are benefited by the rights in Arts. 29-30, it is in the interests of the unity of the nation and the fraternity, assured by the Preamble, that these rights have been guaranteed by Part III, and not primarily in the interests of the members of the minority who may be entitled to exercise them.

Nevertheless, there has been a difference between S. K. Das J. and Subba Rao J. in *Bashesar's case*⁶ as to the nature of the right under Art. 30 (1). In the view of S. K. Das J., it is possible for a minority community "to surrender part of its right of administration of a school of its own choice in order to get aid from Government". He cited the opinion in the Reference on the Kerala Education Bill⁷ in support of this proposition and observed:—

"If we now hold that the minority can never surrender its right, then the result will be that it will never be able to ask for Government aid."

It is admitted that a close study of the opinion in the *Reference case*⁷ shows that no question of waiver of the right under Art. 30 (1) in lieu of aid was either raised or decided in that case. On the contrary, it was observed by Das C.J. that the minority cannot, in lieu of aid 'surrender' their fundamental right under Art. 30 (1) nor can the State demand it. The rationale of the decision was that the right of administration under Art. 30 (1) was not substantially infringed by a 'reasonable regulation' of such right by the State as a condition of granting aid. As soon as such regulation exceeds the limits of 'reasonableness', it becomes an encroachment upon the fundamental rights and becomes void. It was by a proper interpretation of the 'right to administer' that this conclusion was raised. There was an elaborate discussion by Das C.J. which cannot possibly be reproduced, but the following will suffice for our present purpose:

"The right to administer cannot obviously include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings.....It stands to reason, then that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided.We..... find it impossible to support cls. 14 and 15 of the said Bill as mere regulations. The provisions of those clauses may be totally destructive of the rights under Art. 30 (1)..... There is, no doubt,

(5) *Bashesar v. I. T. Commr.*, A. 1959 S.C. 149 (176; 182).

(6) *Bashesar v. I. T. Commr.*, A. 1959 S.C. 149 (176, 182).

(7) Ref. on the Kerala Education Bill, A. 1958 S.C. 956 (982-5).

no such thing as a fundamental right to *recognition* by the State but to deny recognition to the educational institutions except upon terms tantamount to the *surrender* of their constitutional right of administration of the educational institutions of their choice is in truth and effect to *deprive them* of their rights under Art. 30 (1)......"

The opinion of Das C.J., thus, emphatically makes it clear that it is not possible for a minority to voluntarily surrender its fundamental right under Art. 30 (1), even in lieu of an advantage to which it is not otherwise entitled. According to S. K. Das J., however, the admissibility of a 'reasonable restriction' upon the right to administer signifies a *partial* 'waiver' of the right to administer. It is submitted that there is no surrender or *abandonment* of the minority of its right to administer, even partially, when it allows the State to impose reasonable conditions in lieu of aid or recognition, because it can, at any moment, get rid of such conditions by giving up the aid or the recognition. This is not possible in a case of true 'waiver'. Take, for instance, the waiver of a right of a witness against self-incrimination, under the American Constitution. The American Supreme Court has held that as soon as a witness voluntarily consents to answer an incriminating question, by waiving his immunity, he is bound to answer all other questions which directly follow from it; he cannot stop at his will, or revoke his initial waiver.⁸

There is no such case of waiver of the fundamental right under Art. 30 (1), indicated in the majority opinion in the *Reference case*.⁷

(xii) *Art. 31*.—This Article has two parts.

So far as Cl. (1) is concerned, it is plainly intended as a check against the Executive. It is, of course, possible for an individual to convey his property to the State by a valid agreement under the general law. No question of waiver comes in in that case. But, in the absence of an agreement, an individual cannot be deprived of his property without legislative sanction. If the Executive takes any private property by executive fiat, the individual can recover it,⁹ in spite of any conduct on his part, subject of course, to the law of limitation.

In Cl. (2), again, there are two requirements for the compulsory (*i.e.*, without a formal agreement) taking of private property by the State. The first is that the taking must be for a *public purpose*. It is evident that this requirement has been intended for benefit of the general public, namely, to ensure the sanctity of private property under the Constitution, without which there may not exist any security or stability in the State itself. Suppose the State makes a law for the compulsory acquisition of A's property for giving it to B, and there is a patent absence of any public purpose behind it. If the State seeks to achieve the purpose by a general legislation, without resorting to the process of acquisition, *Kochunni v. State of Madras*¹⁰ says that the law would be struck down as an unreasonable restriction upon the right guaranteed by Art. 19 (1) (f). The same result would follow if it is sought to be done by a law of acquisition, for *Kochunni*¹⁰ extends Art. 19 (1) (f) even to a law made under Art. 31 (1). In the present context, however, we are not concerned with Art. 19. The Author submits that the existence of the public purpose is a condition precedent to and a limitation upon the exercise of the legislative power under Art. 31 (2) and that a law made in violation thereof is a *nullity*. No waiver of the individual whose property is so taken can cure that illegality cutting at the root of the legislation.

The latter part of Cl. (2) of Art. 31 requires the Legislature to provide for *compensation*. Suppose the Legislature fails in its duty, and the individual whose property is taken without payment of compensation, takes other benefit from the State and Government builds upon the land on the basis of such conduct of the individual. Is the individual, nevertheless, entitled to challenge the constitutionality of the law on the ground that the law violated Art. 31 (2)?

(8) Cf. *Rogers v. U. S.*, (1951) 340 U.S. 367 (p. 20, *ante*).

(1954) S.C.J. 600; *Virendra v. State of U.P.*, (1955) 1 S.C.R. 415.

(9) Cf. *Wazir Chand v. State of H. P.*,

(10) *Kochunni v. State of Madras (II)*. A. 1960 S.C. 1080.

S. K. Das, J., in *Bashesar's case* expressed the view that the right to compensation under Art. 31 (2) was embodied in the Constitution primarily for the benefit of the individual and that in a case like the foregoing, the individual should be denied the right to recover his property, on the ground of waiver. Subba Rao J. differed. It is submitted that where the individual agrees to convey his property to the State without obtaining *statutory* compensation, if the contract is for some consideration and otherwise valid, no question of violation of the Constitution would arise. Even where the State resorts to a law of compulsory acquisition, the *amount* of compensation may be settled by agreement between the parties, because the *quantum* of compensation is not guaranteed by the Constitution. It is not the quantum of compensation which is guaranteed by Art. 31 (2), but the right to *some* compensation (as distinguished from confiscation). The Supreme Court has invalidated a taxing law as violative of Art. 19 (1) (f) on the ground that it was confiscatory in its effect,¹¹ and has even allowed refund of amounts paid under a taxing statute subsequently declare unconstitutional,¹² rejecting the contention that the petitioner was estopped by reason of the payment having been voluntarily made.

The obligation to provide for *some* compensation in Art. 31 (2) is an obligation of the Legislature, laid down as a matter of constitutional policy, for the benefit of the public in general, and the Court is bound to strike down a law if the Legislature fails in this duty.¹³⁻¹⁴ The State cannot be permitted to contract out of this obligation either by an express contract, or by the application of any rule of implied contract or waiver. If the State enters into possession under any such subterfuge in contravention of the Constitution, the Court is bound to restore possession to the individual even though as a Court of Equity, the Court may impose conditions as to compensation as to structures, or the like.

(xiii) *Art. 32*.—S. K. Das J. observed¹⁵ that if the doctrine that a fundamental right cannot be waived were applied to the remedial right under Art. 32, the person aggrieved could with impunity bring one application after another, after having withdrawn the previous one. But, as Subba Rao J. pointed out, this case presents no problem, for, if the Supreme Court does not give permission to bring another application, but dismisses the withdrawn application, that order is the final adjudication of the Court and no application can be brought thereafter; no question of waiver arises in this case.

The other Articles of Part III are not relevant in this context.

The conclusion that emerges from the above analysis is that none of the fundamental rights included in Part III of *our* Constitution are capable of being lost by 'waiver' in the American sense.

INDEX TO COMMENTS

ARTICLE 20.

Scope of Art. 20, 1.

CLAUSE (1).

Other Constitutions: (A) U.S.A., 1; (B) England, 2; (C) Dominions, 2; (D) Eire, 2; (E) Japan, 2; (F) Government of India Act, 3.

India:

Scope of Cl. (1): Prohibition of retroactive criminal laws—

(I) No conviction under retroactive law, 3.

(II) The penalty not to be made higher by retroactive legislation, 7.

'Offence', 9; 'Law in force', 9.

CLAUSE (2).

Other Constitutions: (A) U.S.A., 9; (B) England, 11; (C) Japan, 12; (D) Government of India Act, 1935, 12.

(11) *Kunnathat v. State of Kerala*, A. 1961 S.C. 552.

(12) *S. T. O. v. Kanhyalal*, A. 1959 S.C. 135.

(13) *State of Rajasthan v. Nathmal*, A. 1954 S.C. 307.

(14) *Namasivaya v. State of Madras*, A. 1959 Mad. 548 (554).

(15) *Bashesar v. I. T. Commr.*, A. 1959 S.C. 149 (176).

India :

Scope of Cl. (2): Bar against double prosecution and punishment, 13; The plea of *autrefois acquit*, 16; The principle of *res judicata*, 18.

CLAUSE (3).

Other Constitutions : (A) England, 19; (B) U.S.A., 19; (C) Japan, 22.

India :

Cl. (3): Rationality of the immunity against self-incrimination, 22; Scope of Cl. (3), 23; In what proceedings the immunity under Art. 20 (3) may be claimed, 25;

What is an 'offence' under Art. 20 (3), 26.

Stage from which the protection is available, 27; Constitutionality of s. 176, Cr. P. C.; s. 54A, Calcutta Police Act, 1866, 33.

When is a person 'compelled' to be a witness, 34.

Whether the accused can be a witness on his own behalf, 35; whether the silence of the accused can be the subject of comment: (A) U.S.A., 37; (B) England, 38; (C) India, 38.

To what kinds of evidence the immunity extends, 39; Compulsory production of documents, 39; Applicability to corporations, 39.

Search and seizure: (A) England, 39; (B) U.S.A., 40; (C) Japan, 40; (D) India, 40.

Constitutionality of s. 94, Cr. P. C., 41.

Constitutionality of wire-tapping and interception of messages: (A) U.S.A., 42; (B) England, 43; (C) India, 43.

Whether accused can be compelled to exhibit his body: (A) U.S.A., 43; (B) England, 43; (C) India, 43.

Whether accused can be compelled to give thumb impression or specimen writing for comparison: (A) U.S.A., 44; (B) England, 44; (C) India, 44.

Admissibility of material evidence obtained from the person of the accused: (A) U.S.A., 46; (B) Canada, 48; (C) India, 48.

Coerced Confession: (A) U.S.A., 51; (B) England, 52; (C) India, 52; Use of retracted confession, 52; Constitutionality of s. 27 of the Evidence Act, 52.

Who is to decide whether the immunity is available: (A) England, 54; (B) U.S.A., 55; (C) India, 55.

Effect of contravention of Art. 20 (3), 55.

Whether a Fundamental Right may be waived: (A) U.S.A., 56; (B) India, 57.

Protection of life and personal liberty.

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

OTHER CONSTITUTIONS¹⁶⁻¹⁷

(A) *England*.—In the Magna Carta (which King John was forced to sign, in 1215), it was demanded that—"No man shall be taken or imprisoned, disseised or outlawed, or exiled, or in any way destroyed, save by the lawful judgment of his peers or by the law of the land."

In the Petition of Grievances, 1610, it was stated thus:

"Among many other points of happiness and freedom which your Majesty's subjects have enjoyed under your royal progenitors, there is none which they have accounted more dear and precious than this, to be guided and governed by the *certain rule of law*, . . . and not by any arbitrary form of government . . . Out of this root hath grown the indubitable right of the people of this kingdom, not to be made subject to any punishment . . . other than such as are ordained by the common laws of this land, or the statutes made by their common consent in parliament".

This demand was reiterated in the Petition of Rights, 1628, and since then the observance of this principle has established what is known as the Rule of Law in England. The phrase 'due process of law' was first used in a statute of the 14th century (28 Edw. III, 3) and the framers of the American Constitution appear

(16) See also Arts. 114, Weimar; 5 (1) Jugoslav; 74 (1), Danzig, Constitutions.

(17) Cf. Arts. 3 and 9 of the Universal Declaration of Human Rights: "3. Everyone has the right to life, liberty and security of person. 9. No one shall be subjected to arbitrary arrest, detention....." Art. 10 says—

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determi-

nation of his rights and obligations and of any criminal charge against him."

Art. 9 (1)-(2) of the Covenant on Human Rights, 1950 says—

"(1) No one shall be subjected to arbitrary arrest or detention.

"(2) No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law."

to have borrowed the phrase from there. But under the English Constitution, the expression 'law of the land' has a different meaning than the 'due process of law' of the American Constitution. In *England*, 'law' means the law as declared by Parliament. It does not mean any fundamental law limiting the powers of Parliament itself. The 'law of the land' in the above Charters thus simply means the absence of any arbitrary power by the *Executive* and that no man can be punished except after being tried for a definite offence, i.e., for violation of a 'law' and in the *ordinary legal manner*.¹⁸ As explained by the Privy Council¹⁹:

"In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the Executive."

Under the English 'Rule of Law', the Executive has no privileges other than what the law for the time being conceded and it has to defend its action before the ordinary Courts and that only by the authority of law. Thus, when a statute does not authorise the arrest of a person without warrant, it cannot be justified on the ground that it was 'convenient' to the Police or any other executive authority.²⁰

But as against the legislative competence of *Parliament*, there is no limit under the English constitutional system. Thus,

"The concessions of Magna Carta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favour of the commons by limiting the power of Parliament the omnipotence of Parliament was absolute, even against common right and reason."²¹

In short,—

"The subject is entitled to have the law impartially *administered*; but he has no right that the law shall not be changed to his detriment. In other words, he has no 'absolute' rights which are guaranteed against an Act of Parliament. This is a consequence of the general principle that Parliament is sovereign."²²

As May observes—

"The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be *unjust* and contrary to the principles of sound government: But Parliament is not controlled in its discretion and when it errs, *its errors can be corrected by itself*."²³

So, Leslie Stephen went so far as to say—

"If a legislature decided that all blue-eyed babies should be murdered, the preservation of all blue-eyed babies would be illegal."

In short, in England, it is not open to a Court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to the Court's notions of justice or 'due process'.

For the most authoritative pronouncement on this question in recent years, we must refer to Lord Wright's observation in *Liversidge v. Anderson*:²⁴

"All the Courts to-day and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty *confined* and *controlled* by law, whether common law or statute."

As to how personal freedom is maintained in England as against the Executive, the words of the Magna Carta are clear enough, viz., that no man can be deprived of his personal freedom save 'by the law of the land'. Though there is no constitutional guarantee safeguarding the freedom, it is safeguarded by the

(18) Dicey, *Law of the Constitution* (1959 Ed., pp. 202-3).

(19) *Eshugbayi v. Government of Nigeria*, A. 1931 P.C. 248 (252).

(20) *Christie v. Leachinsky*, (1947) 1 All E.R. 567 (576).

(21) *Hurtado v. California*, (1884) 110 U.S. 576.

(22) Stephen's *Commentaries*, Vol. I, p. 545. [See also Vol. I, p. 115].

(23) May, *Parliamentary Practice*, 16th Ed., p. 28.

(24) *Liversidge v. Anderson*, (1942) A.C. 206 (260).

ordinary law itself. If anybody's personal freedom is interfered with without lawful justification, he can—

(a) regain his freedom through the ordinary Courts by means of the writ of '*habeas corpus*' (see under Art. 226, *post*);

(b) sue the person (whether a public official or not) who has arrested to detain him unlawfully, for damages for false imprisonment or prosecute him criminally for assault. To such an action brought by a citizen, 'act of State' is no defence.²⁵

The Courts can, however, interfere only on the ground of absence, excess or abuse of authority, but cannot revise decisions lawfully taken by the Executive, on the ground that the Judges are of a different opinion. Of course, in order to make an executive action lawful, it must be in conformity not only with the substantial provisions but also with the procedural requirements laid down by the law. Again, when the executive action is something more of an administrative action and simulates a judicial decision, the Courts impose another common-law requirement, namely, that the decision (which is called quasi-judicial) must be arrived at in compliance with the principles of natural justice (See Vol. I, p. 364).

Again, though a law cannot be invalidated in England on the ground that it violates 'due process', the concept of fairness involved in 'due process' is applied by the Courts in *interpreting* the law itself, so that an individual may escape from executive encroachment upon his liberty or property even though the executive action may be apparently supported by a law. Thus, as will appear shortly,—

(a) In construing statutes depriving a person of his liberty or property, the Courts habitually lean in favour of the individual and would not support the executive action unless the terms of the statute authorising the action are clear and explicit.¹

(b) No person can be punished for an alleged crime unless the terms of the statute which creates the offence are *reasonably certain*.²

(c) The Court leans strongly against an interpretation of a statute which deprives the subject of rights of property without compensation³ and such intention is not imputed to the Legislature unless the intention is expressed in unequivocal terms.⁴ The presumption is, of course, weakened in times of national emergency.⁵

(B) U.S.A.

(I) *Due Process*.

The Fifth Amendment to the Constitution of U.S.A. (1791) declares—

"No person shall be deprived of his life, liberty or property, without due process of law."

The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the 'due process clauses'. Under the above clauses the American Judiciary claims to declare a law as bad, if it is not in accord with 'due process', even though the legislation may be within the *competence* of the Legislature concerned.

While in *England*, all that Parliament enacts is 'law of the land', a legislative enactment, in the *U.S.A.*, is not 'law' unless it is in conformity with 'due process'. This was explained in the early case of *Murray's Lessee*:⁶

"That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law'....."

It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will".

(25) *Entick v. Carrington*, (1765) 19 St. Tr. 1030.

(1) *L. & N. E. Ry. v. Berriman*, (1946) 1 All E.R. 268 (H.L.).

(2) *Elderton v. Totalisator Co.*, (1945) 2 All E.R. 624 (C.A.).

(3) *Wheeler v. Green*, (1946) 1 All E.R. 63 (66) C.A.

(4) *Central Control Board v. Cannon Brewery*, (1919) A.C. 744 (752).

(5) *Edgington v. Swindon Borough Council*, (1938) 4 All E.R. 57.

(6) *Murray's Lessee v. Hoboken Land & Improvement Co.*, (1856) 18 How. 272.

Since the guarantee applies also against the Judiciary, it follows that any judicial proceeding which forfeits the life or liberty of a person, however guilty he may be, without complying with the procedural requirements of due process, must be held to be invalid.⁷

Curiously, though the very expression 'due process of law' was borrowed from an English statute (see p. 66, *ante*) in evolving this concept of 'due process', the fathers of the American Constitution went ahead of the English doctrine of Rule of Law. In *Chambers v. Florida*,⁷ Justice Black explained the difference in attitude as follows:

"... A liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even *more* was needed from the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried... Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed".⁷

The Constitution, however, does not define 'due process of law', and the Courts, taking advantage of that, have given it such a liberal interpretation according to the facts of each case, as to enable itself to invalidate laws which may be supposed to offend against the 'spirit of the Constitution'. This is clearly brought out in the observations of Frankfurter J. in *Wolf v. Colorado*:⁸

"Due process of law conveys neither formal nor fixed nor narrow requirements. It is the *compendious expression for all those rights* which the courts must enforce because they are *basic to our free society*. . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the Judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognise that it is for the Court to draw it by the *gradual and the empiric process of 'inclusion and exclusion'*".⁸

The contents of 'due process' cannot, therefore, be enumerated once for all.⁹

"The pattern of due process is picked out in the facts and circumstances of each case."¹⁰

The application of the guarantee of 'Due Process' in the case of *civil* rights has already been explained in Vol. I (pp. 498-503). In the present context, we are concerned with its application to cases of infringement of the freedom of the person or personal liberty and to criminal proceedings.

As explained earlier (Vol. I, p. 499), 'Due Process' has both a procedural and a substantive meaning.

Historically speaking, the procedural meaning was the original meaning attributed to the Clause. As will be just seen, it was interpreted as meaning "the *process of law* which hears before it condemns".¹¹ Any law which sought to deprive a person of his liberty or property without such hearing was condemned by the Supreme Court as unconstitutional and invalid, notwithstanding the competence of the Legislature to enact it. Thus, originally concerned with securing procedural safeguards to a person accused of crime, the Supreme Court soon came to apply the Clause to question the substantive *reasonableness* of social and economic legislation from the standpoint of individual liberty, inspired by the doctrine of *laissez faire*.¹² Though the substantive attitude has also been extended to nullify criminal laws,—in the realm of personal safety and liberty, it is the procedural aspect which has played a more important part and it is with that aspect that we are primarily concerned in the present context.

(7) *Chambers v. Florida*, (1940) 309 U.S. 227.

(8) *Wolf v. Colorado*, (1949) 338 U.S. 25.

(9) *Joint Anti-Fascist Refugee Committee v. McGrath*, (1951) 341 U.S. 123.

(10) *Brock v. N. Carolina*, (1951) 344 U.S. 424 (427).

(11) *Hagar v. Reclamation Dist.*, (1884) 111 U.S. 701.

(12) *Chicago R. R. Co. v. Minnesota*, (1890) 134 U.S. 418.

I. PROCEDURAL DUE PROCESS.

Procedural due process means that in dealing with individuals, the Government must proceed with 'settled usages and modes of procedure', e.g., that there should be no conviction without a hearing.

In *Hovey v. Elliot*,¹³ the Supreme Court approved of Daniel Webster's argument in the *Dartmouth case*,¹⁴ that 'due process'—"is the process of law which hears before it condemns, which proceeds upon enquiry, and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of the *general rules* which govern society." In a later case,¹⁵ the Court said—

"By due process of law is meant one which, following the forms of law, is appropriate to the case and *just to the parties to be affected*. It must be pursued in the *ordinary modes* prescribed by law, it must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties, it must give them an *opportunity to be heard* respecting the justness of the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those *general rules* established in our system of jurisprudence for the security of private rights."¹⁶

According to *Willis*,¹⁵ the requirements of procedural due process are—

(1) Notice; (2) Opportunity to be heard (3) An impartial tribunal; (4) An orderly course of procedure. (See Vol. I, p. 378).

'Due process' as regards *criminal trial* means that "no person could be punished except for a violation of *definite*¹⁶ and validly enacted laws of the land, and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights",¹⁷ to secure, in short, a 'fair trial'.¹⁸ The State is free to regulate the procedure of its Courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the *traditions and conscience* of our people as to be ranked as fundamental'.¹⁹ Thus, the State may abolish trial by jury but it cannot substitute trial by ordeal. In other words, 'due process' is violated when there is a failure to observe "that fundamental fairness" which is "essential to the very concept of justice".²⁰

In short,

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."²¹

"The deduction is that life, liberty and property are placed under the protection of *known and established* principles which cannot be dispensed with either generally or specially; *either by Courts or executive officers, or by legislators themselves*. Different principles are applicable in different cases, and require different forms and proceedings; in some they must be judicial; in others the government may interfere directly, and *ex parte*; but due process of law in each particular case means such an exertion of the powers of government as the *settled maxims* of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs. When life and liberty are in question, there must in every instance be *judicial* proceedings; and that requirement implies an *accusation*, a *hearing* before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted."²²

The requirement of 'due process', thus,

"inescapably imposes upon this Court an exercise of judgment upon the *whole course* of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offences."²³

(13) *Hovey v. Elliot*, (1897) 167 U.S. 409.

(14) *The Dartmouth College Case*, (1819), 4 Wh. 518.

(15) *Willis*, Constitutional Law, p. 662.

(16) *Connolly v. General Construction Co.*, (1926) 269 U.S. 385.

(17) *Feldman v. United States*, (1943) 322 U.S. 487 (502).

(18) *Adamson v. California*, (1947) 332 U.S. 46 (53).

(19) *Brown v. Mississippi*, (1936) 297 U.S. 278.

(20) *Lisenba v. California*, (1941) 314 U.S. 219 (236).

(21) *Tumey v. Ohio*, (1927) 273 U.S. 510.

(22) *Story*, Constitution, 4th Ed., Arts. 1943-6.

(23) *Malinski v. N. Y.*, (1945) 324 U.S. 401 (416).

Whether such fundamental fairness has been denied is to be determined

"by an appraisal of the *totality of facts* in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations fall short of such denial".²¹

The burden is, of course, upon the person who alleges such unfairness to show that it was sustained "not as a matter of speculation but as a demonstrable reality".²²

Procedural due process, thus, requires—

(i) That the trial shall be held *in public*,^{1,3} as a safeguard against any attempt to employ the criminal courts as 'instruments of persecution'.⁴ This rule is popularly stated as that the accused must have "a day in court".⁴

Even a summary trial for contempt of court cannot be held in secret or in the Judge's chamber.⁴ Due process requires that a person may be deprived of his life, liberty or property only after he has been advised of the charges against him, offered a reasonable opportunity of meeting those charges, aided by a counsel, and in open Court.⁴

(ii) That the trial shall not be vitiated by pressure from any mob⁵ or other external factor, *e.g.*, adverse newspaper comments⁶ or television broadcast of the accused confessing⁷ causing such a 'community prejudice' in the locality where the trial was held,⁸ as to preclude a fair trial.²³

(iii) That the Judge shall be impartial,⁹ *i.e.*, not influenced by a 'direct, personal, substantial pecuniary interest in reaching a conclusion against' the accused¹⁰ [see Vol. I, pp. 345, *et seq.*].

Hence, conviction by a Mayor who received a share of the fines as his fees, such fees being payable only in case the accused was convicted, was held violative of 'Due Process',¹⁰ but not so where the Mayor received a *fixed* salary even though the salary was paid out of a fund to which the fines imposed by him contributed.¹¹

(iv) That the Court shall have jurisdiction.¹²

(v) That the accused shall have real notice of the true charge against him for which he is tried.¹³ Conviction upon a charge not made would be "sheer denial of due process".¹⁴

Thus, due process was held denied—

(a) Where an ignorant layman, without counsel, entered a plea of guilty to what he believed to be a charge of *simple* burglary, on the representation of the prosecuting attorney that he would be leniently dealt with if he entered such a plea, when in fact he was charged with "burglary with explosives".¹⁵

(b) Where, on appeal from conviction for an offence under one section of a statute, the appellate court sustained the conviction for violation of another section of that statute, for which the appellants had never been charged or tried.¹⁵

(24) *Betts v. Brady*, (1942) 316 U.S. 455.

(25) *Darcy v. Handy*, (1955) 351 U.S. 454 (462).

(1) *Gaines v. Washington*, (1928) 277 U.S. 81.

(2) Apart from the deduction from the 'Due Process' clause, a public trial is specifically guaranteed by the Sixth Amendment, as regards criminal proceedings in federal courts [cf. *Betts v. Brady*, (1942) 316 U.S. 455] (see under Art. 22 (1), *post*).

(3) Art. 10 of the Universal Declaration of Human Rights says—

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

(4) *Re Oliver*, (1948) 333 U.S. 257.

(5) *Moore v. Dempsey*, (1923) 261 U.S. 86 (91).

(6) *Stroble v. California*, (1952) 343 U.S. 181.

(7) *Ridean v. Louisiana*, (1962) 372 U.S. 723.

(8) *Shepherd v. Florida*, (1951) 341 U.S. 50.

(9) Cf. 'independent and impartial tribunal' in Art. 10 of the Universal Declaration of Human Rights, quoted at f.n. (3), *ante*.

(10) *Tomey v. Ohio*, (1927) 273 U.S. 510.

(11) *Dugan v. Ohio*, (1928) 277 U.S. 61.

(12) *Twining v. New Jersey*, (1908) 211 U.S. 78.

(13) *Smith v. O'Grady*, (1941) 312 U.S. 329.

(14) *De Jonge v. Oregon*, (1937) 299 U.S. 353.

(15) *Cole v. Arkansas*, (1948) 333 U.S. 196.

Where, however, the accused was charged with a bigger offence, he was allowed to plead guilty of a lesser offence since the charge of the graver offence gave sufficient notice of the lesser offence involved in the act for which he was charged.¹⁶

(vi) That the charge should be specific¹⁵ and worded in such language as "men of ordinary intellect" could follow.¹⁷

(vii) That the nature and cause of the accusation should be communicated to the accused sufficiently in advance of the trial so as to enable him to prepare his defence.¹⁸

(viii) That there should be an 'ascertainable standard of guilt'.¹⁹ A criminal statute which is either vague²⁰ or gives contradictory commands,²¹ offends against Due Process.

It follows from the requirement of 'notice'²² that the law should (a) clearly provide that it shall be an offence to do or to fail to do, the acts specified therein; and also (b) clearly indicate those to whom it applies.¹⁹

"Legislation may run afoul of the due process clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offence with which they are charged, or to guide courts in trying those who are accused".²⁰

A statute is *vague* within the meaning of this rule if a man of common intelligence^{19,23} is unable to determine whether or not he is committing the offence.²⁴ If a statute fails to give notice of what acts will be punished, the statute itself will be unconstitutional, and a specification of the details of the offence in the charge will not serve to validate the statute.²⁴

As has been explained earlier (Vol. I, p. 509), a statute also offends 'Due Process' if it is so broad as to prohibit an act which is constitutionally protected.²²

I. Applying the above tests, the Court has *invalidated* statutes imposing criminal sanctions—

(a) For the exaction of 'unjust or unreasonable' charges for 'necessaries'.¹⁹

(b) For showing films of such character as to be prejudicial to the "best interests of the people".²⁵

(c) For the payment of employees less than "the current rate of per diem wages in the locality where the work is performed".⁶

(d) For printing, publishing etc., of printed matter containing "criminal news,or stories of deeds of *bloodshed, lust or crime*".²²

(e) For committing acts injurious to the 'public morals'.¹

II. As to the vagueness relating to the *persons* to whom a criminal statute is applicable,—the Court has invalidated a statute which sought to penalise as a 'gangster' any person "not engaged in any lawful occupation, *known to be a member* of any gang consisting of two or more persons, who has been convicted.....", for want of a definition of the italicised words either in the statute or in common law.¹

III. Though the principle that 'ignorance of law' is no excuse² is acknowledged in the U.S.A. and it is also competent for the *Legislature* to make the *commission* of an act an offence irrespective of a requirement of the knowledge that such act constitutes an offence,³ in the matter of an offence constituted by an *omission* or failure to do an act, e.g., to failure to get oneself registered in a

(16) *Paterno v. Lyons*, (1948) 334 U.S. 314.

(17) *U. S. v. Lattimore*, (1955) 127 F. Supp. 405.

(18) *Powell v. Alabama*, (1932) 287 U.S. 45.

(19) *U. S. v. Cohen Grocery*, (1921) 255 U.S. 81.

(20) *Musser v. Utah*, (1948) 333 U.S. 95 (97).

(21) *U. S. v. Cardiff*, (1952) 344 U.S. 174.

(22) *Winters v. N. Y.*, (1948) 333 U.S. 507; *Williams v. U. S.*, (1951) 341 U.S. 97.

(23) *Connally v. General Construction Co.*, (1926) 269 U.S. 385.

(24) *Lanzetta v. New Jersey*, (1939) 306 U.S. 451.

(25) *Gelling v. Texas*, (1952) 343 U.S. 960.

(1) *Lanzetta v. New Jersey*, (1939) 306 U.S. 451.

(2) *Shevlin Carpenter Co. v. Minnesota*, (1911) 218 U.S. 57 (68).

(3) *Chicago B. & Q. R. Co. v. U. S.*, (1920) 220 U.S. 559.

State,⁴ it has been held that it would be a violation of due process to provide that the omission will constitute an offence even when a person fails to do the act prescribed without knowing that it constitutes an offence.^{4a}

IV. The Court will not, on the other hand, invalidate a statute for vagueness if the language used in the statute—

(a) has a well-settled meaning which is commonly known;⁵⁻⁶ or a technical meaning known to those who are affected by the statute;⁷ or

(b) may be clarified by reference to well-developed common-law concepts⁸ or when viewed 'in its statutory setting';⁹ or

(c) has been interpreted by Court already.¹⁰

The doctrine of vagueness does not, in other words, require 'impossible standards of specificity'.⁵ What the rule of certainty demands is 'no more than a reasonable degree of certainty'.¹¹ All that is required is that the language conveys a sufficiently definite warning as to the prescribed conduct when measured by *common understanding and practices*.¹²

Thus, the Court has refused to invalidate a statute which penalises—

(i) the pasturing of sheep on any public domain 'range' 'usually occupied by any cattle grower';⁷

(ii) the coercion of an employer to employ persons "in excess of the number of employees needed to perform actual services";⁵

(iii) work in excess of the prescribed maximum hours except in case of emergency;¹³

(iv) a "conspiracy in restraint of trade";⁸

(v) a material that is "obscene, lewd, lascivious or filthy";⁸ "obscene or indecent";¹²

even though these words were not defined or explained.

(vi) That the accused shall have adequate opportunity of being heard in defence of the charge brought against him.¹⁴

Several corollaries have been drawn from this rule—

(a) The accused is presumed to be innocent and can be convicted only on proof of all the elements of the crime charged against him.¹⁵

(b) In view of the above presumption, it is not within the province of the Legislature to declare an individual guilty,¹⁶ or presumptively guilty of a crime. A judicial finding of *fact* cannot, therefore, be substituted by a statutory presumption that is arbitrary or that operates to deny a fair opportunity to repel it¹⁶ (see Vol. I, p. 523).

"A statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the other is arbitrary because of lack of connection between the two in common experience".¹⁷

But, notwithstanding the presumption of innocence, it is permissible for the Legislature to shift the burden of proof to the accused, provided the limits of fairness are not transgressed.¹⁸ These limits, for instance, are—

(i) That the State must have proved *enough* to make it just for the accused to rebut what has been proved.¹⁸

(4) *Lambert v. California*, (1957) 355 U.S. 225 (228).

(4a) *Musser v. Utah*, (1948) 333 U.S. 95.

(5) *U. S. v. Petrillo*, (1947) 332 U.S. 1.

(6) *Connally v. General Construction Co.*, (1926) 269 U.S. 385.

(7) *Omaechevarria v. Idaho*, (1918) 246 U.S. 343.

(8) *Nash v. U. S.*, (1913) 229 U.S. 373.

(9) *U. S. v. Spector*, (1952) 343 U.S. 169.

(10) *Jordan v. De George*, (1951) 341 U.S. 223.

(11) *Boyce Motor Lines v. U. S.*, (1952) 342 U.S. 337.

(12) *Roth v. U. S.*, (1956) 354 U.S. 476 (491).

(13) *Baltimore & Ohio Ry. Co. v. Interstate Commerce Commn.*, (1911) 221 U.S. 612.

(14) *Powell v. Alabama*, (1932) 287 U.S. 45 (68).

(15) *Christoffel v. U. S.*, (1949) 338 U.S. 84.

(16) *Manley v. Georgia*, (1929) 279 U.S. 1.

(17) *Tot v. U. S.*, (1943) 319 U.S. 463 (467-8).

(18) *Morrison v. California*, (1934) 291 U.S. 82 (88-9).

(ii) That upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be aid to the accuser without subjecting the accused to hardship or oppression.¹⁸⁻¹⁹

(c) That the accused shall have the opportunity of summoning and examining witnesses to refute the charges against him. This has been acknowledged as a requirement of due process,²⁰ apart from the right of obtaining compulsory process for summoning witnesses which is guaranteed by the 6th Amendment.

(d) That the accused shall have the opportunity of confronting the prosecution witnesses^{20a} and of cross-examining them face to face.²⁰ So far as federal criminal proceedings are concerned, this is secured by the Sixth Amendment.²¹

Whether the same requirement follows from the 'Due Process' Clause (14th Amendment) is not so clear.²² It was so assumed in *Snyder v. Massachusetts*,²³ and more definitely in *In re Oliver*,²⁰ in quashing the conviction of a witness for perjury, upon a comparison of his evidence with that of another witness, and without a separate trial on the charge of perjury.

Certain exceptions have been admitted to the right of cross-examination owing to the very nature of the exceptional circumstances, viz., in respect of—

(i) *Dying Declarations*.²⁴

(ii) Stenographic report of the evidence at a former trial of a witness who is dead or not available.²⁵

(iii) Undisclosed confidential information may be relied upon in excluding an alien from admission,¹ which, of course, is not a criminal proceeding.

(iv) The same principle has been applied (by a 5 to 4 majority) in denying an application for suspension of deportation of a resident alien. This exception of the usual principle of due process to a person who was otherwise entitled to the constitutional protection was justified on two grounds—(a) that suspension of deportation to an alien was a matter of grace, not of right, and, accordingly, there was no right to a hearing in such proceeding as in the like proceeding for suspension of a criminal sentence;² (b) that the interests of national security justified the exception.³

(v) That the accused shall not be convicted upon coerced or involuntary confession.⁴

An extension of this principle has led to the holding that evidence obtained through force or by means which 'shock the conscience' shall be inadmissible, e.g., the evidence of morphine capsules extracted from the person of an accused through the use of a stomach pump.⁵

(vi) That the accused shall not be convicted by evidence obtained by means of entrapment or through informers or the like;⁶ or by testimony known to be perjured⁷⁻⁸ or by suppressing material evidence,⁷⁻⁹ or evidence favourable to the accused.^{9a}

(19) *Hawker v. N. Y.*, (1898) 170 U.S. 189.

(20) *In re Oliver*, (1948) 333 U.S. 257.

(20a) This includes the obligation of the State to produce the accuser and offer him for cross-examination [cf. *Beard v. Stahr*, (1962) 8 L. Ed. (2d) 321].

(21) *Peters v. Hobby*, (1955) 349 U.S. 331 (351).

(22) In this respect, the Anglo-Indian doctrine of natural justice is more pronounced.

(23) *Snyder v. Massachusetts*, (1934) 291 U.S. 97.

(24) *Kirby v. U. S.*, (1809) 174 U.S. 47 (61).

(25) *Mattox v. U. S.*, (1895) 156 U.S. 237 (240).

(1) *Shaughnessy v. Mezei*, (1954) 345 U.S. 206.

(2) *Berman v. U. S.*, (1938) 302 U.S. 211 (213).

(3) *Jay v. Boyd*, (1956) 351 U.S. 345.

(4) *Lynum v. Illinois*, (1963) 372 U.S. 528 (534); *Townsend v. Sain*, (1962) 372 U.S. 293 (309); *Blackburn v. Alabama*, (1958) 361 U.S. 199; *Ashcraft v. Tennessee*, (1944) 322 U.S. 143; *McNabb v. U. S.*, (1943) 318 U.S. 332; *Chambers v. Florida*, (1940) 309 U.S. 227; *Upshaw v. U. S.*, (1949) 335 U.S. 410.

(5) *Rochin v. California*, (1952) 342 U.S. 165.

(6) *Sherman v. U. S.*, (1958) 356 U.S. 369.

(7) *Mooney v. Holohan*, (1935) 294 U.S. 103.

(8) *Napue v. Illinois*, (1958) 360 U.S. 264.

(9) *Alcorta v. Texas*, (1957) 355 U.S. 28 (31).

(9a) *Brady v. Maryland*, (1962) 373 U.S. 83 (87).

It is open to a prisoner to establish facts, subsequently discovered, to show that the evidence upon which he was convicted was perjured.⁹ In short, due process is violated if the State seeks to secure the conviction of a person by means of a contrivance, through the pretence of a trial,⁷ or there has been a "fundamental unfairness in the use of evidence whether true or false".¹⁰

(vii) That the accused shall have adequate *legal assistance*¹¹ where the denial of such assistance works a 'fundamental unfairness'.¹² The requirement of 'Due Process' includes not only the right of representation at the trial by a counsel¹³ but also the right to prepare the defence with the help of a counsel,¹³⁻¹⁴ and to consult him in private *before* and *during* trial,¹⁵ from the moment of indictment.¹⁶

The guarantee is violated if the accused is not given reasonable time and opportunity to secure a counsel for the preparation of defence¹¹ [see, further, under art. 22 (1), *post*].

(a) Where the accused is in a position to secure a counsel of his own, he has, in a criminal proceeding, an unqualified right to be heard through him.¹⁷

(b) Where the accused is *not* in a position to secure a counsel, it is the duty of the Court to employ a counsel for the accused, irrespective of any question of prejudice.¹⁸⁻¹⁹

II. SUBSTANTIVE DUE PROCESS.

(i) The foremost substantive application of the Due Process Clause to annul criminal legislation comes from the conflict of a criminal law with the rights guaranteed by the First Amendment, *e.g.*, the freedom of speech and of the press;²⁰ freedom of assembly;²¹ freedom of association,²² either because the restriction was excessive or because the danger was not 'clear and present' so as to justify the restriction or because the means adopted had no substantial relation to the object to be achieved. These aspects have been fully explained in Vol. I, under Art. 19 (*cf.* Vol. I, pp. 534 *et seq.*).

(II) *Habeas Corpus*.

Apart from the 'Due Process' Clause, the other safeguard for the protection of personal liberty in the U.S.A., as in England, is the remedial writ of *habeas corpus*, by which the guarantee of 'due process' is enforced in cases of deprivation of personal liberty. The power to issue the writs was assumed by the Courts in the American colonies as an incident of English common law, so much so that the framers of the national Constitution did not think it necessary to insert any provision in the Constitution, specifically conferring this power. On the other hand, it was assumed that the power exists and in Art. I, s. 9 (2), what was ought to be guarded against was a suspension of this writ—

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it".

The exercise of this jurisdiction by the federal Courts is governed by statute. The Judiciary Act, 1789 gave the federal Courts the power to issue the writ (*inter alia*) of *habeas corpus* "agreeable to the principles and usages of law". The jurisdiction of the American federal Courts is wider than of the English

(10) *Lisenba v. California*, (1941) 314 U.S. 219 (236).

(11) *Powell v. Alabama*, (1932) 287 U.S. 45.

(12) *Gibbs v. Burke*, (1949) 337 U.S. 773; *Gallegos v. Nebraska*, (1951) 342 U.S. 55 (64).

(13) *Reece v. Georgia*, (1955) 350 U.S. 85.

(14) *Moore v. Michigan*, (1957) 355 U.S. 155 (160).

(15) *Avery v. Alabama*, (1940) 308 U.S. 444 (446); *Hamilton v. Alabama*, (1961) 368 U.S. 52.

(16) *Spano v. N. Y.*, (1959) 79 S. Ct. 1202. (1209).

(17) *Chandler v. Fretag*, (1953) 348 U.S. 3.

(18-19) *Gideon v. Wainwright*, (1962) 372 U.S. 335 (345).

(20) *Gitlow v. N. Y.*, (1925) 268 U.S. 652; *Stromberg v. California*, (1931) 283 U.S. 359; *Thornhill v. Alabama*, (1940) 310 U.S. 88; *Butler v. Michigan*, (1956) 352 U.S. 380.

(21) *De Jonge v. Oregon*, (1937) 299 U.S. 353.

(22) *Cf. Yates v. U. S.*, (1956) 354 U.S. 298.

Courts, by reason of the wide language of a statute of 1867 (*Habeas Corpus Act*) which lays down that the federal Courts shall have

"power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States".

As a result of this—

(a) A federal Court may issue the writ even in cases where person is detained in execution of a sentence imposed by a Court of competent jurisdiction,²³ and up to the moment of execution of a death sentence.²⁴

(b) Since the writ exists for the protection of the Constitution, the Court has a responsibility in this matter whenever a violation of the Constitution is alleged.

"The proponent before the Court is not the petitioner but the Constitution of the United States."²⁵

If the Court is satisfied as to the violation of 'due process', neither delay²⁴⁻²⁵ nor technicalities and forms¹ may stand in the way of issuing the writ.

(C) *Eire*.—Art. 40 (4) of the Constitution of 1937 says:

"No citizen shall be deprived of his personal liberty save in accordance with law."

'Save in accordance with law' has been interpreted to mean 'in accordance with the law as it exists at the time when the Article is sought to be invoked'.²

The view of Duffy, J.,³ that 'law', in the above Article meant law which was consistent with the constitutional guarantees and not any law enacted by the Legislature, was not supported by the Supreme Court, on a reference by the President.³

In the result, this provision (like Art. 21 of *our* Constitution) is no safeguard against the Legislature itself.

(D) *U.S.S.R.*—Art. 127 of the Soviet Constitution says—

"Article 127.—Citizens of the U. S. S. R. are guaranteed inviolability of the person. No person may be placed under arrest except by decision of a court or with the sanction of a procurator."

Art. 30 then provides—

"No person shall be condemned and suffer any penalty save in virtue of a judicial decision pronounced in conformity with the law".

(E) *West Germany*.—Art. 2 (2) of the West German Constitution (1948) declares—

"Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order."

Though the freedom of life and liberty guaranteed by the above Article may be restricted, such restriction will be valid only if it is in conformity with the 'legal order'. Being a *basic right*, the freedom guaranteed by Art. 2 (2) is binding on the legislative, administrative and judicial organs of the State [Art. 1 (3)]. This gives the individual the right to challenge the validity of a law or an executive act violating the freedom of the person by a constitutional complaint to the Federal Constitutional Court, under Art. 93.

Procedural guarantee is given by Arts. 103 (1) and 104. Art. 104 (1)-(2) provides—

"(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein....."

(2) Only the Judge shall decide on the admissibility and continued deprivation of liberty".

These provisions correspond to Art. 21 of *our* Constitution and the Court is empowered to set a man to liberty if it appears that he has been imprisoned

(23) Cf. *Francis v. Resweber*, (1947) 329 U.S. 459.

(24) *Chessman v. Teets*, (1957) 354 U.S. 156.

(25) *Smith v. O'Grady*, (1941) 312 U.S. 321.

(1) *Frank v. Mangum*, (1915) 237 U.S. 309 (331).

(2) *In re Art. 26*, (1940) I.R. 470.

(3) *State v. Lennon* (*Burke's case*), (1940) I.R. 136.

without the authority of a formal law or in contravention of the procedure prescribed therein.

Art. 103 (1) goes beyond Art. 12 of *our* Constitution by ensuring 'due process' in a judicial hearing:

"Everyone brought before a Court shall have a claim to proper legal hearing".

Under Art. 104, a person whose liberty is infringed is entitled to be brought before a Court and in the Court he is entitled to a 'fair hearing'. If, therefore, the trial does not conform to the standard of a fair hearing, the aggrieved individual can have the judgment annulled on that ground by a constitutional complaint to the Federal Constitutional Court.

(F) *Japan*.—Art. XXXI of the Japanese Constitution of 1946 says—

"No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

This article is similar to Art. 21 of *our* Constitution save that it includes other criminal penalties, such as fine or forfeiture within its ambit.

INDIA

Object of Art. 21.

This Article is *not* intended to be a constitutional limitation upon the powers of the *Legislature* otherwise conferred by the Constitution.⁴ Its object is simply to serve as a restraint upon the *Executive* so that it may not proceed against the life or personal liberty of the individual save under the authority of some law and in conformity with the procedure laid therein.

Art. 21, read with Art. 22, contains the entire provision relating to 'deprivation' of life or personal liberty, as distinguished from 'restriction' of the right to move freely throughout the territory of India, which is dealt with in Art. 19 (1) (d) and (5).⁴ [See Vol. I].

Before a person is deprived of his life or personal liberty the procedure established by law must be *strictly* followed and must not be departed from to the disadvantage of the person affected.⁵

Scope of Art. 21.

The words 'except according to procedure established by law' suggest that Art. 21 does not apply where a person is detained by a private individual and not by or under authority of the State. Since no fundamental right is infringed when the detention complained of is by a private individual, Art. 32 also cannot be invoked in such a case.⁶ [But a petition under Art. 226 would lie; see *post*].

'Life'.

The expression 'deprived of life' should not be construed to refer only to the extreme case of death. In the words of Field J., 'life' in this context should mean—

"something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."⁷

But it refers to freedom of the person and cannot be extended to include a person's livelihood.⁸

(4) *Gopalan v. State of Madras*, (1950) S.C.I. 174 (186-7, Kania C.J.): (1950-51) C.C. 74 (79).

(5) *Makhan Singh v. State of Punjab*, (1950) S.C.R. 88: (1950-51) C.C. 180 (181); *Naranjan v. State of Punjab*, A. 1950 S.C. 106.

(6) *Vidya Verma v. Shivnarain*, (1955) 2 S.C.R. 983.

(7) *Munn v. Illinois*, (1877) 94 U.S. 113, Field J. (dissenting).

(8) *Sant Ram, in re*, A. 1960 S.C. 932 (935).

'Personal Liberty'.

'Liberty' is a very comprehensive term and let alone it would include not merely freedom to move about unrestricted but such liberty of conduct, choice and action as the law gives and protects.⁹

(A) In the U.S.A., the Supreme Court has taken advantage of the generality of the word 'liberty' in expanding the scope of the 'Due Process' clause. Though it has never defined the word, it has often emphasised that it "is not confined to mere freedom from bodily restraint" and that "liberty under law extends to the full range of conduct which the individual is free to pursue".¹⁰

(B) But by qualifying the word liberty by the word 'personal', the import of the word liberty in Art. 21 of our Constitution is narrowed down¹¹ to the meaning given in English law to the expression 'liberty of the person' or 'personal freedom', i.e., the right not to be punished, imprisoned or coerced except according to the procedure established by law,⁹ or, in the words of Dicey,¹²—

"the right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."

It is the antithesis of physical restraint or coercion.¹³

According to Blackstone,¹⁴ the right of personal liberty includes—

"the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law."

In *Kharak Singh v. State of U. P.*,^{13a} the majority of the Supreme Court has reiterated that the personal liberty which is safeguarded by Art. 21 is the freedom from a tangible physical restraint and not freedom from invasion of privacy or protection of a person's personal sensitiveness. There is, therefore, no violation of Art. 21 by domiciliary visits made to the house of a suspect.

'Deprived'.

Deprivation means 'total loss'.¹⁴ Deprivation of personal liberty, therefore, has not the same meaning as restriction of free movement. It is the total loss of personal liberty which is sought to be protected by Art. 21, as distinguished from restriction or partial control of the right to move freely which is referred to in Art. 19 (1) (d) read with cl. (5) of that Article.¹⁵

'Procedure established by law'.

'Procedure' means the manner and form of enforcing the law. Art. 21 simply means that you cannot deprive a man of his personal liberty, unless you follow and act according to the law which provides for the deprivation of such liberty.¹⁵

Our Constitution does not guarantee the right to any particular procedure for the deprivation of life or personal liberty besides those contained in Art. 22. The Legislature is left free to lay down any procedure,¹⁶ within the ambit of the legislative power conferred by Entry 2 of List III ('criminal procedure'), subject, of course, to the limitations included in Arts. 14, 20 and 22. The Courts shall have no power to invalidate a legislation on the ground that the procedure provided therein is arbitrary.¹⁶

(9) *Allegeyer v. Louisiana*, (1897) 165 U.S. 578.

(10) *Bolling v. Sharpe*, (1954) 347 U.S. 497 (499).

(11) Keith, Constitutional Law, p. 434.

(12) Dicey, Constitutional Law, 9th Ed., pp. 207-8.

(13) *Gopalan v. State of Madras*, (1950) S.C.J. 174 (270-1, Mukherjea J.). [Our Supreme Court thus differs from the view

expressed in *Wills*, Constitutional Law, at p. 710].

(13a) *Kharak Singh v. State of U. P.*, A. 1963 S.C. 1295 (1300).

(14) Blackstone's Commentaries, Bk. I, p. 134.

(15) *Gopalan v. State of Madras*, (1950) S.C.R. 88: (1950-51) C.C. 74, (82, 105, 111).

(16) *Ibid*, p. 114, Das J. [See also p. 270, ante].

'Established by law'.

I. By the use of these words, *our* Constitution accepts the English principle of supremacy of the law, in preference to the American doctrine of judicial review of legislation, so far as personal liberty is concerned. Liberty, according to this view, as we have seen¹⁷ is a "liberty confined and controlled by law". 'Law' in this expression means State-made or enacted law and not the general principles of natural justice.¹⁸ Procedure established by law thus means procedure prescribed by the Legislature.¹⁸⁻¹⁹

"Art. 21 affords no protection against competent legislative action in the field of substantive criminal law, for there is no provision for judicial review, on the ground of reasonableness or otherwise of such laws....."¹⁸

II. It is to be noted that the Clause originally stood in the Draft Constitution as follows (Cl. 15)—

"No person shall be deprived of his life or liberty without *due process of law*".

The Drafting Committee introduced two changes in the Clause²⁰—(i) They qualified the word 'liberty' by the word 'personal' in order to preclude a wide interpretation of the word as in the U.S.A., so as to include the freedoms which had already been dealt with in Art. 13 (corresponding to Art. 19 of the Constitution). (ii) They also substituted the words "due process of law" by the words "procedure established by law", following the Japanese Constitution (Art. XXXI; see p. 76, *ante*), because they were more 'specific'.

On the question whether the expression 'due process of law' should be restored in place of the words 'procedure established by law', there was a sharp difference of opinion in the Assembly even amongst the members of the Drafting Committee. On the one side was the view of Sri Munshi, in favour of 'due process':^{20a}

"... the essence of democracy is that a balance must be struck between individual liberty on the one hand and social control on the other. We must not forget that the majority in a legislature is more anxious to establish social control than to serve individual liberty... the amendment would enable the courts to examine not only the procedural part... but also the substantive law. When a law had been passed which entitled government to take away the personal liberty of an individual, the court will consider whether the law which has been passed is such as is required by the exigencies of the case, and, therefore, the balance will be struck between individual liberty and social control".

The stalwart on the other side was Sri Alladi Krishnaswami who said¹—

"Three gentlemen or four gentlemen, sitting as a court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourses and arguments... may appeal to certain democrats more than the expressed wishes of the legislature... This clause may serve as a great handicap to all social legislation, for the ultimate relationship between employer and labour, for the protection of children, for the protection of women... One thing also will have to be taken into account, viz., that the security of the State is far from being so secure as we are imagining at present".

Dr. Ambedkar merely summed up the two views and left it to the House "to decide in any way it likes".^{20a}

The House adopted the Clause as drafted by the Drafting Committee, rejecting 'due process'. The result, as stated by Dr. Ambedkar, at a subsequent stage,^{20b} was that Art. 21 gave "a carte blanche to make and provide for the arrest of any person under any circumstances as Parliament may think fit." Art. 22 was introduced with a view to imposing some limitations upon the Legislature.

(17) *Liversidge v. Anderson*, (1942) A.C. 206 (260).

(18) *Gopalan v. State of Madras*, (1950) S.C.R. 88 [Kania C.J. (p. 109); Mukherjea J. (p. 256); Das J. (p. 319)]; (1950-51) C.C. 74 (133).

This view has been adopted by Sastri J. in the later case of *Ram Singh v. State of*

Delhi, (1951) S.C.R. 451; (1950-51) C.C. 158 (160), and by Mahajan J. in *Krishnan v. State of Madras*, (1951) S.C.R. 621, and, ever since, it holds the field.

(19) *Collector of Malabar v. Ebrahim, A.* 1957 S.C. 688 (690).

(20) Cf. C.A.D., Vol. VIII, p. 844.

(20a) VIII C.A.D., pp. 851-4; 1000.

(20b) IX C.A.D., 1496-7.

In *Gopalan's case*,²¹ Kania C.J. took note of the above changes in the Article at the drafting stage and held that the American doctrine of 'Due Process' could not be imported into the Article simply because the words 'Due Process' were deliberately omitted from the Article. Thus said the Chief Justice—

"Normally read, and without thinking of other Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State. If the Indian Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase, or if they wanted to limit the same to procedure only, to adopt that expression with only the word 'procedural' prefixed to 'law'. However, the correct question is what is the right given by Art. 21? The only right is that no person shall be deprived of his life or liberty except according to procedure established by law. One may like that right to cover a larger area, but to give such a right is not the function of the Court; it is the function of the Constitution. To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rules of natural justice, as regards procedure, are nowhere defined and in my opinion the Constitution cannot be read as laying down a vague standard. This is particularly so when in omitting to adopt "due process of law" it was considered that the expression "procedure established by law" made the standard specific. It cannot be specific except by reading the expression as meaning procedure prescribed by the legislature."²¹

"The only right given by Art. 21 is that no person shall be deprived of his life or liberty except according to 'procedure established by law'. By adopting that phrase, the Constitution gave the Legislature the final word to determine law. Our protection against legislative tyranny, if any, lies, in the ultimate analysis, in a free and intelligent public opinion which must eventually assert itself. It is not for the Court to question the wisdom and policy of the 'Constitution' which the people have given unto themselves. It is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights."²¹

In the later case of *Krishnan v. State of Madras*,²² Mahajan J. explained it more clearly—

"It is open to Parliament to change the procedure by enacting a law and that procedure becomes the 'procedure established by law' within the meaning of that expression in Art. 21 of the Constitution."²²

II. Even though in *Gopalan's case*,²¹ 'law' in Art. 21 was interpreted to mean 'enacted law', later cases have understood that interpretation to refer to 'positive law' as distinguished from 'natural law', and not to restrict the word to statutes or laws made by the Legislature. It would, therefore, include anything having the *authority of law*, e.g.,

(i) Rules made by the Legislature under Arts. 118 (1) and 208 (1), and the privileges of each House under Arts. 105 (3) and 194 (3), including the power of a House to punish for contempt.²³

(ii) The power of a High Court to punish for contempt of itself under Art. 215²⁴ or its summary powers in this behalf as it existed under the common law prior to the Constitution and which was continued by Art. 372.²⁵ Under these powers, therefore, the High Court can adopt *any* procedure for punishment of contempt, provided only the procedure is fair and the contemner is given a fair and reasonable opportunity of defending himself.¹

It would not, however, include mere executive or departmental instructions which have no statutory basis, e.g., the U. P. Police Regulations.^{1a}

III. Such law must, however, be a *valid* law.²

(21) *Gopalan v. State of Madras*, (1950) S.C.R. 88 (111-2).

(22) *Krishnan v. State of Madras*, (1951) S.C.R. 621 (Mahajan & Das JJ.): (1950-51) C.C. 169 (174).

(23) *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (410).

(24) *State of Bombay v. Mr. P.*, A. 1959 S.C. 182 (185).

(25) In the matter of Basanta Chandra Ghosh, A. 1960 Pat. 430 (441) F.B.

(1) *Sukhdeo Singh v. Teja Singh*, A. 1954 S.C. 186 (190).

(1a) *Kharak Singh v. State of U. P.*, A. 1963 S.C. 1295 (1299).

(2) *Collector of Malabar v. Ebrahim*, A. 1957 S.C. 688 (690).

Hence, notwithstanding Art. 21, it is open to challenge the constitutionality of a law which deprives a person of his life or liberty on the grounds—

- (a) that it has not been enacted by a competent Legislature;³
- (b) that the law suffers from the vice of excessive delegation;^{3a}
- (c) that it constitutes a colourable exercise of the legislative power;^{3a}
- (d) that, if the law be a subordinate legislation, it is *ultra vires*, or, if it be an order, that it is *mala fide*;^{3a}
- (e) that it contravenes any of the fundamental rights other than Art. 21.⁸

IV. But such law may not necessarily be a law for the punishment of crimes. Thus, an arrest or detention under s. 13 of the Bombay Land Revenue Act, 1876,⁴ or under s. 48 of the Madras Revenue Recovery Act, 1864,² for the recovery of Government dues is a deprivation in accordance with the 'procedure established by law'.

Whether a law made under Art. 21 is subject to other fundamental rights included in Part III.

There are certain observations in *Gopalan's case*³ which may indicate that the only condition for the validity of a law of criminal procedure, coming under Art. 21 is that it must be enacted by a competent Legislature. Thus, at p. 320 of (1950) S.C.R., Das J. observed—

"..... any law for depriving any person of his life and personal liberty that may be made by the appropriate legislative authority under Art. 246 and in conformity with the requirements of article 22 does not take away or abridge any right conferred by article".

This observation would suggest that a law, coming under Art. 21, made by a competent Legislature is not controlled by any other Article in Part III save Art. 22. Fazal Ali J. simply said that the law, under Art. 21, must be a 'valid law' (p. 169, *ibid.*), and so did Imam J. in the later case of *Collector of Malabar v. Ibrahim*.⁵

So understood, the decision in *Gopalan's case*³ would throw a blanket cover over laws seeking to deprive an individual of his most cherished right, namely, personal liberty: whatever procedure was laid down by an *intra vires* enactment would be a valid procedure under the Constitution.

But Mukherjea J.³ (p. 255, *ibid.*) was cautious enough to see the dangers in such an unguarded statement. He, of all the Judges, observed—

"..... such law must be a valid law which the Legislature is competent to enact within the limits of the powers assigned to it and which does not transgress any of the fundamental rights that the Constitution lays down".

But even Mukherjea J. (p. 256) was not prepared to hold that the reasonableness of a law coming under Art. 21 could be questioned with reference to anything in Art. 19 (p. 256, *ibid.*).

Later decisions have demonstrated that a law under Art. 21 must conform to the requirements of other Articles in Part III, such as Art. 14, or 20, but as regards Art. 19 the position is not so clear.

(i) Thus, as to Art. 14, the Court has held that though a person accused of an offence has no fundamental right to trial by a particular procedure, he is entitled to object to a procedural law on the ground of "discrimination" or "violation of any other fundamental right".⁶ All persons similarly situated are entitled to the same procedural rights for relief and for defence, and if a statute provides for a substantially different procedure, depriving him of rights enjoyed by persons accused of the same offence, the law is liable to be struck down (see Vol. I, p. 422).⁷

(3) *Gopalan v. State of Madras*, (1950) S.C.R. 88 (255).

(3a) *Makhan Singh v. State of Punjab*, A. 1964 S.C. 381.

(4) *Purshottam v. Desai*, A. 1956 S.C. 20.

(5) *Collector of Malabar v. Ibrahim*, A. 1957 S.C. 688 (690).

(6) *Shiv Bahadur v. State of V. P.*, (1953) S.C.R. 1188 (1200).

(7) *State of W. B. v. Anwar Ali*, (1952) S.C.R. 284; *Kathi Raning v. State of Saurashtra*, A. 1952 S.C. 123.

(ii) As to *Art. 20*,—the need for a law of criminal procedure to comply with the limitations contained in *Art. 20* was pointed out by Mukherjea [p. 255 of (1950) S.C.R. 88] and this has been already explained at pp. 3 *et seq.*

(iii) The need for compliance with *Art. 22* was acknowledged by all the Judges in *Gopalan's case*, and reiterated in subsequent cases.⁸

(iv) But as regards *Art. 19*, the proposition asserted in *Gopalan's case*⁹ and reiterated in subsequent cases¹⁰⁻¹² is that a law which deprives a person of his personal liberty comes *exclusively* under Arts. 21-22 and that the reasonableness of such law cannot be questioned under any clause of *Art. 19*. The reason given is that the rights guaranteed by *Art. 19* (1) are capable of being enjoyed only so long as a person remains *free*. As soon as he is deprived of his liberty as a result of detention, punitive or preventive, by a valid law passed under *Art. 21*¹² or *22*,¹⁴ he can no longer complain of any infraction of any of the rights conferred by *Art. 19* (1).

Thus, in *Ram Singh v. State of Delhi*,¹⁴ the Supreme Court observed—

"Although personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in *Art. 19* (1), and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil liberties as distinct from fundamental rights and made separate provisions in *Art. 19* and Arts. 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged. The interpretation of these Articles and their correlation was elaborately dealt with by the full Court in *Gopalan's case*..... It was decided by a majority of 5 to 1 that a law which authorises deprivation of personal liberty did not fall within the purview of *Art. 19* and its validity was not to be judged by the criteria indicated in that Article but depended on its compliance with the requirements of Arts. 21-22."¹⁴

It follows, therefore, that once it is found that a statute enacted under *Art. 21* is within the competence of the Legislature in question, *our* Courts would be powerless to question the *propriety* of the legislation on the ground that it seeks to 'unduly' restrict personal liberty. In short, there is no scope for judicial review of a law coming under *Art. 21* either under the provisions of *Art. 19* or under any general principles of natural justice. In the result, notwithstanding the importation of the doctrine of judicial review in *Art. 19* of *our* Constitution, the entire body of criminal laws would stand outside the reach of judicial review on the ground of 'reasonableness' in the same way as in *England*.

The only difference from the situation in *England* is that *ours* being a federal system under a written constitution, the powers of the Union and State Legislatures are limited by the respective Legislative Lists, and it is within the competence of the Courts to declare whether any Act is within the legislative powers of the Legislature concerned. So, unlike in *England*, *our* Courts shall have the power, notwithstanding the expression 'established by law',—

(a) To declare unconstitutional a law which exceeds the legislative competence of the Legislature concerned:⁹ or contravenes some other provision of the Constitution¹⁵ (which may be applicable).

(b) To declare unconstitutional a law which is only a *colourable* exercise of the power of the Legislature concerned:¹⁶ or contravenes some other provision of the Constitution¹⁵ (which may be applicable).

Thus, when a Legislature professes to take away personal liberty on the ground that preventive detention is necessary for the maintenance of 'public order' [Entry 3, List III], the acts which are sought to be prevented by such law must have a 'real and proximate',—not far-fetched or problematical—connection with the

(8) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708 (713).

(9) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

(10) *Ram Singh v. State of Delhi*, (1951) S.C.R. 451.

(11) *State of Punjab v. Ajaib Singh*, (1953) S.C.R. 254 (271).

(12) *Collector of Malabar v. Ibrahim*, A. 1957 S.C. 688.

(13) *Ram Chandra v. State of Bihar*, A. 1961 S.C. 1629.

(14) *Ram Singh v. State of Delhi*, (1951) S.C.R. 451.

(15) E.g., *Art. 22* [*Gopalan v. State of Madras*, (1950-51) C.C. 74 (83); *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708 (713)].

(16) As to 'colourable' exercise of a legislative power, see, further, under Part XI, Ch. I, *post*.

maintenance of public order. The recital in the Preamble of the Act is not conclusive to establish this connection; it is for the Courts to say whether the prevention of that particular activity has got a real and proximate connection with the maintenance of public order.¹⁷

"Whilst a statement in the preamble of a statute may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on the question of *vires*, where the Legislature concerned has powers to legislate on certain specified matters only. The Court must still see, in such cases, whether the subject-matter of the impugned legislation is really within those powers."¹⁸

But once it is held that the Legislature has not transgressed the powers assigned to it, it is not for the Court to criticise the wisdom and policy of the Legislature.¹⁹ The Court has got to decide on a consideration of the *true nature* and character of a legislation whether it is *really* on the subject to which it purports to relate. Once that point is decided in favour of the legislative authority and it is found that the legislation is within its legislative powers, there is nothing arbitrary in it, so far as a Court of law is concerned.¹⁹

But, as has been pointed out earlier (Vol. I, pp. 645-6), the interpretation of the word 'law' in Art. 21 as made in *Gopalan's case* is hardly consistent with the subsequent interpretation of the same word 'law' as it occurs in a similar context, in Arts. 31 (1)²⁰ and 265.²¹

It is one thing to say that the reasonableness of a law under Art. 21 cannot be questioned with reference to the doctrine of 'Due Process' because that is foreign to *our* Constitution; it is altogether a different thing to say that though other Articles of Part III of the Constitution shall be applicable to test the validity of a law falling under Art. 21, Art. 19 must be excluded.

Subsequent to the comments of the Author on the *Gopalan* limitation, a protest against it has been raised by Subba Rao and Shah JJ. in the minority, in *Kharak Singh's case*,²² as has been pointed out at pp. 722-3 of Vol. I of the 5th Ed. of this Commentary. In the later case of *Krishnachandra v. State of M.P.*,²³ again, a unanimous Court,²⁴ avoided the question of exclusion of Art. 19 by Art. 21 and approached the case from the other end: it was first held that the impugned law did not constitute an unreasonable restriction upon any of the rights guaranteed by Art. 19 and that, accordingly, there was no question of any violation of Art. 21. Since it was a penal law, the Court could have, following *Gopalan*,²⁵ easily said that since it was a law coming under Art. 21, no question of violation of Art. 19 could arise, but the Court did not do so.

There has thus been no direct answer as yet to the questions posed by the Author at pp. 81-2 of Vol. II of the 4th Ed. of this Commentary as follows—

"*Firstly*, the requirement of a procedural reasonableness with respect to a criminal law is not a conceptual absurdity. If the reasonableness of a taxing law, coming under Art. 265 can be questioned on the ground that it takes a property without a notice or hearing,²¹ in contravention of Art. 19 (1) (f), it is not absurd to urge that a law which prescribes a penal procedure for recovery of Government dues is an unreasonable restriction upon the right conferred by Art. 19 (1) (f), in that it gives the defaulter no opportunity of being heard, before he is arrested, as in *Collector of Malabar v. Ebrahim*.¹

What led the Court to hold that the common law giving inherent power to the High Court to punish for contempt is a 'law' within the meaning of Art. 21 only if a reasonable procedure is followed (p. 78, *ante*)?²

(17) *Rex v. Basudeva*, (1950) S.C.I. 47 (50).

(18) *Rex v. Basudeva*, (1950) S.C.J. 47 (50).

(19) *Lakhinarayan v. Prov. of Bihar*, (1950) S.C.J. 32 (43) F.C.

(20) *Kochunni v. State of Madras*, A. 1960 S.C. 1080.

(21) *Kunnathat v. State of Kerala*, A. 1961 S.C. 552.

(22) *Kharak Singh v. State of U. P.*, A. 1963 S.C. 1295 (1305), decided on 18-12-63.

(23) *Krishnachandra v. State of M. P.*, A. 1965 S.C. 307 (310).

(24) *Gajendragadkar, Wanchoo, Hidayatulla, Das Gupta & Shah JJ.*, decided on 25-1-63.

(25) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

(1) *Collector of Malabar v. Ebrahim*, A. 1957 S.C. 688.

(2) *Sukhdeo Singh v. Teja Singh*, A. 1954 S.C. 186 (190).

Secondly, the reasoning in *Gopalan's case*²⁵ was that Art. 19 cannot be invoked to test the reasonableness of a law coming under Art. 21, simply because if a person's liberty is taken away by a law, it is not possible for him to exercise any of the rights conferred by Art. 19 (1). But the same comment was made as regards the right of property with respect to the similar provision in Art. 31 (1), even the other day. In *Collector of Malabar's case*,¹ the Court observed—

"If the property itself is lawfully taken under Art. 31, the right to hold or dispose of it perishes with it and Art. 19 (1) (f) cannot be invoked".

But this view as regards Art. 31 has been overturned in *Kochunni v. State of Madras*,²⁰ holding that where the State seeks to take away a man's property by a law made under Art. 31 (1), he may contend that the law is procedurally or substantively unreasonable and hence inconsistent with Art. 19. The reason is that the 'law' under Art. 31 (1) must be a 'valid law', and the conditions of the validity of a law are two-fold,—(a) legislative vires or competence; (b) non-contravention of any of the Fundamental Rights guaranteed by Part III. One wonders why the same conclusion cannot be made as regards a 'law' depriving a person of his personal liberty. This fallacy in the *Gopalan*²⁵ argument is that because no question of the exercise by a person of his fundamental rights under Art. 19 (1) can possibly arise after his personal liberty has been taken away, therefore, Art. 19 cannot be applied to test the validity of a law coming under Art. 21. With respect, it is putting the cart before the horse. The Court is not going to test the validity of the penal law after assuming that the person's liberty has been validly taken away by the law; the Court merely seeks to discharge its duty of examining whether the law which aims at taking away the man's liberty is valid, being inconsistent with the standard of reasonableness laid down in Art. 19.

In *Kochunni's case*,³ Subba Rao J. realised that after demolishing the *Gopalan*⁴ theory with respect to Art. 31, it was difficult to maintain it with respect to Art. 21. It was clearly observed—

"On the basis of the said theories, this Court, with Fazl Ali J., dissenting, rejected the plea that a law under Art. 21 shall not infringe Art. 19 (1). Had the question been *res integra*, some of us would have been inclined to agree with the dissenting view expressed by Fazl Ali J.; but we are bound by this judgment."

Is it then simple inertia to overrule *Gopalan* that prevented Subba Rao J. from introducing the 'reasonableness' standard into Art. 19?

Even though the Court may not be willing to change its interpretation of the scope of Art. 19 (1) (d) as given in *Gopalan*,⁴ there are other sub-clauses in Art. 19 (1) which may be affected by a penal law under Art. 21. I have already shown its impact on sub-cl. (f), where the penal process relates to a default in paying Government dues. Similarly, sub-cl. (g) may be affected if a law seeks to introduce penal sanction for carrying on a business without licence, and so on.

One reason in support of *Gopalan*⁴ was reiterated by Subba Rao J. in *Kochunni's case*,³ namely, that there was no analogy between Art. 31 (1) and 21, inasmuch as Arts. 21-22 formed one self-contained code with respect to personal liberty. But if we look into the text of the Constitution itself, we find nothing to support any such theory. Even the drafting devices adopted by the makers of the Constitution do not suggest anything like this. There are sub-headings like 'right to equality', 'right against exploitation', to group together provisions of the same nature. There is no such sub-heading to separate Arts. 21-22 from Art. 19; on the contrary, Arts. 31-31B are separated by the sub-heading 'Right to Property'.

There is thus ample material for a reconsideration of the *Gopalan* stand as regards the applicability of Art. 19 (1) to a law depriving a person of his liberty under Art. 21, if ever the Supreme Court is minded to reopen the question instead of acceding to it as '*res integra*'".

(3) *Kochunni v. State of Madras*, A. 1960 S.C. 1080.

(4) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

Court's right to interfere when a person is deprived of liberty otherwise than according to procedure established by law.

Art. 21 says that a person may be deprived of his liberty only according to procedure established by law. It follows, therefore, that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law.⁵ And the Court, in a proceeding for *habeas corpus*, will set the prisoner at liberty whenever this has not been done.⁵ This principle has its application both in the case of punitive as well as preventive detention. Thus,—

(A) Punitive detention:

1. In *habeas corpus* proceedings, the legality or otherwise of the detention is to be determined by the Court with reference to the time of the return and not that of institution of the proceedings. Hence, where a Court adjourns a proceeding under s. 344 of the Criminal Procedure Code without making an order of remand to custody as required by that section, and there is no such order on the date of the return, the accused are entitled to be released on an application for *habeas corpus*.⁶

2. Under r. 41 of the Punjab Communist Detenu Rules, 1950, the Jail Superintendent was empowered to punish a detenu for 'jail offences'; if, however, he was satisfied that the offence was such that it was not adequately punishable by him, he might forward it to the Court of a Magistrate. Held, that where the Jail Superintendent had himself punished a detenu under this rule, he had no authority to refer the case again to a Magistrate, and any prosecution in such circumstances would be contrary to 'the procedure established by law' and, accordingly, invalid.⁶

(B) Preventive detention:

Similarly, in the case of preventive detention, if the detention is not in *strict conformity* with the law authorising detention, the detenu is entitled to be released. Thus, the violation of the following provisions of the Preventive Detention Act has been held to invalidate the detention—

(i) Failure to communicate the grounds to the detenu within a reasonable time, as required by s. 7.^{7a}

(ii) Where a detenu's case is considered by only two of the three members who constitute the Advisory Board constituted under s. 8 (2) of the Act.^{6b}

(iii) Failure to refer the detenu's case to the Board within the time fixed by s. 9 (1), even though the detenu may have been temporarily released under s. 14 (1).⁷

(iv) Where the period of detention was fixed in the initial order of detention.⁷

(v) Where the Government revoked a previous order of detention in conformity with the opinion of the Advisory Board, but by the same order, confirmed the detention under one of the sub-clauses of s. (1) (a) of the Act.⁸

(vi) When the order was not in conformity with s. 11 of the Act.⁸

(vii) Where any of the constitutional requirements of Art. 22, say, that of communicating the grounds to the detenu under Art. 22 (5) has not been complied with, with respect to any one of the grounds.⁹

Construction of Penal Statutes.

Though the strict rule that penal statutes ought to be *strictly* construed has been to a great extent relaxed in modern times owing to the predominance of the rule that *all* statutes should be construed fairly so as to effectuate the intention of the Legislature¹⁰ (see Vol. I, p. 34), there is still a strong desire on the part of the Courts to protect the life and liberty of a citizen by the application of the old doctrine at least in normal times, though in times of emergency different considerations would prevail.

(5) *Ram Narayan v. State of Delhi*, (1953) S.C.A. 399: (1953) S.C.R. 652.

(6) *Maqbool Hossain v. State of Bombay*, (1953) S.C.R. 730.

(6a) *State of Bombay v. Atmaram*, (1950-51) C.C. 139 (182).

(6b) *Kishorilal v. The State*, A. 1951 Assam 169 (170).

(7) *Makhan Singh v. State of Punjab*, (1950-51) C.C. 180 (181): (1950) S.C.R. 88.

(8) *Shibbanlal v. State of U. P.*, (1954) S.C.R. 418: (1952-54) 2 C.C. 321.

(9) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 712.

(10) Maxwell. *Interpretation of Statutes*, 9th Ed., pp. 267, 289.

(A) *In normal times.*—In normal times the Court would still act on the presumption against interference with the liberty of the subject.¹¹ The corollaries following from this presumption are—

(i) Where a criminal offence is created, it should be created in clear language. If the language is ambiguous, it ought to be construed in such a way as to restrict the ambit of the offence which the section creates.¹² When a clause or expression in a penal statute is capable of being interpreted either in favour of or against the accused, the former interpretation ought to prevail and the benefit of the ambiguity ought to be given to the accused.¹³⁻¹⁴ In the words of Lord Porter—"A man should not be put in peril on an ambiguity".¹⁵

In construing a Notification under the Essential Supplies (Temporary Powers) Act, Bose J. has observed—

"In a penal statute, it is our duty to interpret words of ambiguous meaning in a broad and liberal sense so that they will not become traps for honest, unlearned (in the law) and unwary men. If there is honest and substantial compliance with an array of puzzling directions, that should be enough even if on some hypercritical view of the law other ingenious meanings can be devised."^{15a}

(ii) Where there are two possible interpretations one of which would mitigate the penalty and the other aggravate it, the former should prevail.¹⁶

(iii) The Court will not supply even an obvious omission if to do so would render an accused person liable to conviction.¹⁷ "Where an enactment may entail penal consequences no violence must be done to its language in order to bring people within it but care must be taken that no one is brought within it who is not within its express language".¹⁸

(iv) When the Legislature has given power to the Executive to take any action it thinks fit but limits the right to take action only for a *definite purpose*, it will be the duty of the Court to scrutinise whether the power has been exercised for that definite purpose and to construe the restriction on liberty as narrowly as possible and limit it within the words used by the Legislature.¹⁹ The dissenting judgment of Lord Shaw in *R. v. Halliday*²¹ explains the classical principles relating to this point:

The appellant has been interned, without a trial, because he is of hostile origin or associations. Parliament *never said in words* one of those things. If Parliament had really meant to sanction internment without trial for the cause assigned it could have said so without the slightest difficulty, and not left a point which is so fundamental to be reached by inference . . ."

(v) Any provision of a law encroaching upon liberty of the subject, which seeks to oust the jurisdiction of the Courts will be strictly construed.²⁰ Ouster of jurisdiction of the Courts would not be inferred in the absence of *express* words to that effect in the statute.²¹ Should the statute be equally susceptible of two meanings, one leading to an invasion of the liberty of the subject, and the other not, the latter should be preferred on the ground of the presumed intention of the Legislature not to interfere with it.²²

Where, however, the words used by the Legislature are clear and unambiguous, the Court has no right to interfere by reading into the statute what is not there, so long as the powers conferred by the Legislature are used for the purposes for which they were meant.²³

(11) *R. v. Halliday*, (1917) A.C. 260 (291); *Marshall v. Blackpool Corpn.*, (1932) 1 K.B. 688; *Druce v. Beaumont Trust*, (1935) 2 K.B. 257.

(12) *Elderton v. Totalisator Co.*, (1945) 2 All E.R. 624 (C.A.).

(13) *L. & N. E. Ry. v. Berriman*, (1946) 1 All E.R. 268 (H.L.).

(14) *Behram Khurshed v. State of Bombay*, (1955) 1 S.C.R. 613.

(15) *Howell v. Falmouth Boat Construction*, (1951) 2 All E.R. 278 (281) H.L.

(15a) *Seksaria Cotton Mills v. State of Bombay*, A. 1953 S.C. 278 (282).

(16) *Hildesheimer v. Fau'kner*, (1901) 2 Ch. 552.

(17) *Crawford v. Spooner*, (1847) 6 Moo. P.C. 1; Maxwell, 8th Ed. 239.

(18) *London County Council v. Aylesbury Co.*, (1898) 1 Q.B. 106; *R. v. Chapman*, (1931) 2 K.B. 606.

(19) *Eshugbayi v. Govt. of Nigeria*, (1931) A.C. 662.

(20) *Chester v. Bateson*, (1920) 1 K.B. 829.

(21) *Paul v. Wheat Commrs.*, (1937) A.C. 139 (1953-5).

(22) *A. G. for Canada v. Hallet*, (1952) A.C. 427 (450).

(vi) Strict compliance with the formalities laid down by the statute will be required by the Courts.²³

(B) *In emergencies.*—The individual cannot, however, have any liberty safeguarded by the State when the existence of the State itself is in danger, e.g., by a war. In the case of *Liversidge v. Anderson*,²⁴ the bedrock of modern emergency decisions, the House of Lords observed—

"The fact that the nation is at war is no justification for any relaxation of the vigilance of the Courts in seeing that the law is duly observed, especially in matters so fundamental as the liberty of the subject. However, in a *time of emergency*, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the Courts would be slow to attribute to a *peacetime measure*. The *purpose* of the regulation is to ensure *public safety*, and it is right to interpret emergency legislation as to promote, rather than defeat, its efficacy for the *defence* of the realm. This is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time."²⁴

Hence, their Lordships held that to such a regulation there was no scope for the application of any presumption that the liberty of the subject must not depend on the unchallengeable opinion of the Secretary of State, and that the regulation was to be construed "without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention".^{24a} In an earlier case,^{24b} Greer, J. had said:

"Under circumstances such as these the notion that there is any effective presumption that Parliament did not intend to interfere with the liberty or property of the subject becomes so thin as to be described as the *shade of a shadow*, and disappears altogether when we find in the statute express words which show that the Legislature expressly authorised particular regulation which would of necessity restrict the liberty of the subject and his freedom to enjoy his normal rights over his real and personal property."^{24b}

Similarly, in upholding the validity of Regulations made under the Defence of the Realm Act, 1914, authorising the Home Secretary to intern persons without trial 'for securing public safety and the defence of the realm', the majority of the House of Lords had observed²⁵—

"It is beyond dispute that Parliament has the power to authorise the making of such a regulation. The only question is whether on a true *construction* of the Act it has done so It may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised It was urged that if the Legislature had intended to interfere with personal liberty it would have provided, as on *previous occasions* of national danger, for suspension of the rights of the subject as to a writ of habeas corpus. The answer is simple. The Legislature has *selected another way* of achieving the same purpose....."²⁵

Lord Maugham, in *Liversidge v. Anderson*,^{24a} put it more explicitly—

"The suggested rule (that legislation encroaching upon the liberty of the subject should be construed in favour of the subject) has *no relevance* in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved."²⁴

In the same strain said Lord Macmillan—

"However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in war or escape from national plunder or enslavement."^{24a}

Though the lone voice of Lord Shaw (in the minority) in *R. v. Halliday*²⁵ has thus been drowned by overwhelming opinion to the contrary, it is still remembered by lovers of liberty in all lands, contending for a strict construction of emergency statutes and a rigorous application of the doctrine of *ultra vires* to subordinate

(23) *Ram Narayan v. State of Delhi*, (1953) S.C.A. 399.

(24) *Liversidge v. Anderson*, (1942) A.C. 206 (218-9).

(24a) *Liversidge v. Anderson*, (1942) A.C. 206 (257), per Lord Macmillan, quoting *R.*

v. Halliday, (1917) A.C. 260, per Lord Atkinson.

(24b) *Hudson Bay v. Maclay*, (1920) 36 T.L.R. 469 (475).

(25) *R. v. Halliday*, (1917) A.C. 260.

legislation promulgated by the Executive in exercise of powers conferred by such statutes:

"The form in modern times of using the Privy Council as the executive channel for statutory power is measured, and must be measured strictly by the ambit of the legislative pronouncement. The author of the power is Parliament; the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires* . . . In so far as the mandate has been exceeded there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing rush of legislative efforts and the convenience of the executive of a refuge to the device of orders in council would increase the danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny."

Scope for Control of the Executive.

(A) U.S.A.

(i) The principal means of judicial control over executive action affecting an individual's life, liberty or property is the constitutional requirement of 'due process', which has already been explained (p. 67, *ante*).

(ii) Whether inside or outside the constitutional sphere of the 'Due process' clause, the doctrine of *ultra vires* (see Vol. I, pp. 365, *et seq.*) is a potent means of protecting the individual against arbitrary action of the Executive under colour of statutory authority. Thus, if the procedure¹ adopted by the Executive is not authorised by the statute or statutory instrument under which the act is purported to have done, or the conditions² imposed by the statute are not fulfilled, the act will be pronounced invalid.³

(iii) As explained elsewhere [see under Art. 52, *post*], according to the Supreme Court,² the Executive has no inherent or residuary power under the Constitution. The Court will annul any executive action affecting an individual if the Executive cannot point out either constitutional or legislative authority for such action.

(B) India.

1. Though the Courts would be powerless under *our* Constitution to nullify a legislative act affecting the life or liberty of the individual in the exercise of any power of judicial review as in the *United States* on the ground of 'due process' (see p. 79, *ante*), it will be the duty of *our* Courts, (as in *England*) to guard that "no member of the executive can interfere with the liberty or property . . . except on the condition that he can support the *legality of his action*",³ that is to say to see that the action of the Executive is in conformity with 'the procedure established by law' and to nullify such action as is not conformity with that procedure.⁴

2. Thus, though *our* Constitution does not guarantee the right to any particular procedure (see p. 78, *ante*), and though the Supreme Court has denied to itself the right to examine the reasonableness of any *law* depriving a person of his liberty, the Supreme Court has, in fact, interfered in many cases⁵⁻⁸ with *orders* depriving persons of their liberty on the ground that the procedure laid down by the law which authorised such deprivation had not been strictly followed [see p. 85, *ante*].

"Before a person is deprived of his life or personal liberty the procedure established by law must be *strictly* followed and must not be departed from to the disadvantage of the person affected."⁵

(1) *Peters v. Hobby*, (1955) 350 U.S. 551.

(2) *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) 343 U.S. 579.

(3) *Eshugbayi v. Govt. of Nigeria*, (1928) A.C. 459.

(4) *Gopalan v. State of Madras*, (1950) S.C.J. 174 (187); *Makham Singh v. State of Punjab*, (1950) S.C.R. 88; (1950-51) C.C. 180 (181); *Naranjan v. State of Punjab*, A.I.R. 1950 S.C. 106.

(5) *Makham Singh v. State of Punjab*, (1950) S.C.R. 88; (1950-51) C.C. 180.

(6) *Naranjan v. State of Punjab*, (1952) S.C.R. 395.

(7) *Ramnarayan v. State of Delhi*, (1953) S.C.R. 652.

(8) *K. Emp. v. Sibnath*, (1945) 72 I.A. 241; *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418.

"Those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law."⁸

3. So, it is the duty of the Court to see—

(i) That the Executive exercises its powers within the four corners of the statute which seeks to deprive the individual of his liberty, so that it may be said that the order complained against is one 'under the statute' by virtue of which the power is sought to be exercised.⁹

(ii) That the power has been exercised or the order made by an officer or authority who has been duly empowered by or under the statute.⁹

(iii) That every formality¹⁰ required by the legislation is complied with before the subject is deprived of his liberty, as well as the conditions subsequent, if any.¹¹ But when the condition precedent for the exercise of the power is the judgment or opinion or subjective satisfaction of the person upon whom the power is conferred, the Court cannot interfere with that judgment or opinion or inquire into the propriety of the grounds for forming such opinion,¹³ unless the person or authority exercises the power in bad faith or for a collateral purpose.¹² But an inference of bad faith may be made where it is shown that there were *no grounds* on which the authority could be satisfied as to the existence of the facts which was a condition precedent to his exercise of the statutory power.¹⁴

(iv) That the order is in conformity with the provisions of the statute under which it is made.¹⁵

(v) That the statutory power has been exercised *honestly*¹⁶ and not 'in fraud of the statute,¹⁶ or *mala fide*; or, in other words, that the power conferred by the statute has not been utilised for some indirect purpose not connected with the objects of the statute or the mischief it seeks to remedy.¹⁷

As Lord Reading said—

".....if it was clear that an act was done by the executive with the intention of *misusing* those powers, this court would have jurisdiction to deal with that matter."¹⁸

As to the meaning of *mala fides*, in this context, the Madras High Court has observed—

"In the case of the fraudulent execution of a statutory power as in the case of a fraudulent execution of a power to appoint under a deed or will or of any common law power, the fraud does not imply any moral turpitude; but consists in the exercise of the power for purposes foreign to those for which it is in law intended. Persons exercising such a power cannot be held responsible and the exercise of such power by them cannot be held invalid except on proof of *mala fides* or indirect motive or some improper conduct materially affecting such exercise."¹⁹

In any of the foregoing cases, the Court will set the prisoner free, by issuing the writ of *habeas corpus*, under Art. 226 or 32 (as the case may be).

4. The jurisdiction of the Courts to question the validity of the Executive order on any of the above grounds cannot be barred by the statute itself.²⁰ [See further, under Art. 32 (2)].

5. At the same time, in exercising this power of scrutiny, the Court cannot trespass upon the province which the Legislature has marked out as belonging

(9) *In re Banwarilal*, (1944) 48 C.W.N. 766 (119); *Narayanastwami v. Inspector of Police*, A. 1949 Mad. 307 (F.B.).

(10) *Enraght's Case*, (1881) 6 Q.B.D. 376.

(11) *In re Rajadhar*, A. 1948 Bom. 334 (F.B.); *Murat v. Prov. of Bihar*, A. 1948 Pat. 135 (F.B.); *Mani v. Dt. Magistrate*, A. 1950 Mad. 162 (164).

(12) *In re Banwarilal*, (1944) 48 C.W.N. 766 (782).

(13) *A. G. for Canada v. Hallet*, (1952) A.C. 427 (445).

(14) *Ross-Clunis v. Papadopoulos*, (1958) 2 All E.R. 23 (33) P.C.

(15) *Howell v. Falmouth Boat Construction*, (1951) 2 All E.R. 278 (281) H.L.

(16) *R. v. Halliday*, (1917) A.C. 260; *Liveridge v. Anderson*, (1942) A.C. 206; *K. Emp. v. Sibnath*, (1945) 8 F.L.J. 203 (P.C.); *Emp. v. Vimlabai*, A. 1946 P.C. 123.

(17) *Cf. Ashutosh Lahiry v. State of Delhi*, (1950) S.C.J. 433 (435), Mukherjee J.

(18) *R. v. Brixton Prison*, (1916) 2 K.B. 742.

(19) *In re Gopalan*, (1952) II M.L.J. 690 (699).

to the Executive. Nor can it take upon itself the duty of considering questions of policy which are essentially for the executive and not for a judicial tribunal.²⁰

Onus where imprisonment or detention is challenged.

Where a person who has been deprived of his liberty challenges the detention by a petition for *habeas corpus*, it is for the authority who has detained him to show that the person has been detained in exercise of a valid legal power. Once that is shown, it is for the detenu to show that the power has been exercised *mala fide* or improperly.²¹

What constitutes want of 'good faith'.

'Bad faith' in the present context has been interpreted to mean 'malice in law', i.e., inflicting a wrong or injury upon another person in contravention of the law, even though it may be without any malicious intention.²² Good faith is obviously wanting where there is a 'fraud on the statute', i.e., a misuse of the statute for a collateral purpose or a purpose other than that for which it was intended,—or, in other words, a 'colourable use' of the statute.^{20,23}

(a) When the condition precedent required by the statute is *objective*, the existence or not of the objective condition or facts and circumstances can be tested by the Courts, viz., whether the circumstances which called for the issue of the order existed in fact.²⁰ (b) But where the condition is *subjective*, viz., the state of the mind of the authority issuing the order, "he is alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called on to disclose to anyone but himself that these circumstances constituted a reasonable cause and belief";²⁴ in other words, the existence of the circumstances which called for the order cannot be questioned by the Courts in this latter (subjective) case,²⁵ and the only question left to the Court is whether the authority exercised the power in *good faith*. The Court cannot undertake an investigation as to the sufficiency of the materials on which such satisfaction was grounded.¹

I. In a case of subjective satisfaction, the *sufficiency* of the grounds which gave rise to the satisfaction of the authority is not a matter for determination of the Court, for, one person may be, though another may not be, satisfied on the same grounds.² Thus, orders of detention under the Preventive Detention Act, 1950, are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a Court, but which the law, taking into consideration the needs and exigencies of the administration, has allowed to be considered sufficient for the *subjective* decision of the Government. It is not for the Court to sit in the place of the Government and try to determine if it would have come to the same conclusion as the Government.¹ The making of a detention order should rest upon the Executive as they alone are entrusted with the duty of maintaining public peace. The Court can examine the grounds disclosed by the Executive only for two purposes—(a) to see if the grounds are *relevant* to the object which the legislation has in view; (b) to see whether the action of the Executive has been *mala fide*.¹

Where the authority is empowered to make an order upon a *subjective* condition, i.e., a particular state of his mind, e.g., 'on being satisfied' or 'having reasonable grounds for believing' that certain facts exist,—once an order asserting that state of mind and belief has been proved in a valid form, by production of a duly authenticated order, the onus is on the person challenging the *bona fides*

(20) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

(21) *R. v. Halliday*, (1917) A.C. 260.

(22) *Shearer v. Shields*, (1914) A.C. 808.

(23) *Puranlal v. Union of India*, (1958) S.C.R. 460.

(24) *Liversidge v. Anderson*, (1942) A.C. 206 (224).

(25) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

(1) *State of Bombay v. Atmaram*, (1951) S.C.R. 167.

(2) *Tarapada v. State of West Bengal*, (1951) S.C.R. 212: (1950-51) C.C. 150 (153).

of the order to disprove the existence of that state of mind. The onus is obviously more difficult than that of disproving an objective fact. Mere evidence of the applicant that he does not know that there are any reasons for the authority's belief, or denial that there are or can be any reasons for it, is not a sufficient discharge of the onus so as to call on the authority to explain and justify the assertion of his order.³

"The mere fact that the detenu challenges the factum or the *bona fides* of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot . . . make it incumbent on the Government to adduce evidence in support of the order."⁴

In a normal case, the recital of the existence of the subjective condition in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate.⁵ Nevertheless the detenu would succeed in proving want of *bona fides* if he can show that his case had never been placed before the authority so that he never had any opportunity of exercising his mind with respect to it,⁶ as to whether the detention of the person is or is not justified under the Act under which the authority purports to act;⁶⁻⁷ e.g., where the authority merely acts on the report of the police, and simply signs a cyclostyled form⁸ or mechanically signs grounds prepared by some clerk in his office⁹ or refers to *particulars* which are so incorrect as to show that the authority did not apply his mind at all.⁹ But a mere error in description of the name of the detenu or of his father does not necessarily show this.¹⁰ Further, an affidavit of the authority that he was satisfied from a perusal of the materials before him, is often sufficient to repel the allegation that he did not apply his mind.⁹ Thus, in a case where the ground supplied to a detenu patently referred to an event which had taken place subsequent to the order of detention, the Court nevertheless held that the allegation of *mala fides* was negatived by the affidavit of the District Magistrate.⁹

The detenu may also succeed if, of course, he proves personal malice or spite of the authority issuing the order,¹¹ or that the order was made for purposes other than those mentioned in the order.¹²

An order of detention is *mala fide* if it appears that the relevant material was not at all considered by the detaining authority at the time of passing the particular order.¹³

On the other hand, when a large number of persons were in detention under the Bengal Criminal Law Amendment Act, 1930, but the validity of that Act having been challenged Parliament passed the Preventive Detention Act, 1950, and fresh orders of detention were made under the latter Act, it could not be contended that merely because the fresh orders were made simultaneously in a large number of cases, the authorities could not have applied their minds to each individual case. There was no bad faith in this respect because the minds of the authorities had already been made up as to the expediency of detention when the original order under the Bengal Criminal Law Amendment Act had been made.¹³

An order is not *mala fide* merely because the order refers to past activities of the detenu as the ground of the order, because the satisfaction of the

(3) Ex parte Greene, (1942) A.C. 284; Ram Singh v. State of Delhi, (1951) S.C.J. 374 (380); (1950-51) C.C. 158 (162).

(4) Basanta v. King-Emp., A. 1945 F.C. 18.

(5) Emp. v. Sibnath, A. 1945 P.C. 156.

(6) Narayanaswami v. Inspector of Police, (1948) 11 F.L.J. 43 (62) (Mad.).

(7) In re Ghatge, A. 1951 Bom. 161; B. N. Mukherjee v. State, A. 1951 Nag. 1 (F.B.).

(8) Keshav v. Emp., A. 1945 Bom. 212.

(9) Cf. Ram Krishan v. State of Delhi, (1953) S.C.R. 708.

(10) Kameshwar v. Rex, A. 1948 All. 440; Jhala v. State, A. 1952 All. 12.

(11) Narayanaswami v. Inspector of Police, (1948) 11 F.L.J. 43 (62).

(12) Puranlal v. Union of India, A. 1958 S.C. 163 (172).

(13) Tarapada v. State of West Bengal, (1951) S.C.J. 233 (238).

detaining authority under the law of preventive detention is solely subjective, and it is not open to the Court to examine its sufficiency.¹⁴

Where the facts specified have no *prima facie* connection with the *ground* mentioned in the order of detention, it would at once appear that the authority did not apply his mind at all.¹⁵ Even where the authority has applied his mind but has acted upon considerations wholly irrelevant¹² to and outside the scope of the law under which he purports to act, the result is the same.¹⁶ Further, it should be noted that, apart from any question of *mala fides*, if the grounds on which the order has been made have no connection with the order, or have no connection with the circumstances or classes of cases under which the order could be made under the statute, the order would be bad for non-compliance with Art. 22 (5), *post*.¹⁶

Again, even in the case of a subjective condition, there must be a *recital* that the authority concerned has been satisfied that the facts calling for the order exist. Without such a recital, the order is not under the statute.¹⁷

II. Different considerations would prevail where the person making the arrest is a *Police-officer*. If a Police officer is empowered by a law to arrest a person without warrant on reasonable suspicion that such person has acted in a manner prejudicial to the public safety, the Court is entitled to enquire whether his suspicion was *reasonable* or not in the circumstances.¹⁸ The arrest would not be valid even if the Police officer acted *bona fide*,¹⁸ but not reasonably.

III. An order of detention may be held to be *mala fide* where a person while in jail custody is served with an order of detention under the Preventive Detention Act.¹⁹

Proclamation of Emergency and Art. 21.

In view of the Chinese aggression in NEFA, on October 26, 1962, the President made a Proclamation of Emergency, under Art. 352 (1).

Art. 359 (1) of the Constitution empowers the President to suspend the right to move any court for the enforcement of such of the fundamental rights as may be mentioned in his Order, for the period during which a Proclamation of Emergency is in operation.

In exercise of the above power, the President has made—

(a) G.S.R. 1418/30-10-62, which is as follows:

"In exercise of the powers conferred by clause (1) of article 359 of the Constitution, the President hereby declares that the right of any person who is—

(a) a foreigner, or

(b) a person not of Indian origin who was at birth a citizen or subject of any country committing external aggression against India, or of any other country assisting the country committing such aggression against India,

to move any court for the enforcement of the rights conferred by article 21 and article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of article 352 thereof on the 26th October, 1962 is in force.

Explanation.—In this Order,—

(a) the word "foreigner" has the meaning assigned to it in the Foreigners Act, 1946 (31 of 1946);

(b) the expression "a person not of Indian origin" means a person other than a person of Indian origin within the meaning of the *Explanation* to sub-section (1) of section 5 of the Citizenship Act, 1955 (57 of 1955)."

The result of this Order is that during the continuance of the Proclamation of Emergency made on October 26, 1962, no alien or a person not of Indian origin within the meaning of s. 5 (1) of the Citizenship Act, 1955 who commits aggression against India, shall not be entitled to move any Court for the enforcement of his rights under Art. s. 21 and 22. So far as these persons are concerned, these two

(14) *Bhim Sen v. State of Punjab*, A. 1951 S.C. 481.

(15) *Municipal Corpn. v. I. T. Commr.*, A. 1949 Bom. 37 (39).

(16) *Gopalan v. State of Madras*, (1950) S.C.J. 174 (197).

(17) *Cf. Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1340).

(18) *K. Emp. v. Vimlabai*, A. 1946 P.C. 123.

(19) *Cf. Makhan Singh v. State of Punjab*, A. 1964 S.C. 1120 (1124).

Articles, in short, shall remain suspended during the continuance of the Proclamation.

(b) G.S.R. 164/3-11-62, which, as amended by G.S.R. 1510/11-11-62 is as follows:

"In exercise of the powers conferred by clause (1) of article 359 of the Constitution, the President hereby declares that the right of any person to move any court for the enforcement of the rights conferred by article 14, article 21 and article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder."

The result of this Order is that if any person, including a citizen, is arrested or sentenced under the Defence of India Ordinance, 1962, he will not be entitled to move the Supreme Court, a High Court or any Court on the ground that his fundamental rights under Art. 14, 21 or 22 have been infringed. This Order thus affects not only aliens but citizens of India as well. But the suspension of the right will affect a citizen only if he has contravened a rule or an order issued under s. 5 of the Defence of India Ordinance, 1962.

III. The Defence of India Ordinance, 1962 was promulgated by the President on 26-10-62, with the following Preamble—

"An Ordinance to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences.

WHEREAS the President has declared by Proclamation under clause (1) of article 352 of the Constitution that a grave emergency exists whereby the security of India is threatened by external aggression;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance."

Rules were made under the Ordinance on the same day.

IV. The Defence of India Ordinance, 1962 has been replaced by the Defence of India Act, 1962, with certain additions and alterations, and the Defence of India Rules, framed under the Ordinance, have been adopted as Rules made in exercise of the power conferred by s. 38 of the Act.

But though Arts. 21 and 22 of the Constitution cannot be invoked²⁰ by a person against whom action under the Defence of India Act or the Rules or Orders made thereunder, it cannot be said that relief under Art. s. 226²¹⁻²² and 227²³ of the Constitution on other grounds, has been barred e.g., on the ground that the order issued against the Petitioner was *ultra vires*,²⁰⁻²¹ or *mala fide*.^{20,24}

Relief may, accordingly, be available to such person on the following grounds, *inter alia*,—

(a) That the Order or Rule which is alleged to have been contravened has not been notified by the Central Government under r. 155 (b).²⁵

(b) That the decision to continue the detention of a person under r. 30A (8) has not been reduced into writing²¹ or that such order does not show a clear and unambiguous decision of the appropriate authority to continue the detention^{21, 1}

(c) That the person on whom an order under r. 30 (1) (b) has been served is already in jail custody, so that it cannot be said that, but for such order he would be free to carry on prejudicial activity of the character specified in the Rule.²⁻³

But there is nothing illegal if the order under r. 30 (1) (b) is made after the prisoner is released on bail³ or after the prisoner is acquitted in the pending criminal proceedings.²

(20) *Makhan Singh v. State of Punjab*, A. 1964 S.C. 381.

(21) *Biren Dutta v. Chief Commr.*, (1965) 1 S.C.A. 32.

(22) *Godavari v. State of Maharashtra*, A. 1964 S.C. 1128 (1131).

(23) *Bhagwan Singh v. State*, A. 1965 Punj. 86.

(24) *Sobran Lal v. State of Bihar*, A. 1964 Pat. 237; Cf. C 4, Vol. 5, pp. 194-6.

(25) *Betal Singh v. State*, A. 1965 All 78.

(1) *Harkishan v. State of Punjab*, A. 1964 Puni. 198 (205).

(7) *Rameshwar v. D. M.*, A. 1964 S.C. 334.

(3) *Makhan Singh v. State of Punjab*, A. 1964 S.C. 1120 (1124).

Additional guarantees to safeguard life and liberty, under other Constitutions.

It would be profitable, in this connection, to refer to certain other guarantees to safeguard personal liberty which exist under *other* Constitutions but are absent in ours. Thus,—

(i) There is, under *our* Constitution, no guarantee of any right to trial in the ordinary Courts of law or the right of access to the ordinary Courts, as exists in some Constitutions (see Vol. I, p. 468, *ante*). In the U.S.A., though there is no specific prohibition against the creation of extraordinary tribunals, the right of the individual is safeguarded by the guarantee of the right to jury trial [Art. III, s. 2 (3); Amendments V and VI] and the interpretation of due process as including 'an indefeasible right of access to the ordinary Court'.³⁻¹⁸

Nor is there under *our* Constitution any direction upon the Legislature as to the circumstances under which it may create special Courts, as is contained in Art. 38 (3) (1) of the Constitution of *Eire* 1937, which says:

"Special Courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order."

So, the Legislatures, under *our* Constitution shall be free not only to create special Criminal Courts for the trial of particular offences, notwithstanding the existence of the ordinary Courts, but also to empower the Executive to decide what offences or classes of offences or classes of cases shall be triable by the special Courts created by the Legislature. [As to the limitations imposed upon this power by Art. 14, see Vol. I, pp. 470-4].

(ii) It has just been pointed out that in the U.S.A., the right to trial by a Jury in all cases of crimes, is guaranteed by Art. III, s. 2 (3) of the Constitution, amplified by the 5th and the 6th Amendments, though, of course, it has been held that the right may be *waived* by the accused.¹⁹

But under *our* Constitution, there is no corresponding constitutional guarantee of any right to trial by Jury. Though the general law of procedure embodied in the Cr. P. Code (s. 269) prescribes such trial in the cases of certain offences, which are known as 'Sessions' cases, there is no limitation upon the power of the State to dispense with such trial in the case of such offences or of some of them, provided only the Legislature has any reasonable basis for such discrimination, having regard to the object of the legislation²⁰ (see Vol. I, p. 452), and does not proceed against some only of the persons who may commit the same offence or offences.²¹

It should be mentioned that most of the States in India have, by this time, abolished trial by Jury, by non-discriminatory notifications issued under s. 269, Cr. P. C.

(iii) Another analogous right guaranteed by the Constitution of the *United States* is the right to a 'public trial', in all criminal prosecutions. This safeguard is provided in order to prevent 'Star Chamber practices'.²² The purpose of a public trial is for the public to see that the defendant receives a square deal, and that the presence of the public may remind both witnesses, jurors and even the Court of their responsibilities.²³ The right has been so steadfastly upheld that a conviction has been set aside by a federal Court²⁴ for violation of this right, where in a case relating to a sordid sexual offence the Court excluded from the Court room *all* persons excepting court officers and those having connection with the case, seeing that amongst the persons present in Court were many young girls.

The Constitution of *India* does not guarantee any such right and the Legislature is free to enact that the trial of any particular classes of cases shall be heard

(3-18) *Ex parte Young*, (1908) 209 U.S. 123.

(19) *Patton v. U. S.*, (1930) 281 U.S. 276.

(20) *Lachmandas v. State of Bombay*, A. 1952 S.C. 235 (244).

(21) *Dhirendra v. Legal Remembrancer*, (1955) 1 S.C.R. 224.

(22) *Davies v. U. S.*, (1917) 247 Fed. 394.

(23) *In re Oliver*, (1948) 333 U.S. 257.

(24) *U. S. v. Kobli*, (1949) 172 F. 2d. 919.

in camera. As in England, the Court itself has the power to exclude the public or to hear any case in camera "where the presence of the public would make the administration of justice impracticable",²⁵ e.g., where there is apprehension of public disturbance. This does not mean that the Court has got discretion to hear any case in public or in camera. The rule should be to observe the salutary principle of public trial where the litigation is between two parties. As Lord Haldane observed—

"The broad principle is, that the courts of this country must, as between parties, administer justice in public."²⁶

(iv) Yet another limitation upon the power of the Legislature under the American Constitution to enact laws against personal liberty is that provided in ss. 9-10 of Art. I of the Constitution which says that

"No Bill of attainder shall be passed."²⁷

It prohibits the Legislature from adjudging a man guilty and inflicting punishment upon him, without going through the ordinary process of a judicial trial.²⁸ The Legislature, in short, cannot assume the function of a Judge as well, for the purpose of punishing particular individuals.

Though our Constitution has no express provision condemning a Bill of Attainder, our Supreme Court has rendered it impossible for the Legislature to make any attempt to make any law simulating a bill of attainder, by applying the provision of Art. 14 against 'ad hoc' legislation (see Vol. I, p. 474, ante).

(v) The Eighth Amendment to the American Constitution says—

"Excessive bail shall not be required....."

It has been held that a pre-trial bail which is unusually higher than an amount which may be reasonably calculated to assure the presence of the accused at the trial is 'excessive'.²⁹ Unless the right to a reasonable bail is preserved, the presumption of innocence and the right to freedom before conviction would lose its meaning.³⁰

The above provision, however, applies only to criminal proceedings, so that an alien arrested for deportation may be held without bail pending determination of his liability to be deported.³¹

(vi) The Eighth Amendment to the American Constitution says—

"... nor cruel and unusual punishments inflicted".

Execution of a sentence in a cruel manner has also been held to violate 'due process'.³²

The Supreme Court has refused³³ to exhaustively enumerate what modes of punishment would be regarded as cruel, except that it would include any kind of punishment by torture,³⁴ or lingering death, e.g., burning at the stake, crucifixion, breaking on the wheel.³⁵ In some cases, it has even been held that a penalty or judicial sentence which is grossly disproportionate to the offence in question, would come within the present prohibition, e.g., a sentence of imprisonment for 20 years for a false entry in a public record.³⁶ The widest application of the principle has been made in a recent case³⁷ to hold that the denationalisation of a citizen as a punishment for an offence must be regarded as a 'cruel and unusual punishment', which means nothing else than a punishment

(25) Cf. Stephen's Commentaries, 1938, Vol. I, p. 58.

(1) *Scott v. Scott*, (1913) A.C. 427.

(2) This safeguard was included in the American Constitution to prevent resort to the English practice which attained notoriety during the time of the Stuarts but which has since become obsolete (see Keith, Constitutional Law, 1939, p. 245).

(3) *U. S. v. Lovett*, (1946) 328 U.S. 303.

(4) *Stack v. Boyle*, (1951) 342 U.S. 1.

(5) *Carlson v. London*, (1952) 342 U.S. 524.

(6) *Louisiana v. Resweber*, (1947) 329 U.S. 459.

(7) *Wilkerson v. Utah*, (1879) 99 U.S. 130 (135).

(8) *Re Kemmler*, (1890) 136 U.S. 436 (446).

(9) *Weems v. U. S.*, (1910) 217 U.S. 349 (371).

(10) *Trop v. Dulles*, (1957) 356 U.S. 86.

beyond the limits of civilised standards, even though no physical torture is involved.

On the other hand, it has been held that punishment of death by shooting⁷ or electrocution⁸ is not cruel, even where a previous attempt to execute by electrocution failed for accidental mechanical failure.⁶

Art. 36 of the *Japanese Constitution* provides—

“The infliction of torture by any officer and cruel punishments are *absolutely* forbidden.”

As in the *U.S.A.*, the Japanese Supreme Court has held that a punishment of death as such is not a ‘cruel’ punishment and that it is sanctioned by Art. 31.¹¹

(vii) It has been deduced from the guarantee of ‘Due Process’ that the security of one’s privacy in his own home against arbitrary intrusion by the police is basic to a free society.¹²

INDEX TO COMMENTS

ARTICLE 21.

Other Constitutions :

(A) England, 66 ; (B) *U.S.A.*, 68 ; (C) *Eire*, 76 ; (D) *U.S.S.R.*, 76 ; (E) *West Germany*, 76 ; (F) *Japan*, 77.

India :

Object of Art. 21, 77 ; Scope of Art. 21, 77 ; ‘Life’, 77 ; ‘Personal Liberty’, 78 ; ‘Deprived’, 78 ; ‘Procedure established by law’, 78 ; ‘Established by law’, 79 ; Whether a law made under Art. 21 is subject to other Fundamental Rights included in Part III, 81.

Court’s right to interfere when a person is deprived of liberty otherwise than according to procedure established by law, 85 ; Construction of penal statutes, 85 ; Scope for control of the Executive: (A) *U.S.A.*, 88 ; (B) *India* 88.

Onus where imprisonment or detention is challenged, 90 ; What constitutes want of ‘good faith’, 90.

Additional guarantees to safeguard life and liberty, under other Constitutions, 92.

Proclamation of Emergency and Art. 21, 92 ; Additional Guarantees to safeguard life and liberty, under other Constitutions, 94.

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Protection against arrest and detention in certain cases.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

- (a) to any person who for the time being is an enemy alien ; or
- (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

- (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

(11) *State v. Murakami*, (1948) 2 Sup. Ct. Rep. 191.

(12) *Stefanelli v. Minard*, (1951) 342 U.S. 117.

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

- (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

¹³(7) Parliament may by law prescribe—

- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4).
- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
- (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Arts. 21 and 22.

Art. 22 provides a limitation upon the power of the Legislature conferred by Art. 21, to make any law as to deprivation of personal liberty. Any such law must not contravene the conditions or limits imposed by the present Art. 22. The proper mode of construction as between Arts. 21 and 22 is that—

“to the extent the procedure is prescribed by Art. 22, the same is to be observed: otherwise Art. 21 will apply..... If the Legislature prescribes a procedure by a validly enacted law and such procedure in the case of Preventive Detention does not come in conflict with the express provisions of Part III or Art. 22 (4) to (7), the Preventive Detention Act must be held valid notwithstanding that the court may not fully approve of the procedure prescribed under such Act.”¹³

In other words—

“The Constitution of India has given legislative powers to the States and the Central Government to pass laws permitting preventive detention. In order that a legislation permitting preventive detention may not be contended to be an infringement of the Fundamental Rights provided in Part III of the Constitution, Article 22 lays down the permissible limits of legislation empowering preventive detention. Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and as and when such requirements are not observed the detention, even if valid *ab initio*, ceases to be “in accordance with procedure established by law” and infringes the fundamental right of the detenu guaranteed under Articles 21 and 22 (5) of the Constitution.”¹³

“Art. 21 is applicable to preventive detention except in so far as the provisions of Art. 22

(13) *Gopalan v. State of Madras*, (1950) S.C.R. 88 (Kania C.J.): (1950-51) C.C. 74 (133).

(4) to (7) either expressly or by necessary implication exclude its application, with the result that a person cannot be deprived of his personal liberty even for preventive purposes, 'except according to procedure established by law.' Part of such procedure is provided by the Constitution itself in cls. (5) and (6) of Art. 22 If this procedure is not complied with, detention may be held to be unlawful as it would then be deprivation of personal liberty which is not in accordance with the procedure established by law."¹⁴

Consequently, in a case of preventive detention, the procedure prescribed by the law under which the detention is made must be strictly followed, and if this is not done, the person detained is entitled to be released by the Court.¹⁵⁻¹⁶

Arts. 19 and 21-22.

It has already been pointed out (p. 82, *ante*), that Arts. 21-22 have been construed as independent provisions, not governed by anything in Art. 19.¹⁵ This view has been reiterated by the Supreme Court in the case of *Ram Singh v. State of Delhi*,¹⁷ holding that even though a restriction upon the freedom of expression may be invalid owing to the fact that the ground for the restriction is not covered by Art. 19 (2), the same ground may justify preventive detention, for Art. 22 is not limited by any such consideration, and in *Kochuni v. State of Madras*,¹⁸ holding that the reasonableness of a law coming under Art. 21 or 22 cannot be questioned under any of the clauses of Art. 19 [see p. 82, *ante*].

Scope of Art. 22: Safeguards against arbitrary arrest and detention.

This Article has two parts: One part deals with persons arrested under the ordinary law of crimes and another deals with persons detained under a law of 'preventive detention'.

(A) *Ordinary law*: Cls. (1)-(2) provide certain constitutional *limitations* upon the Union and State Legislatures to make any law of procedure (under Entry 2 of List III, read with Art. 21) for depriving a person of his personal liberty. These are: (i) The arrested person must, as soon as may be after arrest, be informed of the grounds of his arrest. (ii) He must be produced before a Magistrate, within 24 hours of his arrest (excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate) and then an order of the Magistrate confirming the arrest must be obtained. (iii) The arrested person must be given the opportunity to consult a legal practitioner and to defend himself.

(B) *Law of preventive detention*: Cls. (4)-(6) provide certain limitations upon the Union and State Legislatures to make any law providing for 'preventive detention', e.g., detention without trial, under Entries 9 of List I and 3 of List III,—to prevent 'arbitrary arrests' by the Executive under cover of such laws. These limitations are: (i) Government is ordinarily entitled to detain a person in custody only for 3 months. But Parliament is entitled to make a general law laying down in what classes of cases, the detention may exceed three months. (ii) Apart from such law of Parliament [Cl. (7) (a)], Government may detain a person beyond 3 months, without trial, only if it obtains the report of an Advisory Board that there is sufficient cause for such detention [Cl. (4) (a)]. (iii) The authority making the detention shall, as soon as may be, communicate to the detenu the grounds of his detention and offer him an earliest opportunity to make representation against such order of detention [Cl. (5)]. But the authority will not be bound to disclose facts which may be considered by itself to be against the public interest to disclose [Cl. (6)]. Persons detained under a law of preventive detention shall not be entitled to the protection of Cls. (1)-(2). [Cl. (3) (b)].

(14) *State of Bombay v. Atmaram*, (1951) S.C.R. 167 (189).

(15) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

(16) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 604 (609).

(17) *Ram Singh v. State of Delhi*, (1951) S.C.R. 451: (1950-51) C.C. 158.

(18) *Kochuni v. State of Madras*, A. 1960 S.C. 1080 (1092).

It is for the Courts to jealously guard that the above limitations are not violated by the Executive or the Legislature. For,

"Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court."¹⁸

CLAUSE (I).

OTHER CONSTITUTIONS¹⁹⁻²⁰

(A) U.S.A.—The 6th Amendment to the Constitution provides—

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public²¹ trial, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."

(a) By speedy trial is meant trial with such a reasonable speed as is consistent with due course of justice.²²

It has been held that the right to speedy trial is denied if a person is sought to be tried upon a charge brought six years earlier, if the delay was deliberately made to have the accused tried before a court more likely to convict,²³ but not where the delay is accidental.²⁴

Besides, an arraignment before a judicial officer 'without unnecessary delay' after arrest is required by statutory rules, so that the arrested person may be advised of his rights and the cause for his arrest may be promptly determined,²⁵ without giving the Police an opportunity for the extraction of a confession.

(b) The right to be informed of the nature and cause of accusation means that the police must with reasonable promptness show legal cause for detaining an accused person,¹ i.e., a specification of the charge against him so that he may decide whether he should present his defence by motion to quash, demurrer or plea.² This guarantee has been used to quash conviction upon vague and obscure charges.³

(c) The 'right to counsel' implies not merely that the accused shall have the right to engage a lawyer where he has the means to do so, but also a right to have a lawyer engaged by the Court, where the accused is not in a position to pay for the legal advice.⁴ This right, under the Sixth Amendment, extends to all criminal proceedings in a federal Court, irrespective of the nature of the offence involved, unless, of course, the accused clearly⁵ waives his right⁴ (see *post*). Any indirect infringement of the right is not tolerated, e.g., where one counsel is assigned to represent more than one accused whose interests are not identical.⁶

The 6th Amendment is addressed to the Federal Government. In the case of State Courts, the right to counsel has been deduced from the 'Due Process' requirement of the Fourteenth Amendment⁴ [see p. 73, *ante*]. But whether the 6th or the 14th Amendment applies, the standard is the same, viz., that of a fair trial.⁷

The requirement of fair trial involves two things—(a) an opportunity to the accused to secure a counsel of his own choice; (b) the duty of the State to provide

(19) See also Art. 114 of the Weimar; Art. 5 of the Yugoslav; Art. 74 of the Danzig, Constitutions.

(20) Article 9 (3) of the Covenant on Human Rights, 1950 says—

"Any one who is arrested shall be informed promptly of the reasons for his arrest and of any charges against him."

(21) As to the right to 'public trial', see p. 94, *ante*.

(22) *Beavers v. Haubert*, (1905) 198 U.S. 77 (87).

(23) *U. S. v. Provoe*, (1955) 215 F. 2d. 531.

(24) *Pollard v. U. S.*, (1956) 352 U.S. 354 (361).

(25) *Mallory v. U. S.*, (1957) 354 U.S. 449.

(1) *McNabb v. U. S.*, (1943) 518 U.S. 332 (343).

(2) *U. S. v. Cruikshank*, (1876) 92 U.S. 542 (559).

(3) *U. S. v. Lattimore*, (1955) 127 F. Supp. 405 (522).

(4) *Johnson v. Zerbst*, (1938) 304 U.S. 458.

(5) *Von Moltke v. Gillies*, (1948) 332 U.S. 708.

(6) *Glasser v. U. S.*, (1942) 315 U.S. 60.

(7) *Massey v. Moore*, (1954) 348 U.S. 105 (108).

a counsel to the accused in certain cases. These two rights of the accused may be dealt with separately:

(a) In every case, irrespective of the gravity of the offence, the Court⁸ must offer the prisoner *reasonable* time and opportunity to secure a counsel of his own.⁹ This right is unqualified¹⁰ and any violation of this right vitiates the trial.¹¹

(b) As to the right to have a counsel appointed by the Court at the cost of the State, a distinction has been made, under the 'Due Process' Clause, between cases involving *capital* punishment and other cases.

(i) In *capital* cases, it is the duty of the Court to employ a counsel and give him reasonable time and opportunity to take instructions from the accused.¹² This is an absolute right of the accused, irrespective of the circumstances surrounding the trial.¹³

(ii) In *other than capital cases*, there is no inexorable rule that the Court must provide a counsel for defence in every case.¹⁴ But such obligation on the part of the Court will arise

"where there are *special circumstances* showing that, otherwise, the defendant would not enjoy that fair notice and adequate hearing which constitute the foundation of due process of law in the trial of any criminal charge."¹⁵

The question of unfairness has thus to be determined according to circumstances:

"Where the gravity of the crime and other factors—such as the age¹⁶ and education¹⁷ of the defendant,^{18,19} the conduct of the Court or the prosecuting officials,^{20,21} and the complicated nature of the offence²² charged and the possible defences²³ thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair,..... the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel."²⁴

One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without the benefit of counsel.²⁵

The constitutional guarantee has been held to include not only the right to have a fair opportunity to secure a counsel of his own choice²⁵⁻¹ but also the right to consult him privately and any violation of this right vitiates the trial *without proof* of actual prejudice resulting from denial of the right.² Thus, the presence of an agent of the prosecution at the pre-trial conference of the accused with his counsel was held sufficient for quashing trial.³ The right which is guaranteed by the Constitution is the right to have 'effective' counsel,^{4,5} and the question whether the right has been denied is one of *substance*. Assistance of counsel is effective only where the accused is afforded a reasonable opportunity to consult with the counsel and counsel is afforded such opportunity to consult with the accused and to prepare his defence.^{4,6} The right is not complied with where the counsel offered by the Court is not devoted to the interests of the accused, *e.g.*, where he is a government representative⁷ or also represents a co-accused whose defence is in conflict with that of the accused.²

(8) *Gibbs v. Burke*, (1949) 337 U.S. 773.

(9) *Powell v. Alabama*, (1932) 287 U.S. 45.

(10) *Palko v. Connecticut*, (1937) 302 U.S. 319.

(11) *Chandler v. Fretag*, (1954) 348 U.S. 3 (9).

(12) *Powell v. Alabama*, (1932) 287 U.S. 45; *De Meerleer v. Michigan*, (1947) 329 U.S. 663.

(13) *Johnson v. Zerbst*, (1938) 304 U.S. 458 (468).

(14) *Betts v. Brady*, (1942) 316 U.S. 455.

(15) *Bute v. Illinois*, (1948) 333 U.S. 640 (677).

(16) *De Meerleer v. Michigan*, (1947) 329 U.S. 663.

(17) *Marino v. Ragen*, (1947) 332 U.S. 561.

(18) *Wade v. Mayo*, (1948) 334 U.S. 672.

(19) *Palmer v. Ashe*, (1951) 342 U.S. 134.

(20) *Townsend v. Burke*, (1948) 334 U.S. 736.

(21) *Rice v. Olson*, (1945) 324 U.S. 786.

(22) *Gibbs v. Burke*, (1949) 337 U.S. 773.

(23) *Uveges v. Pennsylvania*, (1948) 335 U.S. 437.

(24) *Massey v. Moore*, (1954) 348 U.S. 105.

(25) *Powell v. Alabama*, (1932) 287 U.S. 45.

(1) *Chandler v. Fretag*, (1954) 348 U.S. 3.

(2) *Glasser v. U. S.*, (1941) 315 U.S. 60.

(3) *Coplon v. U. S.*, (1951) 191 F. 2d. 749.

(4) *Avery v. Alabama*, (1940) 308 U.S. 444.

(5) *Hawk v. Olson*, (1945) 326 U.S. 271.

(6) *House v. Mayo*, (1945) 324 U.S. 42.

(7) *Von Moltke v. Gilles*, (1948) 332 U.S. 708.

The right to assistance of counsel exists at every stage of the trial, from the arraignment⁸ up to the sentence,⁹ and the right subsists whether the accused requests for counsel or not.⁹ A denial of this right even in the pre-trial proceedings¹⁰ violates due process if the accused is so prejudiced that his subsequent trial is infected with an absence of "that fundamental fairness (which is) essential to the very concept of justice."¹⁰⁻¹¹

But the right to counsel may be expressly *waived* by the accused, provided he does it voluntarily,¹² competently,¹³ with full comprehension of all the facts and circumstances which are essential to a proper understanding of his right and its waiver, e.g., the nature of the charges, the range of punishment prescribed for the offence and the like,⁷ and with the approval of the Court which has the duty to satisfy itself that all the foregoing conditions have been satisfied.^{7, 13} Waiver is not dependent upon a plea of guilty or not guilty.⁸ Pleading guilty of one charge does not constitute waiver of the right to counsel as regards other charges.¹⁴ The failure of an insane person without counsel to raise the question of his insanity on appeal does not operate as waiver of his constitutional right to counsel.¹⁵ Where right to counsel is found to be an element of 'due process' a finding of waiver of the right is not to be lightly made.¹⁶

(B) *England.*—(a) It is a fundamental principle of English common law¹⁷ that a citizen who is *prima facie* entitled to personal freedom is also entitled to know why for the time being his freedom is interfered with. The object of the right to be informed of the cause of arrest is to enable the person to take immediate steps for regaining his freedom.¹⁷

(i) If the arrest was authorised by a magisterial warrant or if proceedings were instituted by the issue of a summons, the warrant or summons must specify the offence and, in normal cases, the warrant has to be read to the person arrested.¹⁷ This principle is now embodied also in the Criminal Justice Act, 1925.

(ii) The same principle applies when a policeman or a private person arrests another person on suspicion (where the law authorises such arrest). In all such cases, the person who makes the arrest must, as a rule, inform the arrested person of the true ground of his arrest and, in default of such information, the person who makes the arrest is liable for false imprisonment¹⁷ except where the person arrested himself produces a situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away,¹⁷ or where the circumstances of the arrest are such that the person must know the reason already, e.g., where he is caught red-handed. It is not necessary to communicate a formal charge, clothed in any technical language,¹⁷ but the arrested person is entitled to know the substance of the alleged offence for which he is arrested.¹⁷

(b) At common law, a prisoner had no right to be defended by a counsel. Exceptions have, however, been engrafted by statutes. Thus, in 1695, a statute permitted one accused of treason to be defended by a counsel, and in 1836, the right was extended to persons accused of summary offences and charges of felony. Next, the Poor Prisoners' Defence Act, 1930, provided for the supply at public expense of legal aid to poor persons accused of crime. Finally, came the Legal Aid and Advice Act, 1949, which has been already noted (Vol. I, p.).

Thus, though there is no right to have a counsel to be appointed by the Court, there is a right to engage counsel for defence, and there are statutory provisions to make a counsel available to persons of low income.

(8) *Spans v. N. Y.*, (1958) 360 U.S. 315 (325).

(8a) *Center v. Illinois*, (1946) 329 U.S. 173.

(9) *Rice v. Olson*, (1945) 324 U.S. 728.

(10) *Crooker v. California*, (1957) 357 U.S. 433.

(11) *Lisenba v. California*, (1941) 314 U.S. 219.

(12) *Bute v. Illinois*, (1948) 333 U.S. 640.

(13) *Johnson v. Zerbst*, (1938) 304 U.S. 458.

(14) *Chandler v. Fretag*, (1954) 348 U.S. 3.

(15) *Massey v. Moore*, (1954) 348 U.S. 105 (109).

(16) *Moore v. Michigan*, (1957) 355 U.S. 155 (161).

(17) *Christie v. Leachinsky*, (1947) 1 All E.R. 567 (571, 575), H.L.

(C) *Japan*.—Art. XXXIV of the Japanese Constitution, 1946, says—

"No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel."

Art. XXXVII further provides—

"At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State".

(D) *Czechoslovakia*.—Art. 3 (2)-(3) of the Czechoslovak Constitution of 1948 provides—

"(2) Unless caught in the act of committing an offence, no person shall, be arrested except on the written order of a judge, giving the reason therefor. The order shall be delivered at the time of the arrest or, if this is not possible, within 48 hours thereafter.

(3) No person shall be taken into custody by a public official except in the cases prescribed by law; he must then be either released within 48 hours or brought before a court or authority which is competent to proceed with the case from the view of its nature."

(E) *West Germany*.—Art. 104 of the West Germany Constitution (1948) provides—

"(2) Only the judge shall decide on the admissibility and continued duration of a deprivation of liberty. If such deprivation is not based on the order of a judge, a court decision must be obtained without delay. The police may, on its own authority, hold no one in custody beyond the end of the day following the arrest. Details shall be regulated by legislation.

(3) Any person temporarily detained on suspicion of having committed a punishable act must, at the latest on the day following the arrest, be brought before a judge who shall inform him of the reasons for the arrest, interrogate him, and give him an opportunity to raise objections. Without delay, the judge must either issue a warrant of arrest setting out the reasons thereof, or order his release."

The right to legal advice is not explicitly guaranteed by any provision of the Constitution, but is ensured by the ordinary law, e.g., the Code of Criminal Procedure. Nevertheless, the Federal Constitutional Court has interfered on the ground that the guarantee of 'equality before the law' [Art. 3 (1)] has been violated where owing to poverty or like circumstances, an accused had no legal assistance at a trial.

INDIA

Scope of Cl. (1): Safeguards against arrest.

The language of cls. (1) and (2) of this Article suggests that the fundamental right conferred by this Article gives protection against such arrests as are effected otherwise than under a warrant issued by a Court on the allegation or accusation that the arrested person has or is suspected to have committed, or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest. In other words, there is indication in the Article that it was designed to give protection against the act of the *executive or other non-judicial authority*.¹⁸

Two conditions are necessary for the application of cls. (1)-(2):

(i) The arrest must have been made without warrant of a Court.¹⁸

(ii) The person must have been taken into custody on the allegation or accusation of an actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or some act prejudicial to the public interest.¹⁸

(i) Cls. (1)-(2) do not apply to arrests made under a warrant of Court,—for a person arrested under warrant of a Court is made acquainted with the grounds of his arrest before the arrest is actually effected.¹⁸ (See, however, p. 108, *post*).

(18) *State of Punjab v. Ajai Singh*, (1953) S.C.R. 254.

It follows that art. 22 (1)-(2) have no application to—

(a) Arrest and detention under s. 123 of the Cr. P. Code¹⁹ (for failure to give security).

(b) Arrest and detention ordered by a Panchayati Adalat in default of payment of fine.²⁰

(ii) Cl. (1) would have no application where there is *no accusation* of any 'offence' of a criminal or quasi-criminal nature²¹ against the person taken into custody but he is taken into custody under some policy of the Legislature which the Court cannot question,²¹ e.g., for the purpose of delivery to the officer-in-charge under the Abducted Persons (Recovery and Restoration) Act LXV of 1949;²² or for the removal of a minor girl from a brothel under the Bengal Suppression of Immoral Traffic Act, 1933;²² or where the person is arrested under some Civil²³ or Revenue law which has no penal object in view, e.g., for recovery of arrears of land-revenue²⁴ or income-tax, or in execution of a decree under s. 55 of the C. P. Code.²¹

The clause would, however, apply if a person is taken into custody under warrant issued by some authority other than a Court, under some *accusation*, e.g., where a person is arrested under a warrant issued by the Speaker of a Legislature on a charge of contempt of the House.²⁵ Thus, where a newspaper Editor was arrested in execution of a warrant issued by the Uttar Pradesh Legislative Assembly to answer a charge of contempt of the House, the Supreme Court granted an application for *habeas corpus* on the ground that the Petitioner's fundamental right under Art. 22 (2) had been violated as he had not been produced before any Magistrate within 24 hours of his arrest under the warrant.²³

'Arrested'.—It would follow from the above, that 'arrest' within the meaning of Art. 22, does not include mere *removal*.²²

In *State of U. P. v. Abdul Samad*,^{25a} the majority of the Supreme Court made a suggestion (without deciding the question) that Cls. (1)-(2) of this Article should not apply where an alien is taken into custody under a deportation order because (i) "he is not charged with any offence . . . but the State is merely effecting his removal from the country—an act which the alien was himself bound by law to have done," and (ii) "in the case of a lawful deportation order the Magistrate can obviously pass no order for release on bail or direct any other custody than that of the officers who have to execute the order of deportation".^{25a}

(19) *Jit Bahadur v. State*, A. 1953 All. 753.

(20) *Digambar v. Nanda*, A. 1957 Orissa 281 (284).

(21) *State of Punjab v. Ajaib Singh*, (1953) S.C.R. 254 (270).

So stated, the proposition would be very broad, but the Court guarded against being misunderstood by observing—

"It is not our purpose, nor do we consider it desirable, to attempt a precise and meticulous enunciation of the scope and ambit of this fundamental right or to enumerate exhaustively the cases that come within its protection."

(22) *Raj Bahadur v. Legal Remembrancer*, A. 1953 Cal. 522.

(23) *Dharam Chand v. Ladu Ram*, A. 1956 Ajmer 63.

(24) *Collector of Malabar v. Ebrahim*, A. 1957 S.C. 688 (691).

(25) *Gunapati v. Nafisul Hasan* [popularly known as the *Blitz* case: A. 1954 S.C. 36: (1952-54) 2 C.C. 309 also referred to in A.I.R. 1953 Journal 62]. The authority of this decision was questioned in *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (410), but it has been affirmed in the *U. P. Legislature Reference Case* [(1965) 1 S.C.A. 447].

(25a) *State of U. P. v. Abdul Samad*, (1962)

S.C. A. 1962 S.C. 1506. But the view taken by Subba Rao J., in the minority deserves to be considered, namely, that when foreigners who are directed to leave the country refuse to do so and the Police arrest them with a view to deporting them from the country, they are "certainly guilty of an act prejudicial to the State or the public interest" within the meaning of the dictum in *Ajaib Singh's case*, (1953) S.C.R. 254. Secondly, it is submitted that the object behind Cls. (1)-(2) of Art. 22 is not merely to enable the detenu to obtain bail. In the case of a deportation order, if he is produced before a Magistrate and offered opportunity to consult a legal practitioner, he may challenge the very legality of the deportation order and have his alienage determined by making an application for *habeas corpus*, in the proper forum [cf. *Eshugbayi v. Govt. of Nigeria*, (1931) A.C. 662 (670)]. If a deportation case is taken out of cl. (2), it will also go out of cl. (1), and the person detained may be denied the opportunity to be informed of the grounds or to consult a lawyer so that he may be advised to move for *habeas corpus* which, obviously has a scope in deportation cases, according to the instant decision.

'Detained'.—Detention means that the person detained is at liberty to go nowhere. Externment is not detention, for the person externed is free to go anywhere save the place from which he is externed.¹

Right to be informed of the grounds.

The object of this safeguard is that, apprised of the grounds of arrest, the person arrested will be in a position to make an application to the appropriate Court for bail, or move the High Court for *habeas corpus*. The intimation will also enable the arrested person to prepare his defence in time for the purposes of his trial.²

Hence, though it is not necessary for the authorities to furnish full details of the offence, sufficient particulars must be furnished to enable the arrested person to understand why he has been arrested. The ground to be communicated to the arrested person should be somewhat similar to the charge framed by the Court for the trial of a case.³ Thus, merely to inform the person that he has been arrested under s. 7 of the Criminal Law Amendment Act, 1932, without giving any particulars of the alleged acts for which such action has been taken against him, is not sufficient compliance with Art. 22 (1).^{2,3}

'As soon as may be'.

While cl. (2) sets a maximum time-limit for production of the arrested person before a Magistrate, cl. (1) does not fix any time-limit for the obligation of the arresting authority to communicate to the arrested person the grounds for such arrest. The words '*as soon as may be*' means as nearly as is reasonable in the circumstances of the particular case. So, no definite period of time can be laid down as reasonable in all cases.⁴ The expression also occurs in cl. (5) and has been commented upon under that clause.

But it will be possible for the Court, in a proceeding for *habeas corpus*, to pronounce whether the arresting authority has communicated the grounds as soon as reasonable in the circumstances, and, if it finds that a *reasonable* time has already passed and the arrested person has not yet been informed of the grounds of his arrest, the Court would order his immediate release.⁵ The reason is that the two conditions of arrest embodied in this clause are constitutional conditions subsequent to arrest, and there is no reason to construe these conditions as other than mandatory, being valuable fundamental rights of the individual. So, even though the arrest has been initially valid, the failure to supply the grounds within a reasonable time may render *further* detention unconstitutional or illegal.⁵

"It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps all of which are *regular*, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue."⁶

It is to be noted that while the object of furnishing the grounds in the case of preventive detention [under cl. (5)] is to allow the detenu to make a representation against his detention at the earliest opportunity, the object of such information under cases other than of preventive detention [cl. (1)] is to allow the arrested person the earliest opportunity to move the Court for *habeas corpus*.

Since in *habeas corpus* proceedings the material date for determining the validity of the detention is the date of return, where the Court finds that a reasonable time for communicating the grounds had expired before the date of

Of course, if the foreigner who is sought to be deported has been arrested under the law of preventive detention, he is not entitled to the right under cls. (1) and (2) of Art. 22, in view of cl. (3) of that Article [*Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1284; *Jagan Nath v. Union of India*, (1960) 2 S.C.R. 784].

(1) *Inderjit v. State of Delhi*, A. 1953 Punj. 52.

(2) *Vimal Kishore v. State of U. P.*, A. 1956 All. 56 (59).

(3) *Madhu v. State*, A. 1959 Punj. 506

(4) *Tarapada v. State of West Bengal*, (1951) S.C.R. 212.

(5) *State of Bombay v. Atmaram*, (1951) S.C.R. 167.

(6) *Enraght's case*, (1881) 6 Q.B.D. 876.

return, a communication subsequent to the return cannot save the detention of the Petitioner from invalidity, for, the detention became invalid as soon as the reasonable time expired.^{6a}

'Right to consult a legal practitioner'.

The implications of this right in India have already been discussed at p. 293 of Vol. I. The right guaranteed by Art. 22 (1) arises as soon as a person is *arrested*.⁷

Since Art. 22 (1) does not apply in the case of detention under judicial orders, a law which debar lawyers from appearing before a *Panchayati Adalat* would not be unconstitutional on the ground of contravention of Art. 22 (1).⁸

Right to be defended by a legal practitioner.

The article does not guarantee any absolute right to be *supplied* with a lawyer by the State.⁹

Nor does the Article confer any right to engage a lawyer who is disabled under the law.¹⁰

The only right is to have the opportunity to engage a lawyer.¹¹ Where a trial is held without informing the accused of the date fixed for trial and without giving him an opportunity of getting into communication with his legal adviser, the conviction is liable to be set aside.¹² For the same reason, where a law makes it discretionary with the Judge to allow the arrested person to be represented by a lawyer of his choice, the law offends against Art. 22 (1).¹²

But a person cannot complain of the infringement of this right unless he had made a request to the proper authorities for permission to allow him to be represented by a lawyer and that prayer has been refused.^{12a}

CLAUSE (2).

OTHER CONSTITUTIONS¹³

(A) *England*.—When a person is arrested without warrant, he must be produced before a justice of the peace as soon as *reasonably possible*.^{12b}

(B) *Rumania*.—Art. 28 of the Rumanian Constitution, 1948, provided—

"No person shall be arrested and detained for more than 48 hours without warrant from the Department of Prosecutions, from the examining authorities appointed by law, or an authorisation from the courts in conformity with the provisions of the law."

(C) *Czechoslovakia*.—Art 3 (2)-(3) of the Czechoslovak Constitution of 1948 provides—

"(2) Unless caught in the act of committing an offence, no person shall be arrested except on the written order of a judge, giving the reason therefor. The order shall be delivered at the time of the arrest or, if this is not possible, within 48 hours thereafter.

(3) No person shall be taken into custody by a public official except in the cases prescribed by law; he must then be either released within 48 hours or brought before a court or authority which is competent to proceed with the case from the view of its nature."

(6a) *Vimal Kishore v. State of U. P.*, A. 1956 All. 56 (59).

(7) Cf. *R. v. Llewelyn* (1926) 50 Bom. 741; *R. v. Mona Puna*, (1892) 16 Bom. 661.

(8) *Digambar v. Nanda*, A. 1957 Orissa 282 (284).

(9) *Janardhan v. State of Hyderabad*, (1951) S.C.R. 344: (1950-51) C.C. 233 (235).

(10) *Public Prosecutor v. Venkata*, A. 1961 A.P. 104.

(11) *Hansraj v. State*, A. 1956 All. 641.

(12) *Inderjit v. State of Delhi*, A. 1953 Punj. 52.

(12a) *Ram Sarup v. Union of India*, A. 1965 S.C. 247 (250).

(12b) *John Lewis & Co. v. Tims*, (1952) A.C. 676 (H.L.).

(13) Art. 9 (4) of the Covenant on Human Rights, 1950 says—

"(4) Any one arrested or detained on the charge of having committed a crime or of preparing to commit a crime shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pending trial, release may be conditioned by guarantees to appear for trial."

INDIA

Scope of Cl. (2): Right to be produced in Court of Magistrate.

This Clause aims at securing a speedy trial. No person can be deprived of his liberty without the intervention of a judicial authority at the earliest opportunity. As soon as the arrested person is produced before a Magistrate, the trial of the arrested person cannot be put off indefinitely.¹⁴

The maximum period allowed by the Article is 24 hours plus the time required for the journey. Under the ordinary law, s. 61 of the Cr. P. C. secures the same object, in all cases of arrest without warrant:

"No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

Art. 22 (2) gives a constitutional guarantee to the above safeguard.

If 24 hours have passed without compliance with the requirement of the clause, the arrested person is entitled to be released forthwith.¹⁵

There is a provision in s. 81 of the Cr. P. C. which uses the wide expression "without unnecessary delay" instead of specifying the definite period of 24 hours. In order to avoid unconstitutionality, it must be interpreted as being subject to the constitutional limit imposed by Art. 22 (2).¹⁶ A verbal amendment of this section is advisable in order to clearly make it subject to the maximum period laid down in Art. 22 (2). S. 81 is as follows:

"The police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person."

The words 'nearest Magistrate' were used in the interests of the accused and in order to prevent the Police officer from keeping the person in custody for a larger time than was necessary on the plea that the particular Magistrate to whom he wanted to take the accused was living at a distance.^{16a}

The 'nearest Magistrate' refers to a Magistrate acting under a judicial capacity, as under s. 167 of the Cr. P. C.¹⁷

Hence, when a person is arrested by a Magistrate acting under s. 64 of the Cr. P. C., read with the U. P. Social Disabilities Act, the arrested person must be produced before another Magistrate, acting under s. 167, Cr. P. C.¹⁸ But it has been held that where a person was arrested by a Station Officer on his own authority, and immediately thereafter the City Magistrate (invested with judicial powers) arrived at the spot in his executive authority, and the person arrested having been produced before such Magistrate, he remanded him to jail custody, there was sufficient compliance with Art. 22 (2).¹⁹

In *State of U. P. v. Abdul Samad*^{19a} the majority of the Supreme Court has held that the purpose of Art. 22 (2) was served where the arrested person was produced before the High Court itself, within 24 hours of the arrest, in a proceeding for *habeas corpus*, where the person had already applied for the same.

(14) This is secured under the existing law, by s. 167 (2) of the Criminal Procedure Code.

(15) *Ganapati v. Nafisul*, A. 1954 S.C. 636.

(16) The same comment applies to s. 60, Cr. P.C.

(16a) IX C.A.D., pp. 1557-8.

(17) *Hariharanand v. Jailor*, A. 1954 All. 601.

(18) *Eshaq v. State of U. P.*, A. 1957 All. 782.

(19) *Ram Manohar v. Supdt., Central Prison*, A. 1955 All. 193. [The soundness of this decision requires further examination. The words 'court of the magistrate' in Art.

22 (2) should not be overlooked. Can it be said that the City Magistrate who visited the spot in his executive capacity, was holding his court there? The words 'court of the Magistrate' correspond to the words 'Magistrate's Court' in s. 61 of the Cr. P. C. How is the accused to get opportunity to consult a lawyer, if he is not taken to a court? The right of production before a Magistrate in his judicial capacity is an independent right and that requirement must be strictly complied with].

(19a) *State of U.P. v. Abdul Samad*, A. 1962 S.C. 1506.

Whether the rights in Art. 22(1)-(2) extend to arrests under warrant.

Though the question appears to be concluded by the observations of the Supreme Court in *State of Punjab v. Ajaib Singh*,²⁰ there are ample reasons for a fuller consideration of the question by the Supreme Court in some subsequent decision. Before proceeding further, it would be useful to quote the observations of the Court, speaking through Das J.²⁰—

"Broadly speaking, arrests may be classified into two categories, namely, arrests under warrants issued by a court and arrests otherwise than under such warrants . . .

Turning now to Art. 22 (1) and (2), we have to ascertain whether its protection extends to both categories of arrests mentioned above, and, if not, then which one of them comes within its protection. There can be no manner of doubt that arrests without warrants issued by a Court call for greater protection than do arrests under such warrants. The provision that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a Court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right. It is also perfectly plain that the language of Art. 22 (2) has been practically copied from Secs. 60 and 61, Criminal P. C. which admittedly prescribe the procedure to be followed after a person has been arrested without warrant. The requirement of Art. 22 (1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest indicates that the clause really contemplates an arrest without a warrant of Court, for as already noted, a person arrested under a Court's warrant is made acquainted with the grounds of his arrest before the arrest is actually effected. There can be no doubt that the right to consult a legal practitioner of his choice is to enable the arrested person to be advised about the legality or sufficiency of the grounds for his arrest. The right of the arrested person to be defended by a legal practitioner of his choice postulates that there is an accusation against him against which he has to be defended. The language of Art. 22 (1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by a Court on the allegation or accusation that the arrested person has, or is suspected to have, committed, or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest. In other words, there is indication in the language of Art. 22 (1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority."²⁰

The following are the reasons which call for a reconsideration of the pronouncement that the protection under cls. (1)-(2) of Art. 22 does not extend to arrests under warrant:

Firstly, the above pronouncement is in the nature of an *obiter*, inasmuch as the decision of the Court that 'arrest' in Art. 22 (1)-(2) refers to arrest "upon an allegation or accusation" of a "criminal or quasi-criminal nature" was sufficient to dispose of the case before the Court because no such accusation was involved when an abducted person was taken into custody under the Abducted Persons (Recovery and Restoration) Act, 1949. Whether such arrest must be one under warrant or without warrant was a further question which was not necessary to decide for the purposes of the case.

Secondly, in a later passage, the Court itself came to the view that it should not finally decide the scope of Art. 22 (1)-(2) beyond what was necessary for the purposes of the case before their Lordships:

"It is not, however, our purpose, nor do we consider it desirable, to attempt a precise and meticulous enunciation of the scope and ambit of this fundamental right or to enumerate exhaustively the cases that come within its protection. Whatever else may come within the purview of Art. 22 (1) and (2), suffice it to say for the purposes of this case, that we are satisfied that the physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest, and delivery of that person to the custody of the officer in charge of the nearest camp under Sec. 4 of the impugned Act cannot be regarded as arrest and detention within the meaning of Art. 22 (1) and (2)."²¹

(20) *State of Punjab v. Ajaib Singh*, (1953) S.C.R. 254 (264, 268).

(21) *State of Punjab v. Ajaib Singh*, (1953) S.C.R. 254 (269).

Thirdly, the statement that Art. 20 (1)-(2) reproduces the language of ss. 60-61 of the Cr. P. C. is not correct inasmuch as while the latter expressly refer to 'arrest without warrant', Art. 20 (1)-(2) uses the word 'arrested' generally, and without referring to warrant at all. The question is whether the omission of the words 'without warrant' is deliberate or unintentional. Merely because in the existing law, the protection is confined to arrests without warrant is no ground for concluding that the framers of the Constitution did not intend to improve upon the existing law. In fact, cl. (1) itself shows that the Constitution-makers intended to go further than the existing law, for, the right to consult and to be defended by a lawyer was not to be found in ss. 60-61 of the Cr. P. C. Previous legislation is, no doubt, a guide in interpreting a statute, but not where the context indicates an intention to depart from the previous legislation.²²

Fourthly, according to the canons of interpretation (Vol. I, p. 34), the intention of a Legislature is to be gathered from the language actually used by it and not from 'supposed intentions'. The language used cannot be ignored except where it would lead to absurdity, or anything in the context indicates a contrary intention.

As to the context, the Court relied upon two arguments: (i) the object of production before a Magistrate is to ensure the 'application of a judicial mind' to the legal authority and regularity of the arrest; in the case of arrest under warrant, there has already been such application of a judicial mind at the time of issuing the warrant; (ii) in the case of arrest under warrant, the warrant itself informs the arrested person of the grounds of his arrest, so that it would be meaningless to insist again that he should be informed of the grounds after arrest. Now, so far as the first argument is concerned, the previous application of the judicial mind did not take place in the presence of the arrested person; is there any irresistible reason for denying him an opportunity to challenge the validity of the warrant itself? Similarly, so far as the second argument is concerned, though the warrant usually states the grounds of arrest, there may possibly be cases where a warrant is deficient in this respect and the right of the arrested person to be informed of the grounds of arrest is violated by the defective warrant; why should such person be denied the opportunity of urging that the warrant under which he has been arrested violates his constitutional right?

Besides, the mention of the two grounds alone overlooks the fact that the right to consult and be defended by a legal practitioner is an *independent* right ensured by Cl. (1). The Anglo-American precedents (pp. 99-101, *ante*) clearly demonstrate that this is a separate and most valuable right. Even though a warrant is issued by a judicial authority, that is done *ex parte* and the person to be arrested has no opportunity of consulting a lawyer at that stage. If we hold that Cl. (1) does not extend to arrests under warrant, the arrested person shall have no constitutional right to consult or to be defended by a lawyer all the time that he is detained under the warrant.

Lastly, there is no absurdity involved in the requirement of producing the arrested person before the nearest judicial Magistrate after a person has been arrested under a warrant; for, apart from the contingency that the warrant itself may be defective, there may be illegality in the execution of the warrant which the arrested person may urge if he is produced before a Court and afforded opportunity to consult a legal practitioner.

It is submitted, with respect, that there is no irresistible case to cut down the plain language of Art. 22 (1)-(2) and to exclude cases of arrests under warrant from its purview. An Allahabad decision²³ has relied upon the language of the Article notwithstanding the observations of the Supreme Court.²⁴

(22) See Vol. I, p. 51.

(23) *Hariharanand v. Jailor*, A. 1954 All. 601.

(24) *State of Punjab v. Ajaib Singh*, (1953) S.C.R. 254.

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England*.—In times of war, Parliament may provide for preventive detention in the interests of national safety²⁵ (see under Art. 359, *post*).

(B) *Australia*.—Power to detain without trial persons engaged in activities prejudicial to the safety of the realm has been deduced from the 'defence' power.¹

(C) *Eire*.—The validity of a law providing for preventive detention in a period of emergency under Art. 28 (3) has been upheld.¹²

(D) *U.S.A.*—Until 1950, it could be said that an American citizen could not be detained unless convicted by a Court of law of an offence. Though this still holds good as regards times of peace, a system of preventive detention has been introduced, as regards times of *emergency*, by the Internal Security Act, 1950 (otherwise known as the McCarran Act).

INDIA

Enemy Aliens and detenus.

This clause constitutes an exception to cls. (1)-(2). The result is that enemy aliens as well as persons detained under the law of preventive detention have neither the right to consult nor to be defended by any legal practitioner. In the case of detenus, there is a right of representation to the detaining authority [cl. (5)], and a provision for consideration of that representation by the Advisory Board. But in neither case shall the detenu have any *right* to be heard in person² or of appearance by any lawyer³ or to cross-examine witnesses.⁴

The other right which enemy aliens and detenus lose by reason of cl. (3) is the right not to be detained in custody beyond 24 hours without the authority of a Magistrate [cl. (2)].

Enemy Aliens.

As to who are enemy aliens, see Vol. I, p. 93. An enemy alien is not entitled to the protection of cls. (1)-(2) of Art. 22. This is in accord with the English law, under which an enemy alien may be detained, without a right of *habeas corpus*, under the royal prerogative as well as under statute.⁵ But under *our* Constitution, even enemy aliens may, subject to legislation by Parliament, be entitled to the protection of cls. (4)-(5) of Art. 22, in case they are arrested under a law of 'preventive detention'.

The place of Preventive Detention in a Chapter on Fundamental Rights.

Prima facie, the provision for preventive detention is rather anomalous in a Chapter of the Constitution which guarantees fundamental rights. Preventive detention is, by nature, repugnant to democratic ideas, and no such laws exist in the *U.S.A.*⁶ or in *England*,⁷ in times of *peace* [see also p. 112, *post*]. *Our* Con-

(25) *Liversidge v. Anderson*, (1942) A.C. 206 (H.L.).

(1) *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116.

(1a) *In re Art. 26 of the Constitution*, (1940) Ir. R. 470.

(2) *State of Bombay v. Atmaram*, (1951) S.C.J. 208 (223), Shastri J. [S. 10 (1) of the amended Preventive Detention Act, however, provides for a hearing of the detenu *in person*, if the Board thinks it necessary or the detenu desires to be heard (see p. 114, *post*)].

(3) It may be noted that under Reg. 18-B under the English Emergency Power

(Defence) Act, 1939, which was a wartime measure, the detenu was given a right of calling witnesses and to engage a solicitor.

(4) *Gopalan v. State of Madras*, (1950) S.C.J. 174 (240).

(5) *Ex parte Forman*, (1917) 87 L.J.K.B. 43.

(6) The Internal Security Act, 1950, makes similar provisions to control spies and saboteurs in times of 'war, invasion or insurrection' (see p. 107, *post*).

(7) See Schwartz *Comparative View of Gopalan's Case*, (1950) 3-4 Indian Law Review 276 (283).

stitution, however, empowers the Legislatures to make laws for preventive detention for reasons connected with several matters (enumerated in Entry 9, List I and Entry 3 of List III), irrespective of any war or emergency. It has adopted preventive detention as a subject-matter of peace-time legislation as distinct from emergency legislation.⁷ In short, preventive detention is a normal feature of our Constitution.

The object of the framers of the *Constitution* in giving a constitutional status to preventive detention was to prevent anti-social and subversive elements from imperilling the welfare of the infant Republic:

"The primary reason for the enactment of this legislation was the necessity to protect the country against violent activities organised in secrecy and intended to produce chaos."⁸

One practical result following from the adoption of preventive detention as a permanent feature of our Constitution has been that even in peace-time, the Courts cannot question the sufficiency of reasons for depriving a person of his liberty.⁹

No lover of liberty can commend preventive detention as a permanent and peace-time measure. The object of the present work, however, is not to discuss the justifiability of preventive detention as a legal norm, but to comment upon the constitutional safeguards which have been provided in the present Article of our Constitution, by reason of which 'preventive detention' has found a place, along with Art. 21, in Part III.

While the framers of our Constitution considered the institution of preventive detention as indispensable for maintaining the existence of the infant Republic, they also provided certain safeguards¹⁰ to mitigate its harshness by placing fetters on the legislative power conferred on this subject under Art. 22. These are—

"(1) That no law can provide for detention for a period of more than 3 months unless the sufficiency for the cause of the detention is investigated by an Advisory Board within the said period of three months

(2) That a State law cannot authorize detention beyond the maximum period prescribed by Parliament under the powers given to it under cl. (7).

(3) That Parliament also cannot make a law authorizing detention beyond 3 months without the intervention of an Advisory Board unless the law conforms to the conditions laid down in cl. (7).

(4) Provision has been also made to enable Parliament to prescribe the procedure to be followed by Advisory Boards, as a safeguard against any arbitrary procedure

(5) Apart from these enabling and disabling provisions certain procedural rights have been expressly safeguarded by clause (5) of Art. 22. A person detained under a law of preventive detention has a right to obtain information as to the grounds of his detention and has also the right to make a representation protesting against an order of preventive detention. This right has been guaranteed independently of the duration of the period of detention"¹¹

(8) Statement of Objects and Reasons of Act IV of 1951.

(9) *Gopalan v. State of Madras*, (1950) S.C.R. 88; *State of Bombay v. Atmaram*, (1951) S.C.R. 167; *Bhimsen v. State of Punjab*, (1952) S.C.R. 18.

[In these cases the Supreme Court applied the rule of interpretation laid down by the House of Lords in *Liversidge v. Anderson*, (1942) A.C. 206. But as Sir Alfred (since Lord) Denning has observed in his Lectures on *Freedom under the Law*, the doctrine propounded in *Liversidge's case* was in connection with 'emergency powers'. Again, as Prof. Alexandrowicz contends (Year Book of World Affairs, 1953, p. 262), *Darnel's case*, (1627) 3 St. Tr. 1, stands to establish that the Crown has no 'absolute power to commit', and that on a motion for *habeas corpus*, the Court has the power to consider the

sufficiency of the cause of commitment; *Liversidge v. Anderson* is only an exception to this general rule, founded on consideration of the exigencies of a national emergency.

At the same time, it should also be remembered that India is still passing through an abnormal situation, both externally and internally, even eighteen years after her independence].

(10) Not only have the rigours of this drastic power been mitigated by the conditions imposed by such legislation, the use of the power has also been less frequent of late, and, since the promulgation of the Defence of India Rules, they are being resorted to in most cases than the P. D. Act.

(11) *Gopalan v. State of Madras*, (1950) S.C.R. 88 (223, Mahajan J.).

Preventive detention.

'Preventive detention' means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof,¹² but may still be sufficient to justify his detention, for any of the reasons specified in Entry 9 of List I and Entry 3 of List III of Sch. VIII (Defence, foreign affairs, security of India or of a State, maintenance of public order or of supplies and services essential to the community). While the object of *punitive* detention is to punish a person for what he *has done*, the object of preventive detention is to prevent him *from doing* something¹³ which comes within the above entries. While punitive detention comes after the illegal act is actually committed, preventive detention has reference to the *apprehension* of wrongdoing.¹⁴ The object of preventive detention is to prevent the individual not merely from acting in a particular way, but from achieving a particular *object*.¹⁵

"A person is *punitively* detained only after a trial for committing a crime and after his guilt has been established in a competent court of justice Preventive detention, on the other hand, is not a punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification is *suspicion* or reasonable probability and not criminal conviction which only can be warranted by legal evidence."¹⁶

When a law of preventive detention is challenged before the Court, the Court has got to decide on a consideration of the true nature and character of the legislation whether it is *really* on the subject of preventive detention or not.¹⁷ But once the legislation is held to be really on the subject of preventive detention and within the powers assigned to the Legislature in question, the Courts have nothing to do with the reasonableness or unreasonableness of the legislation. If a particular piece of legislation be within the ambit of the Legislature's authority, there can be nothing *arbitrary* in it, so far as a Court of law is concerned.¹⁸

Grounds for preventive detention.

(A) *England*.—Preventive detention for reasons connected with war has come to stay in *England* since World War I. We have seen (p. 87, *ante*) that it was provided by Regulations framed under the Defence of the Realm Act, 1914. Reg. 18B of the Defence (General) Regulations framed under the Emergency Powers (Defence) Act, 1939, similarly provided—

"If the Secretary of State has *reasonable cause to believe* any person to be of hostile origin or associations . . . and that by reason thereof it is *necessary* to exercise control over him, he may make an order against that person directing that he be detained."

The House of Lords held that the expression 'if he has reasonable cause to believe' meant nothing more than 'if he *thinks* he has reasonable cause'. The Courts could not, therefore, interfere with an order of detention except where it had been made without good faith, the onus to prove which was on the person who challenged the order.¹⁷

The traditional theory of 'personal liberty' as *Dicey* understood it, has thus undergone a revolutionary change. According to him, personal liberty meant that "(i) Physical restraint of an individual may be justified only on the ground that he has been *accused* of some *offence* and must be brought before the Court to stand his *trial*, or (ii) that he has been *convicted* of some offence and must suffer punishment for it." But since the decisions in *R. v. Halliday*¹⁸ and *Liversidge v. Anderson*¹⁷ (see p. 87, *ante*) it is now settled that Parliament may empower the Executive to make regulations for the detention without trial of

(12) *Liversidge v. Anderson*, (1942) A.C. 206 (218).

(13) *State of Bombay v. Atma Ram*, (1951) S.C.J. 208 (212).

(14) *Lakhinarayan v. Prov. of Bihar*, (1950) S.C.J. 32 (43).

(15) *Gopalan v. State of Madras*, (1950) S.C.J. 174 (192), *Kania C.J.*

(16) *Ibid.*, pp. 205, 263 (Mukherjee J.).

(17) *Liversidge v. Anderson*, (1942) A.C. 206.

(18) *R. v. Halliday*, (1917) A.C. 260.

persons whose detention appears to be expedient "in the interest of the *public safety* or the defence of the realm".

"At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention."¹⁸

But never so far has the English Parliament authorised detention without trial except in times of war or beyond the duration of such exigency. It is to be noted that while the Emergency Powers Act, 1920, empowers the Executive to take extraordinary action, in time of *peace*, to secure the essentials of life to the community, and even provides for summary trial of offences against the regulations so made, the Act specially prohibits the alteration of the rules of *criminal procedure* and there is, accordingly, no provision for preventive detention in the interests of public order, general safety or essentials of life, apart from a war or emergency.

(B) *Australia*.—The validity of *wartime* legislation empowering the Executive to detain persons (on suspicion) with a view to preventing them from acting in any manner prejudicial to the *public safety* and the defence of Commonwealth, has been upheld.¹⁹⁻²¹

(C) *U.S.A.*—As has been already pointed, there is no provision for preventive detention in time of peace.

But provision for preventive detention in an 'emergency' has now been made by ss. 100-3 of the Internal Security Act, 1950.

In the event of any one of the following—(a) invasion of the territory, (b) declaration of war by Congress, (c) insurrection within the United States in aid of a foreign enemy, the President may make a proclamation of an 'Internal Security Emergency'. During the continuance of such emergency, the President is authorised to apprehend and by order detain "each person as to whom there is reasonable ground to believe that such person *probably* will engage in, or *probably* will conspire with others to engage in, acts of espionage or of sabotage".

This provision introduces a new era in the constitutional history of the United States. It is worthy of notice that Congress gives a legislative determination of 'clear and present danger' in the Preamble in support of this legislation, as follows:

"As a result of evidence adduced before various committees . . . the Congress hereby finds that—

The experience of many countries in World War II and thereafter with so-called 'fifth columns' which employed espionage and sabotage to weaken the internal security and defense of nations resisting totalitarian dictatorships demonstrated the grave dangers and fatal effectiveness of such internal espionage and sabotage . . .

Due to the wide distribution and complex interrelation of facilities which are essential to national defense and due to the increased effectiveness and technical development in espionage and sabotage activities, the free and unrestrained movement in such emergencies of members or agents of such organizations . . . would make adequate surveillance to prevent espionage and sabotage impossible and would therefore constitute a clear and present danger to the public peace and safety of the United States . . .

The detention of persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage is, in a time of internal security, emergency, essential to the common defense and to the safety and security of the territory, the people and the Constitution of the United States."

The procedure for detention under this Act has some similarity to that under our Preventive Detention Act, 1950, with this difference that the American statute can be used only in a war emergency, and that it provides for an ultimate judicial review of the grounds of detention. The Attorney General is empowered to issue a warrant for the arrest of any person whom he *believes* to be dangerous. The arrested person is brought before a preliminary hearing officer who issues a detention order if he finds that there is a probable cause for detention. Against the order of detention, the detenu may appeal to the Detention Review Board.

(19-21) *Little v. Commonwealth*, (1947) 75 C.L.R. 94; *Australian Communist Party v. Commonwealth*, (1951) 83 C.L.R. 1 (195).

From the decision of the Board the detenu may have a judicial review by way of appeal to the federal Court of Appeals; but the findings of the Board as to facts, if supported by 'reliable, substantial and probative' evidence, are conclusive.

What is of particular interest for us is that at the hearing before the preliminary hearing officer, the detenu is to be told the grounds of his detention, is allowed to be represented by counsel, to introduce evidence on his behalf as well as to cross-examine witnesses except those whom the Attorney-General withholds from cross-examination on the ground of national security.

Though there is no direct decision as yet upholding the validity of an order of detention under this Act, there are decisions which suggest its constitutionality.²²

(E) *India*.—But under the *Constitution of India*, the Legislature has been empowered to provide for preventive detention even in times of peace. Entry 9 of List I, of course, relates to reasons connected with war or the external security of India; but Entry 3 of List III authorises the Union and State Legislatures to provide for preventive detention to maintain internal security, public order and the essentials of life, apart from any condition of war. This is undoubtedly an extraordinary departure from the English ideal of personal liberty. And this is why Courts take particular care and caution in applying a law passed under this power, even though they may not be competent to question the wisdom or propriety of the provision itself.

Since the above view was expressed at p. 172 of the 2nd Ed. of this Commentary, our Supreme Court has observed—

"Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court."²³

But while even in *Burma* the Courts have held that preventive detention cannot be resorted to in cases punishable under the ordinary criminal law,²⁴ our Courts²⁵ have held that there is nothing wrong in it, provided they relate to a ground specified in the relevant legislative Entry, e.g., public order or maintenance of essential supplies. This aspect has been bitterly criticised by a section of public opinion in India, particularly because the power may be abused for purposes of discrimination on political grounds.

Our Supreme Court has, however, held²⁶ that an order of detention under the law of preventive detention made against a person while he is already in jail custody must be *mala fide* because if he is already in jail custody, it cannot be rationally postulated that if he is not detained he would act in a prejudicial manner.

A history of the law of Preventive Detention in India.

The first Act of Preventive Detention passed by Parliament under the above powers conferred by the Constitution was Act IV of 1950, which came into force on the 25th February, 1950 and was to cease to have effect on the 1st April, 1951. On 19-5-50, the Supreme Court pronounced its decision in *Gopalan v. State of Madras*,¹ declaring s. 14 of the Act as *ultra vires*. This led to the passing of the Preventive Detention (Amendment) Act (L) of 1950, by which s. 14 of Act IV of 1950 was omitted, and some other changes effected. Subsequently, by the Preventive Detention (Amendment) Act (IV) of 1951, the duration of Act IV of 1950 was extended up to the 1st April, 1952, and some other provisions were inserted.

The Amendment Act (IV) of 1951 was declared valid by the Supreme Court in *Krishnan v. State of Madras*.²

(22) *Ex parte Endo*, (1944) 323 U.S. 283; *Korematsu v. U. S.*, (1944) 323 U.S. 214.

(23) *Ram Krishan v. State of Delhi*, A. 1953 S.C. 318 (320). [See also *Rameshwar v. D. M.*, (1964) II S.C.A. 724.

(24) *Ma Than v. Commr. of Police*, (1949) *Burma L.R.* 1 (S.C.).

(24a) *Rameshwar v. D. M.*, (1964) II S.C.A. 724.

(25) Cf. *Rambhuj v. State of Punjab*, A. 1954 Punj. 154.

(1) *Gopalan v. State of Madras*, (1950) S.C.J. 174.

(2) *Krishnan v. State of Madras*, (1951) S.C.R. 621: (1950-51) C.C. 169.

The scheme of the Amendment Act of 1951 was (i) to extend the benefit of a review by Advisory Board to *all* cases [s. 9 (1)] and (ii) to bind the detaining authorities to act in conformity with the report of the Board [11 (2)].²

Under s. 11 of the Act, as amended in 1951, the question arose whether it was obligatory upon Government to fix a definite period of detention after the Advisory Board reports that the detention is justified. In some cases³ it was held that the discretion conferred upon Government by the words 'as it thinks fit' in s. 11 must be exercised by fixing a specified date not beyond the duration of the Act itself under which the order is made. In others⁴ it was held that the words 'as it thinks fit' authorised Government to keep the person in detention for any indefinite period subject to the overall limit of duration of the temporary Act of preventive detention. It was to set at rest this controversy that Parliament enacted the Preventive Detention Amendment Act (XXXIV) of 1952. It extended the life of the Act of 1950 till 1st October, 1952, and validated orders of detention for an indefinite period, by providing that all such orders would subsist till the expiry of the life of the Act as extended by the Amending Act. S. 3 of the Amendment Act of 1952 provided—

"Every detention order confirmed under section 11 of the principal Act and in force immediately before the commencement of this Act shall have effect as if it had been confirmed under the provisions of the principal Act as amended by this Act; and accordingly, where the period of detention is either not specified in such detention order or specified (by whatever form of words) to be for the duration or until the expiry of the principal Act or until the 31st day of March, 1952, such detention order shall continue to remain in force for so long as the principal Act is in force, but without prejudice to the power of the appropriate Government to revoke or modify it at any time."

The Supreme Court next laid down in the case of *Dattatraya v. State of Bombay*⁵ that an order of detention would not be invalid because no definite period of detention has been fixed in the order under s. 11 of the Act. It also held that even where the order under s. 11 of the Act specifies a period of detention, the detaining authority can, in view of s. 21 of the General Clauses Act, *before* the period initially fixed has expired and the detenu released, direct the detention to continue for any further period subject to the limit of duration of the Act itself. In the case of *Shamrao v. District Magistrate*,⁶ the Supreme Court held that s. 3 of the Amendment Act of 1952 was *intra vires*, and that under the law as it stood, the period of detention was left to the discretion of the Government subject to the overall limit of the Act of 1950, as amended from time to time. The result was that it was competent for Parliament to continue detention indefinitely by resorting to the expedient of periodic amendments of the Preventive detention Act of 1950.⁶

Next came the P. D. (Second Amendment) Act (LXI of 1951). It not only extended the life of the original Act up to the 31st December, 1954, but also introduced substantial provisions, such as s. 11A, to prescribe the maximum duration of an order of detention. In the case of *Godavari v. State of Bombay*,⁷ the Supreme Court upheld the validity of s. 11A (2), as inserted by the Second Amendment Act, 1952, holding that the subsection did not offend against Art. 14 by differentiating between detention orders which were confirmed before 30-9-52 and those which were confirmed thereafter.

The term of the Act has been further extended by Act 51 of 1954 up to the 31st December, 1957; by Act of 54 of 1957 up to the 31st December, 1960; by Act 61 of 1961 up to the 31st December, 1963 and by Act 51 of 1963 up to the 31st December, 1966.

On the whole, the history of this extraordinary legislation is one of minimisation of its rigours. On the one hand, by successive amendments, ampler safe-

(3) *Teja Singh v. The State*, A. Pepsu 1; *Bashir v. The State*, A. 1951 All. 357.

(4) *Prahlad v. State of Bombay*, A. 1951 Bom. 1 (8); *Pyarelal v. State*, A. 1952 All. 180.

(5) *Dattatraya v. State of Bombay*, A. 1952 S.C. 181.

(6) *Shamrao v. District Magistrate*, A. 1952 S.C. 324.

(7) *Godavari v. State of Bombay*, (1953) S.C.R. 210.

guards have been provided against any abuse of its powers and the differences between the special procedure prescribed by it and the ordinary law of criminal procedure have been narrowed down. On the other hand, less frequent use of these powers is being made in practice.^{7a}

The Act, however, calls for further procedural improvements, if it is necessary to retain it further. *Firstly*, while the right of personal hearing has been given to the detenu, much would not be lost in giving him the right to be represented by a lawyer or to cross-examine witnesses before the Advisory Board, inasmuch as Government has the right to withhold prejudicial facts. *Secondly*, though the superior Courts have the right to examine questions of law in proceedings for *habeas corpus*, some sort of appellate jurisdiction may be given to the High Court over the decisions of the Board in respect of questions of fact as well to ensure against *mala fide* use of the power, which it is practically impossible to establish in a proceeding for *habeas corpus*.

The text of the Act of 1950, as amended, is reproduced below for convenience of reference, as the decisions on Art. 22 are to be understood with reference to this Act:

**PREVENTIVE DETENTION ACT, 1950 (IV OF 1950), AS AMENDED BY
SUBSEQUENT ACTS UP TO ACT 51 OF 1963.**

*An Act to provide for preventive detention in certain cases and matters
connected therewith.*

Be it enacted by Parliament as follows:—

1. Short title, extent and duration.—(1) This Act may be called the Preventive Detention Act, 1950.

(2) It extends to the whole of India:

Provided that it shall not apply to the State of Jammu and Kashmir except to the extent to which the provisions of this Act relate to preventive detention for reasons connected with defence, foreign affairs or the security of India.⁸

(3) It shall cease to have effect on the 31st day of December, 1966 save as respects things done or omitted to be done before that date.⁹

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "State Government"¹⁰ means in relation to a Union Territory, the Chief Commissioner of the State;

(b) "detention order" means an order made under section 3; and

(c) "appropriate Government" means, as respects a detention order made by the Central Government or a person detained under such order, the Central Government, and as respects a detention order made by a State Government or by an officer subordinate to a State Government or as respects a person detained under such order, the State Government.

3. Power to make orders detaining certain persons.—(1) The Central Government or the State Government may—

(a) if satisfied¹¹ with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(7a) Its use has been further obviated by the alternative power available to the Executive under r. 30 of the Defence of India Rules since the Proclamation of Emergency in 1962 (see p. 93, ante).

(8) As regards Jammu & Kashmir, see next caption.

(9) Substituted for '1963' by Act 51 of 1963.

(10) See, in this connection, the definition in s. 3 (60) of the General Clauses Act, 1897—

"'State Government', as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Gov-

ernor, and in a Union Territory, the Central Government".

(11) Leaving the determination of the necessity for detention to the subjective satisfaction of the Executive is not delegation of legislative power. This is necessary owing to the very nature of preventive detention [*Gopalan v. State of Madras*, (1950) S.C.R. 88 (121-2)]. The propriety or reasonableness of the satisfaction cannot be challenged [*Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 276; *Rameshwar v. D. M.*, A. 1964 S.C. 334 (337)]. (As to how far the order can be challenged on other grounds, see p. 137, post).

(i) the defence of India, the relations of India with foreign powers,¹² or the security of India, or

(ii) the security of the State or the maintenance of public order,¹³ or

(iii) the maintenance of supplies and¹⁴ services essential to the community^{15,16}; or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners' Act 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,¹⁷ it is necessary so to do, make an order directing that such persons be detained.¹⁸

(2) Any of the following officers,¹⁹ namely,—

(a) District Magistrates,

(b) Additional District Magistrates specially empowered in this behalf by the State Government,

(c) the Commissioner of Police for Bombay, Calcutta, Madras or Hyderabad,

(d) Collector in the State of Hyderabad,

may if satisfied as provided in sub-clauses (ii) and (iii) of clause (a) of sub-section (1) exercise powers conferred by the said sub-section.

(3) When any order is made under this section by an officer mentioned in sub-section (2) he shall forthwith²⁰ report the fact to the State Government to which he is subordinate together with the grounds²¹ on which the order has been made and such other particulars as in his

The 'satisfaction' need not be proved where the order is in conformity with cls. (1) and (2) of Art. 166. If, however, the order be defective, it may be proved by the affidavit of the Home Secretary who has the requisite means of knowledge [*State of Bombay v. Purushottam*, A. 1952 S.C. 317].

The authority making the order of detention must, however, state in the order the fact of its satisfaction that it is necessary to make the order of detention with a view to preventing the detenu from acting in a manner prejudicial to one or more of the objects contained in one or more of the sub-clauses of s. 3 (1) [*Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1340)].

(12) This expression includes Pakistan though it is not a 'foreign State' [*Jagannath v. Union of India*, (1960) 2 S.C.R. 784].

(13) This expression is to be read with Entry 3 of List III (see also Vol. I, p. 546). It has been held that preventive detention cannot be ordered 'for the maintenance of', or 'for reasons connected with', public order, for the following acts—

(a) Blackmarketing [*R. v. Basundeva*, A. 1950 F.C. 67 (69)];

(b) Contempt of Court [*Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 276];

(c) Incitement not to pay taxes or other Government dues, unless the restriction is exclusively aimed at a general campaign for nonpayment [*Supdt. v. Ram Manohar*, A. 1960 S.C. 633 (640)].

(d) Holding of meetings and processions when there is no allegation of violence [*Umraomal v. State of Rajasthan*, A. 1955 Raj. 6 (10)];

(e) Spread of disaffection against a party Government without inciting violence or resort to other illegitimate course [*Ishaq v. U. P. State*, A. 1957 All 782].

There must be a 'proximate' or 'rational' connection between the act complained of and the apprehension of the disturbance of public order [*R. v. Basundeva*, A. 1950 F.C. 67 (69); *Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 276].

(14) This 'and' has been interpreted as disjunctive [*Dayananda v. State of Bihar*, A. 1951 Pat. 47 (51)].

(15) Cl. (iii) is an independent clause and is not to be read *ejusdem generis* with cl. (ii).

Hence, a person may be detained for the maintenance of supplies [e.g., to suppress blackmarketing or hoarding], whether there is any likelihood of public order or not [*Dayananda v. State of Bihar*, A. 1951 Pat. 47 (52)]. But adulteration of food-stuffs is not covered by 'maintenance of supplies' [*Mishrilal v. The State*, I.L.R. 30 Pat. 716; see further under Entry 3 of List III, *post*].

(16) Cl. (iii) cannot be challenged on the ground that it has failed to lay down a standard by defining what are 'supplies and services essential to the community' [*Krishna v. State of W. B.*, (1954) 9 D.L.R. 73 (Cal.)].

(17) Validity of s. 3 (1) (b) has been upheld in *Hans Muller v. Supdt.*, (1955) 1 S.C.R. 1285 (1295).

(18) It is contrary to the scheme of the Act that the period of detention should be specified in the initial order under s. 3, before the case was placed before the Advisory Board. If such period is fixed in the order under s. 3, it is void [*Makhan Singh v. State of Punjab*, (1952) S.C.R. 368].

(19) An order made by any other officer or by an officer in any different capacity will be quashed [*Dhanapatrai v. State of W. B.*, (1954) 58 C.W.N. 363].

(20) 'Forthwith' means immediately. But where owing to circumstances, not due to any act or default of the officer, the officer was not in a position to make the report to the Government, the order of detention cannot be held to be invalid for contravention of s. 3 (3). [*Keshav v. Commr. of Police*, (1956) S.C.A. 1123 (1131); A. 1957 S.C. 28 (32)].

(21) While the object of the communication under s. 7 (1) is to enable the detenu to make a representation, the object of the report to the State Government under s. 3 (3) is to enable the Government to satisfy itself whether the detention should be approved. Hence the communication under s. 3 (3) need not be a formal document like that under s. 7 (1); there is a sufficient compliance with s. 3 (3) if the materials on which the order was made are communicated to the Government [*Shamrao v. Dist. Magistrate*, A. 1957 S.C. 23].

opinion have a bearing on the matter, and no such order made after the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall remain in force for more than twelve days²² after the making thereof unless in the meaning it has been approved by the State Government."

(4) When any order is made or approved by the State Government under this section, the State Government shall, as soon as may be, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have bearing on the necessity for the order.

3A. Execution of detention orders.—A detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1898 (Act V of 1898).²³

4. Power to regulate place and condition of detention.—Every person in respect of whom a detention order has been made shall be liable—

(a) to be detained in such place²⁴ and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention whether within the same State or in another State, by order of the appropriate Government:

Provided that no order shall be made by a State Government under clause (b) for the removal of a person from one State except with the consent of the Government of that other State.

5. Detention orders not to be invalid or inoperative on certain grounds.—No detention order shall be invalid or inoperative merely by reason—

(a) that the person to be detained thereunder is outside the limits of the territorial jurisdiction²⁵ of the Government or officer making the order, or

(b) that the place of detention of such person is outside the said limits.

6. Powers in relation to absconding persons.—(1) If the Central Government or the State Government or an officer specified in sub-section (2) of section 3, as the case may be, has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government or officer may—

(a) make a report in writing of the fact to a Presidency Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 87, 88 and 89 of the Code of Criminal Procedure, 1898 (Act V of 1898), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notification in the *Official Gazette* direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply therewith and that he had within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year and with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), every offence under clause (b) of sub-section (1) shall be cognizable.

7. Grounds of order of detention to be disclosed to persons affected by the order.—

(1) When a person is detained in pursuance of a detention order, the authority making the order¹ shall, as soon as may be, but not later than five days from the date of detention, com-

On the other hand, the objects of the two provisions being different, the particulars communicated to the Government under s. 3 (3) or (4) may contain such details of facts as may not be communicated, in the public interest, to the person detained [*Nareish v. State of W. B.*, A. 1959 S.C. 1335 (1341)].

(22) A person who is detained beyond 12 days without an order of approval of the State Government is entitled to be released forthwith [*Bhimsingh v. The State*, A. 1957 Raj. 5].

(23) S. 3A does not curtail the extra-territorial jurisdiction conferred by S. 5 and does not imply that a detention order cannot be executed outside India, by virtue of an agreement or treaty with the foreign State concerned [*Gour Gopal v. Chief Secretary*, (1952) 56 C.W.N. 427 (433)].

(24) Failure to mention in the detention order the place where he is going to be

detained does not render the order invalid. Where there is a valid order for detaining the detenu, the absence of a valid order directing his detention in a particular place would not compel the Court to release the detenu if a valid order directing that he be detained in a particular place is passed by a proper authority before his release [*Prahlad v. State of Bombay*, A. 1952 Bom. 1 (6)].

(25) This section confers extra-territorial jurisdiction and authorises the making of an order of detention even though the person to be detained is outside the jurisdiction of the Government making the order,—and even when he is in foreign territory [*Gourgopal v. Chief Secretary*, (1952) 56 C.W.N. 427 (432)].

(1) S. 7 does not require that the communication of the grounds must be made directly by the authority making the order. The communication may be made through

municate² to him the grounds³ on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.⁴

8. Constitution of Advisory Boards. (1) The Central Government and each State Government shall whenever necessary, constitute one or more Advisory Boards for the purposes of this Act.

(2) Every such Board shall consist of three persons who are or have been or are qualified to be appointed as, Judges of a High Court, and such persons shall be appointed by the Central Government, as the case may be.⁵

(3) The appropriate Government shall appoint one of the members of the Advisory Board who is or has been a Judge of a High Court to be its Chairman, and the appointment to the Advisory Board, of any person who is a Judge of the High Court shall be with the previous approval of the State Government concerned:

Provided that nothing in this sub-section shall affect the power of an Advisory Board constituted before the commencement of the Preventive Detention (Second Amendment) Act, 1952, to dispose of any reference under section 9 pending before it at such commencement.

9. Reference to Advisory Boards.—In every case where a detention order has been made under this Act, the appropriate Government shall, within thirty days⁶ from the date of detention under the order, place before the Advisory Board⁷ constituted by it under section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report by such officer under sub-section (3) of section 3.⁸

10. Procedure of Advisory Boards.—(1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within ten weeks⁹ from the date of detention.

(2) The report¹⁰ of the Advisory Board shall specify in a separate part thereof the opinion

recognized channels prescribed by the administrative rules of business [*Ujagar v. State of Punjab*, (1950-51) C.C. 155]. Nor is there anything wrong if the order of detention is made by one District Magistrate and, on his transfer, the grounds are communicated by his successor [*In re Maganlal*, A. 1951 Bom. 33].

(2) Verbal communication is not sufficient [*Inder Singh v. The State*, A. 1952 Pepsu 61]. Failure to communicate the grounds within time makes the detention illegal [*State of Bombay v. Atmaram*, A. 1951 S.C. 157].

(3) 'Grounds' in this context means something more than a recital of the ground of satisfaction of the authority as contained in any of the sub-cl. of s. 3 (1) and which must be given in the order itself. The grounds contemplated by s. 7 are the conclusions of fact which have led to the passing of the order. The order of detention itself may contain such a recital also; but where it does not, s. 7 requires that within a period of 5 days from the date of detention, such conclusions of fact must be communicated to the detenu to inform him of the reasons why he was being detained. Again, if this communication does not contain all the particulars for enabling the detenu to make his representation, he may ask for further particulars and then it will be the duty of the authority to furnish such particulars except those he is entitled to withhold under s. 7 (2) [*Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1341)]. Hence, a mere communication of a sub-clause of s. 3 (1) is not a sufficient compliance with the requirements of s. 7 (1) [*ibid*].

(4) This sub-sec. reproduces cl. (6) of Art. 22. Where the State takes recourse to this provision, it must prove that the authority concerned was satisfied that it was not in the public interest to disclose the facts which have been withheld [*Sangappa v. State of Mysore*, A. 1959 Mys. 7]. Even where such facts are disclosed to the Advisory Board under its direction, the detenu is not entitled to have copies thereof [*Jaganath v. Union of India*, A. 1960 S.C. 625].

(5) Proviso to s. 8 (2) omitted by Act LXI of 1952.

(6) Where Government has failed to place the case before the Board within this time-limit, the detenu is entitled to be released by the Court forthwith [*Pursuram v. State*, A. 1952 Orissa 208].

(7) As to the scope of the Advisory Board, see under Cl. (4), p. 118, *post*.

(8) Substituted for s. 9 as amended in 1951, by Act LXI of 1952.

(9) If the Board fails to submit its report within 10 weeks, the detenu is entitled to be set at liberty immediately thereafter [*Dharam v. State of Punjab*, (1958) S.C.R. 997].

(10) Ss. 10-11 do not specify what the Report of the Advisory Board should contain, besides the opinion. At any rate they do not require the Board to give its reasons as in a judgment. The Court has no power to examine the contents of the report to determine whether it is a report in conformity with s. 10 (1), for, under s. 10 (3), the entire report, excepting the opinion, is confidential [*Thevar v. State of Madras*, (1958) 2 M.L.J. 169 (174)].

of the Advisory Board as to whether or not there is sufficient cause¹¹ for the detention of the person concerned.

(2A) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(3) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

11. Action upon the Report of Advisory Board.—(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order¹² and continue the detention of the person concerned for such period as it thinks fit.¹³

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

11A. Maximum period of detention.—(1) The maximum period¹⁴ for which any person may be detained in pursuance of any detention order which has been confirmed under section 11 shall be twelve months from the date of detention.

(2) Notwithstanding anything contained in sub-section (1), every detention order which has been confirmed under section 11 before the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall, unless a shorter period is specified in the order, continue to remain in force until the 1st day of April, 1953, or until the expiration of twelve months from the date of detention, whichever period of detention expires later.¹⁵

(3) The provisions of sub-section (2) shall have effect notwithstanding anything to the contrary contained in section 3 of the Preventive Detention (Amendment) Act 1952 (XXXIV of 1952), but nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time.

12. Validity and duration of detention in certain cases.—For the avoidance of doubt it is hereby declared that—

(a) every detention order in force at the commencement of the Preventive Detention (Amendment) Act, 1951, shall continue in force and shall have effect as if it had been made under this Act as amended by the Preventive Detention (Amendment) Act, 1951; and

(b) nothing contained in sub-section (3) of section 1 or sub-section (1) of section 12 of this Act as originally enacted shall be deemed to affect the validity or duration of any such order.¹⁶

(11) It follows from the Supreme Court decision in *Shibban Lal v. State of U. P.*, (1954) S.C.A. 53 (56), that when the Advisory Board finds that any of several grounds upon which the detention order is based is irrelevant, vague or non-existent, the Board must hold that there is no sufficient cause for detention, for if, in such a case the Board recommends for confirmation of the order on the grounds which are valid or existent, the Court would quash the order on a motion for *habeas corpus*.

(12) There must be a formal order of confirmation and it must be made within a reasonable period from the date of receipt of the report of the Advisory Board [*Sital v. State*, A. 1952 Punj. 349], but not beyond three months from the date of detention [*Sangappa v. State of Mysore*, A. 1959 Mys. 7]. But there is nothing in the section to require the Government to communicate the order of confirmation [*Prahlad v. State of Bombay*, A. 1952 Bom. 1; *Afzal v. State of J. & K.*, (1957) S.C.R. 63 (67)], or the report of the Advisory Board [*Sarju v. State*, A. 1956 All. 589] to the detenu.

(13) In *Krishnan v. State of Madras*, (1951) S.C.R. 621, the Supreme Court held that s. 11 (1) is not invalid on the ground that it authorises detention for an indefinite period, for, the Act itself being temporary, the detention will automatically terminate with the expiry of the Act, and in *Dattatraya*

v. State of Bombay, A. 1952 S.C. 181, it was held that the period need not be specified when confirming the detention order. Act LXI of 1952 has put a limit to detention for an indefinite period by providing, in s. 11A that when a detention order has been confirmed, the detention will terminate on the expiry of 12 months from the date of detention (unless revoked earlier). S. 11A, thus, controls s. 11 (1). In *Puranlal v. Union of India*, A. 1958 S.C. 163, again, it has been held, that s. 11 (1) does not, by authorising the Government and not the Advisory Board to fix the period of detention beyond three months, violate Art. 22 (4).

(14) By inserting s. 11A, Act LXI of 1952, for the first time, prescribed the maximum period of detention under the P. D. Act. This is legislation in pursuance of the power conferred by Art. 22 (7) (b), *post*.

(15) S. 11A does not contravene Art. 14 of the Constitution [*Godavari v. State of Bombay*, A. 1953 S.C. 52].

(16) S. 12 of the original P. D. Act, 1950 provided that there was to be no review in cases falling within s. 3 (1) (ii). The scheme of the Amendment Act of 1951 is (i) to extend the benefit of a review by advisory Board to all cases [s. 9 (1)] and (ii) to bind the detaining authorities to act in conformity with the report of the Board [s. 11 (2)] —(*Krishnan v. State of Madras*, (1951) S.C.R. 621.) S. 12, read with s. 9 (2) (a) has been

13. Revocation of detention orders.—(1) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897 (X of 1897), a detention order may at any time be revoked or modified—

(a) notwithstanding that the order has been made by an officer mentioned in the sub-section (2) of section 3, by the State Government to which that officer is subordinate or by the Central Government; and

(b) notwithstanding that the order has been made by a State Government or by the Central Government.

(2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry which the Central Government or a State Government or an officer, as the case may be, is satisfied that such an order should be made.¹⁷

14. Temporary release of persons detained.—(1) The appropriate Government may at any time direct that any person detained in pursuance of a detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may at any time cancel his release.

(2) In directing the release of any person under sub-section (1), the appropriate Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) Any person released under sub-section (1) shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years or with fine or with both.

(5) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof.

15. Protection of action taken under the Act.—No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done in pursuance of this Act.

The Preventive Detention Act of Jammu & Kashmir.

The Constitution (Application to Jammu and Kashmir) Order, 1954, amended the Constitution of India in its application to Jammu and Kashmir in the following respects:

(a) Entry 9 of List I of the 7th Sch. is omitted. The result is that Parliament shall have no power to legislate with respect to preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India, in relation to Jammu and Kashmir, and laws made by Parliament under this Entry will not extend to that State.

(b) The power conferred upon Parliament to legislate with respect to the matters enumerated in Art. 22 (7) will not extend to Jammu and Kashmir.

(c) The existing law of the State with respect to preventive detention shall continue to be in force until repealed or amended by the Legislature of the State.

The P. D. Amendment Act, 1954, made consequential amendments in this Act, in conformity with the provisions of the above Order.

held to be valid as being a law "substantially" in accordance with sub-cl. (a) and (b) of cl. (7) of Art. 22 of the Constitution [*Krishnan v. State of Madras*, (1951) S.C.R. 621].

(17) The above sub-section was substituted by Act LXI of 1952 for the original s. 13 (2) which was follows:

"The revocation of a detention order shall not bar the making of a fresh detention order under s. 3 against the same person."

It would, accordingly seem that the intention of the Legislature behind the amendment is to confine the making of a fresh

order to the case where there are fresh facts justifying the fresh order.

This sub-section also overrides the decision in *Dattatraya v. State of Bombay*, A. 1952 S.C. 181, to the effect that the detaining authority may extend the period of detention, from time to time, provided it is done before the period originally fixed has expired; and follows the observations in *Narajan Singh v. State of Punjab*, A. 1952 S.C. 106 that, in the absence of bad faith, the detaining authority can supersede an earlier order challenged as illegal, and make a fresh order which is free from defects.

In short, the entire legislative power relating to preventive detention will belong to the Legislature of the State of Jammu and Kashmir and Parliament shall have no power in relation to that State.

In pursuance of this power, the Legislature of Jammu and Kashmir has enacted the Jammu and Kashmir Preventive Detention Act, 2011. The main points of difference of the State Act, as compared with the Indian Act are as follows:

(i) The Government of India shall have no power to make an order of detention with respect to a person in Jammu & Kashmir, except for reasons connected with *defence, foreign affairs or the security of India*;

(ii) The State Government of Jammu & Kashmir shall have the power to make an order of detention, in relation to the State, on grounds of—(a) security of the State; (b) maintenance of public order; (c) maintenance of the *loyalty of and discipline among the members of the Police forces of the State*; or (d) maintenance of supplies and services essential to the community.

It is evident that the ground relating to the Police Forces is new.

(iii) Under s. 8 (1) of the State Act [corresponding to s. 7 (1) of the Indian Act], there is no fixed time limit of 5 days for communication of the grounds of detention to the detenu; it will suffice if it is done '*as soon as may be*', which means within such time as is *reasonable* having regard to the circumstances of the case.¹⁸

In this sub-section, a Proviso has been added as follows:

"Provided that nothing contained in this sub-section shall apply to the case of any person detained with a view to preventing him from acting in any manner prejudicial to the *security of the State* if the Government by order issued in this behalf declares that it would be against the public interest to communicate to him the *grounds* on which the detention order has been made".

As a result of this, detention on the ground of 'security of the State of Jammu & Kashmir' is taken out of the general obligation to communicate the *grounds* of detention to the detenu (as distinguished from *facts* which are considered to be against the public interest to disclose), if the State Government makes a declaration that it would be against the public interest to communicate to the detenu the grounds on which the detention order has been made. But such declaration must be made within the same time specified in sub-sec. (1) for communication of the grounds, i.e., '*as soon as may be*' after the detention order.¹⁸ Where in the order of detention itself, the State Government mentions that the order is being made in the interests of the security of the State, there is no reason why the declaration as to the non-disclosure of the grounds should not be made in the detention order itself or '*as soon as may be*' thereafter.¹⁸ The Supreme Court, accordingly, set free a detenu where the declaration referred to in the Proviso was not made until two months after the order of detention (which stated that it was made on the ground of security of State), and the Government failed to give any reasons why the declaration could not be made earlier.¹⁸

(iv) In s. 9 [corresponding to s. 10 of the Indian Act], the maximum time for reference to the Advisory Board is *six weeks* instead of thirty days.

(v) In s. 13 [corresponding to s. 11A of the Indian Act], the maximum period of detention in pursuance of a detention order confirmed according to the report of the Advisory Board shall be *ten years* instead of 12 months.

(vi) What is most important, s. 14 of the State Act enables the State Government to take out two cases from the obligation to refer to the Advisory Board. This provision has been made by the Legislature of the State by virtue of the power conferred by Art. 22 (7), as modified in relation to the State of Jammu & Kashmir.

These two cases are detention on the grounds of—(a) Security of the State; and (b) maintenance of public order. In these two cases, it would be permissible for the State Government to detain a person for more than 3 months *but not exceeding 10 years, without obtaining the opinion of the Advisory Board*.

(18) *Abdul Jabbar v. State of J. & K.*, A. 1957 S.C. 281.

As the Supreme Court has held in *Lakhanpal v. State of J. & K.*,¹⁹ notwithstanding any inconsistency in the Jammu & Kashmir Preventive Detention Act with the provisions of Part III of the Constitution, the State Act shall prevail for a period of 10 years from the commencement of the Constitution (Application to Jammu & Kashmir) Order, 1954. It follows that the validity of s. 8 (1) of the State Act [see above], cannot be questioned under Arts. 21-22 of the Constitution of India.

But, as the Supreme Court has explained,¹⁸ the word 'may' in sub-sec. (1) indicates that it is permissive. It does not mean that every case relating to security of the State or public order must necessarily be withheld from the Advisory Board. It is discretionary with the Government to send any such case to the Advisory Board.

CLAUSE (4).

Sub-cl. (a). —The present clause requires that a law which provides for preventive detention for *more* than three months²⁰ must contain a provision for the establishment of an Advisory Board²¹ [unless the law is one which is referred to in cl. (b)].

Reading cls. (4) and (7) together, it is clear that a person may be detained for more than three months only in two cases—(i) where the opinion of an Advisory Board is obtained, subject to the maximum period prescribed by Parliament by a law made under cl. (7) (b); (ii) where a person is detained under a law made by Parliament under sub-cls. (a) and (b) of cl. (7). The Board must report *before* the expiration of *ten weeks* from the date of detention. [See s. 10 (1) of the P. D. Act, p. 114, *ante*]. If the Board does not report within that time, further detention becomes illegal.²²

Scope of Advisory Board.

The only function of the Advisory Board is to report to the Government whether a detenu is liable to be detained for a period exceeding 3 months, subject to the maximum laid down by Parliament under Cl. (7) (b).²³ Such report will enable the Government to detain the person beyond three months, provided the detention is valid on its merits, and does not otherwise offend the Constitution.²⁴

The words 'such detention' have been interpreted to refer to preventive detention and not the period for which the person is to be detained. It follows that the matter before the Advisory Board is whether the detention is justified and not for how long he should be detained. After the Advisory Board reports that the detention is justified, it is for the detaining authority to determine the period of detention, subject to the maximum laid down by Parliament.²⁵⁻²⁴

"An Advisory Board, composed as it is of Judges or lawyers, would hardly be in a position to judge how long a person under preventive detention, say, for reasons connected with defence, should be detained. That must be a matter for the executive authorities, the Department of Defence, to determine as they alone are responsible for the defence of the country and have the necessary data for taking a decision on the point. All that an Advisory Board can reasonably be asked to do, as a safeguard against the misuse of power, is to judge whether the detention is justified and not arbitrary or *mala fide*".²⁵

(19) *Lakhanpal v. State of J. & K.*, A. 1956 S.C. 197: (1955) 2 S.C.R. 1101.

(20) In fact, however, s. 9 (1) of the Preventive Detention Act, as amended by Act IV of 1951, has made it obligatory upon the appropriate Government to refer *every* case of detention to the Advisory Board, within *thirty days* of the order of detention, so that it is not possible to keep a person under detention for more than thirty days, without referring to the Advisory Board.

(21) See s. 8 of the Act, for constitution of Advisory Board.

(22) *Umedsing v. State*, A. 1952 Sau. 51.

(23) The maximum period now prescribed by s. 11A of the P. D. Act is 12 months from the date of detention.

(24) *Puranlal v. Union of India*, A. 1958 S.C. 163.

(25) Sastri J. in *Gopalan v. State of Madras*, (1950) S.C.R. 88 (209-210), approved in *Puranlal v. Union of India*, A. 1958 S.C. 163 (168, 169).

The Advisory Board is not, accordingly, competent to say *anything* regarding the period for which the person should be detained.¹

The function of the Board is purely advisory and its report does not make the detention valid if it is *ultra vires* the P. D. Act or the Constitution. Hence, *habeas corpus* would still lie against the initial order of detention notwithstanding the report of the Advisory Board² confirming it,—for instance, on the ground that the law is *ultra vires* or that the order is *mala fide*. Again, *habeas corpus* would lie even before the detenu's case is placed before or considered by the Advisory Board. In other words, the High Court's jurisdiction under art. 226 is not in any way controlled by the constitution of Advisory Boards.³

Similarly, the disposal of an application for *habeas corpus* under Art. 226 cannot affect an applicant's case before the Advisory Board. The Court and the Advisory Board function in different areas.³

If the Advisory Board reports against the order of detention, it would be illegal for Government to detain the person beyond three months, under Art. 22 (4). S. 11 (2) of the amended Detention Act, requires the appropriate Government, in such a case, to revoke the detention order and to release the detenu *forthwith* [see *ante*].

When the Government confirms the order of detention in pursuance of the report of the Board it must specify the period of detention.^{3a} It cannot be urged that where the Government fails to specify the period, it must continue for the maximum period specified in s. 11A of the P. D. Act.⁴

'Qualified to be appointed as Judges of a High Court'.—It has been held that the qualifications required for membership of the Advisory Board are the qualifications laid down in Cl. (2) of Art. 217 and not the age-limit prescribed for the tenure of High Court Judges in Cl. (1) of Art. 217.⁵

Sub-cl. (b).—Before the insertion of s. 11A in 1952, it was held⁶ that in the absence of a legislation by Parliament under Art. 22 (7) (b), it was competent for Government to detain a person for any length of time if the Advisory Board reported that there was sufficient cause for detention. The insertion of s. 11A sets the maximum limit at 12 months from the date of detention (see p. 115, *ante*).

In the case of the State of Jammu & Kashmir, it is the Legislature of the State which is competent to make the law under Cl. (7) of Art. 22.^{5a} (See p. 120, *ante*).

CLAUSE (5).

Scope of Cl. (5).—This clause considers two things: (a) It is first considered that the man so detained has a right to be given as soon as may be the grounds on which the order has been made. He may otherwise remain in custody without having the least idea as to why his liberty has been taken away. This is considered an elementary right in a free democratic State. (b) Having received the grounds for the order of detention, the next point which is considered is, "but that is not enough; what is the good of the man merely knowing grounds for his detention if he cannot take steps to redress a wrong which he thinks has been committed either in belief in the grounds or in making the order." This clause therefore further provides that the detained person should have the earliest opportunity of making a representation against the order. The representation has to be against the order of detention because the grounds are only steps for the satisfaction of the Government and on which satisfaction the order of detention has been made.⁷ As there is no trial in cases of preventive detention,

(1) *Dattatraya v. State of Bombay*, (1952) S.C.R. 612 (626), Mukherjee J.

(2) *Prem Dutt v. Supdt., Central Prison*, A. 1954 All 315.

(3) *Raman Lal v. Commr. of Police*, (1951) 56 C.W.N. 42.

(3a) *Puranlal v. Union of India*, (1957) S.C.R. 460 (474).

(4) *Cf. Teja Singh v. State*, A. 1951

Pepsu 1. [Cl. (2) of s. 11A engrafted a limited exception].

(5) *Baishnab v. State*, A. 1952 Orissa 60.

(6) *Krishnan v. State of Madras*, (1951) S.C.R. 621.

(5a) *Cf. Afzal v. State of J. & K.*, (1957) S.C.R. 63 (66).

(7) *State of Bombay v. Atmaram*, (1951) S.C.R. 167; (1950-51) C.C. 139; *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708.

the right of making a representation affords the only opportunity to the person detained to repel the accusation brought against him and establish his innocence.

It is to be noted, however, that while the Court is entitled to examine the sufficiency of the recitals in the 'grounds' for the purpose of determining whether they gave the detained person the earliest opportunity to make a representation, the sufficiency of the ground which gave rise to the *satisfaction* of the detaining authority is not a matter for examination of the Court [see p. 117, *ante*]. The two things are different and it does not, accordingly, follow that merely because the grounds are not sufficient for making representation, they were also not sufficient for the subjective satisfaction of the authority, so that the order was *mala fide*.⁸

The right of representation.

Art. 22 (5) gives to the detenu the right to make a representation, but no right to be heard by an independent tribunal.⁹

The detention order will be invalid if the requirements of this clause are not complied with *e.g.*, if the grounds on which the order has been made have no connection with the order, or have no connection with the circumstances or classes of cases under which preventive detention could be supported,⁹ or the grounds are too vague to enable him to make the representation.⁹

When an order of preventive detention is challenged on the ground that it contravenes Art. 22 (5), the question for determination by the Court is not whether the petitioner will in fact be prejudiced in the matter of securing his release by his representation, but whether his constitutional safeguard has been infringed. Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.¹⁰

The sufficiency of the particulars conveyed to a detenu is a justiciable issue under cl. (5), the test being whether they are sufficient to enable him to make an effective representation.¹¹

'As soon as may be'.—The judicial interpretation placed upon this expression has been rendered unnecessary, so far as the application of cl. (5) is concerned, by the amendment of s. 7 of the Preventive Detention Act which requires the grounds to be communicated not later than 5 days from the date of detention (see 116, *ante*).

The right to be informed of grounds: 'Grounds', 'facts' and 'particulars.'

The obligation of the authority to furnish information under this clause differs from that under cl. (1) in this that under the present clause, read with cl. (6), the authority is not bound to disclose facts which he considers to be prejudicial to the public interest to disclose. But 'facts' must be distinguished from 'grounds'.

While there is a discretion as to disclosure of 'facts', cl. (5) requires a disclosure of *all* the grounds, without any reservation. Since the words 'grounds' and 'facts' are used in opposition to each other, they should be taken to refer to different things. 'Grounds' refer to the *conclusions* or reasons¹⁷ leading to the order, while 'facts' means the evidence or data upon which those conclusions are based. The authority need not disclose all the evidence, but the communication must give the detenu the reasons or conclusions which impelled the authority to take action against him, with sufficient *particulars* or facts as are necessary, in the circumstances of the case, to enable the detenu to make a representation, which on being considered may give him relief.^{10, 12}

(8) *Tarapada v. State of W. B.*, (1951) S.C.R. 212: (1950-51) C.C. 151 (153).

(9) *Gopalan v. State of Madras*, (1950) S.C.R. 88: (1950-51) C.C. 74 (133).

(10) *Ram Krishan v. State of Delhi*, (1953)

S.C.R. 708: (1952-54) C.C. 317: A. 1953 S.C. 318.

(11) *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418.

(12) *State of Bombay v. Atmaram*, (1951) S.C.J. 208 (214-5): (1951) S.C.R. 167.

Although the facts may not be exhaustive, the grounds stated and the particulars supplied must be sufficiently *precise*, so as to make it possible for the detenu to make representation which is the object of supplying the information under the present clause.¹²

Thus, mere reproduction of the words of the section of the statute under which action has been taken is not proper compliance with Art. 22 (5); the authority must disclose sufficient facts upon which action has been taken, subject, of course, to cl. (6).¹² There is, however, no bar to the facts being supplied subsequently to the communication of the grounds.¹² (See next caption).

The 'grounds' should not be confused with the *object* of the detention, e.g., maintenance of public order, security of the State and the like. An order of detention must recite any of these objects (as stated in s. 3 (1) of the P. D. Act). Besides, the order must state the 'grounds' contemplated by s. 7 of the Act, i.e., the conclusions of fact which have led to the passing of the order of detention or the reasons why the order of detention has been made. Where the order of detention itself does not recite these conclusions of fact, they must be communicated to the detenu within 5 days of the date of detention, under s. 7 of the Act.¹³

In the words of the Supreme Court—

"The first part of Article 22, clause (5) gives a right to the detained person to be furnished with 'the grounds on which the order has been made' and that has to be done 'as soon as may be.' The second right given to such person is of being afforded 'the earliest opportunity of making a representation against the order.' It is obvious that the grounds for making the order as mentioned above, are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds therefore must be in existence when the order is made. By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts. The conclusions drawn from the available facts will show in which of the three categories of prejudicial acts the suspected activity of the particular person is considered to fall. These conclusions are the 'grounds' and they must be supplied. No part of such 'grounds' can be held back nor can any more 'grounds' be added thereto. What must be supplied are the 'grounds on which the order has been made' and nothing less.

The second right of being afforded 'the earliest opportunity of making a representation against the order' is not confined to only a physical opportunity by supplying paper and pen only. In order that a representation can be made the person detained must first have knowledge of the grounds on which the authorities conveyed that they were satisfied about the necessity of making the detention order. It is therefore clear that if the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object. . . . While the grounds of detention are thus the main factors on which the subjective decision of the Government is based, other materials on which the conclusions in the grounds are founded could and should equally be conveyed on the detained person to enable him to make out his objections against the order. To put it in other words, the detaining authority has made its decision and passed its order. The detained person is then given an opportunity to urge his objections which in case of preventive detention comes always at a later stage. The grounds may have been considered sufficient by the Government to pass its judgment. But to enable the detained person to make his representation against the order, *further details* may be furnished to him. In our opinion, this appears to be the true measure of the procedural rights of the detained person under Article 22 (5)."¹³

Thus, though *our* Constitution does not specifically lay down any obligation to give 'particulars' or details and leaves it to the discretion of the authority to disclose or withhold facts, it cannot be held that a mere recital of the clauses of the statute without giving any particulars or details would suffice, for without any particulars, it is not possible to make a representation which is the very object of communicating the grounds.¹³ The detenu is not entitled to know the *evidence*, nor the source of the *information*, but he must be furnished with the grounds for his detention and sufficient *details* to enable him to make out a case, if he can, for the consideration of the detaining authority.^{13-13a} The Supreme Court has thus evolved out of Art. 22 (5) an obligation to furnish to the detenu 'particulars as full and adequate as the circumstances permit'.^{13-13a}

(13) *Naresh Chandra v. State of W. B.*,
A. 1959 S.C. 1335 (1340).

(13a) *Ram Krishan v. State of Delhi*, (1953)
S.C.R. 708.

In other words—

Art. 22 (5) only obliges the authorities to communicate to the detenu the grounds on which the order of detention has been made, *i.e.*, to indicate the kind of prejudicial activity the detenu is being suspected to be engaged in. But the obligation to furnish sufficient facts or particulars comes from the duty of the authorities under the second part of Art. 22 (5), *viz.*, to 'afford the detenu the earliest opportunity of making representation', for, without getting information sufficient to make a representation against the order of detention, it is not possible for the man to make the representation at all.¹³ Hence, a person detained is entitled, in addition to the right to have the ground of his detention communicated to him, to a further right to have particulars as full and adequate as the circumstances permit furnished to him so as to enable him to make a representation against the order of detention and the sufficiency of particulars conveyed in the second communication is a justiciable issue, the test being whether they are sufficient to enable the detained person to make a representation which on being considered may give him relief.¹⁴

But, while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. For the first, the test is whether it is sufficient to satisfy the authority; for the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity.¹⁵

Even where the grounds or the 'basic facts'¹⁶ have been furnished, the detenu may require further particulars or details in order to enable him to make an effective representation, or the particulars supplied may be vague so that further information becomes necessary. In such a case, the Supreme Court has held that it is for the detenu to ask for such particulars as are necessary to enable him to make a representation, after the detaining authority has discharged its duty to communicate the 'grounds' as required by the earlier part of cl. (5) of Art. 22.¹⁶⁻¹⁷ If he does not ask for such particulars, his conduct may, in particular circumstances, be taken into consideration in deciding whether the grounds can be considered to be vague.¹⁷⁻¹⁸

The question arises, within what time the particulars required by the detenu should be supplied by the Government. It seems that sec. 7 (1) governs only the communication of the grounds. So far as the particulars required to enable the detenu to make a representation are concerned, they should come under the latter part of cl. (5) of Art. 22, namely, that they should be supplied as early as possible so that it may be said that the detenu has got the 'earliest opportunity to make a representation'.¹⁸

The right to obtain further particulars is, again, subject to the limitation in cl. (6).¹⁷ Even where the grounds are vague, the order of detention cannot be challenged on the ground of vagueness if the disclosure of facts is against the public interest, within the meaning of Cl. (6) of Art. 22.¹⁷

Scope for a second communication.

In some High Court decisions, it had been held that the grounds and the particulars should not be furnished in instalments, but at one time soon after the order of detention is made,¹⁹ because if the grounds originally furnished are not such as to enable the detenu to make a proper representation, then there is a

(14) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 418.

(15) *Ram Singh v. State of Delhi*, (1951) S.C.R. 451: (1950-51) C.C. 158 (163): A. 1951 S.C. 270: *Puranlal v. Union of India*, (1958) S.C.R. 460.

(16) *Nareesh v. State of W. B.*, A. 1959 S.C. 1335 (1340).

(17) *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (390).

(18) *Ujagar Singh v. State of Punjab*, (1950-51) C.C. 155.

(19) Cf. *Durgadas v. Rex*, A. 1949 All 148.

violation of the fundamental right under Art. 22 (5), which cannot be set right by the detaining authority by amplifying or improving the grounds already given.

These decisions must now be read subject to the observations of the Supreme Court in *State of Bombay v. Atma Ram*.²⁰

"The argument that supplementary grounds cannot be given after the grounds are first given to the detenu, similarly requires a closer examination. The adjective 'supplementary' is capable of covering cases of adding new grounds to the original grounds, as also giving particulars of the facts which are already mentioned, or of giving facts in addition to the facts mentioned in the ground to lead to the conclusion of fact contained in the ground originally furnished. It is clear that if by 'supplementary grounds' is meant *additional* grounds, i.e., conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in Article 22 (5) as the grounds for the order of detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished *as soon as may be*. The other aspects, viz., the second communication (described as supplemental grounds) being only *particulars* of the facts mentioned or indicated in the grounds firstly supplied, or being *additional incidents* which taken also with the facts mentioned or indicated in the grounds already conveyed lead to the same conclusion of the fact (which is the ground furnished in the first instance), stand on a different footing. These are not new grounds within the meaning of the first part of Article 22 (5). Thus, while the first mentioned type of 'additional' grounds cannot be given after the grounds are furnished in the first instance, the other types even if furnished after the grounds are furnished as soon as may be, but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in Article 22 (5) of the Constitution. . . . While there is the duty on the part of the detaining authority to furnish grounds and the duty to give the detained person the earliest opportunity to make a representation which obligations, as shown above, are co-related, there exists no express provision contemplating a second communication from the detaining authority to the person detained. This is because in several cases a second communication may not be necessary at all. The only thing which emerges from the discussion is that while the authorities must discharge the duty in furnishing grounds for the order of detention 'as soon as may be' and also provide 'the earliest opportunity to make representation', the number of communications from the detaining authority to the detenu may be one or more and they may be made *at intervals*, provided the two parts of the aforesaid duty are discharged in accordance with the wording of cl. (5). So long as the latter communications do not make out a *new* ground, their contents are no infringement of the two procedural rights of the detenu mentioned in the clause. They may consist of a narration of facts or particulars relating to the grounds already supplied. But in doing so the *time factor* in respect of the second duty, viz., to give the detained person the earliest opportunity to make a representation, cannot be overlooked . . ."

In short, though new *grounds* cannot be added, there is nothing to bar the communication of *particulars* or facts relating to the grounds already supplied, by one or more subsequent communications, provided the 'earliest' opportunity of making a representation is not defeated.

Illustrations.

1. A was arrested on the 21st April, 1950, under the Preventive Detention Act, 1950, and on the 29th April, the following ground for his detention was supplied to him—"That you are engaged and are likely to be engaged in promoting acts of sabotage on railway and railway property in Greater Bombay."

He filed a *habeas corpus* petition on the 31st of July, 1950, and urged, *inter alia*, that the ground supplied gave no particulars and was vague. Pending the disposal of the Rule, on the 26th August, 1950, the Commissioner of Police sent a communication to A as follows:—

"In pursuance of section 7 of the Preventive Detention Act, 1950 (Act IV of 1950), and in continuation of my communication No. 227, dated the 29th April, 1950, the following *further particulars* are hereby communicated to you in connection with the grounds on which a detention order has been made against you under sub-section (1) of section 3 of the said Act:—

That the activities mentioned in the grounds furnished to you were being carried on by you in Greater Bombay between January, 1950, and the date of your detention; and

In all probability you will continue to do so."

Held, the second communication of the 26th August mentioned no new ground but only gave particulars relating to the ground supplied on the 29th April. Together with these particulars, the detenu had enough materials for making a representation and the ground

(20) *State of Bombay v. Atma Ram*, (1951) Commr. of Police, (1951) 6 D.L.R. 23 (Bom.). S.C.J. 208 (218-9), reversing *Atmaram v.*

supplied could not be said to be vague, and it gave the detenu the earliest opportunity of making representation.²⁰

2. Detention orders were served on T and 99 others on 26-2-50 and the following grounds for detention were served on them on 14-3-50:

- "(1) That you have been assisting the operations of the Communist Party of India, which along with its volunteer organisations has been declared unlawful by Government under section 16 of the Indian Criminal Law Amendment Act (Act XIV of 1908), and which has for its object commission of rioting with deadly weapons, robbery, dacoity, arson and murder and possession and use of arms and ammunitions and explosives and thus acting in a manner prejudicial to the maintenance of public order, and that it is necessary to prevent you from acting in such manner.
- (2) That as a member of the C.P.I. on its Kishan front, you have fomented trouble amongst the peasants of Howrah district and incited them to acts of lawlessness and violence:

and have thereby acted in a manner prejudicial to the maintenance of public order:

- (3) That as a worker of the C.P.I. you have tried to foment trouble amongst the tramways men and other workers at Calcutta and in speeches which you delivered at the University Hall and other places you actually incited them to resort to acts of violence and lawlessness; and have thereby acted in a manner prejudicial to the maintenance of public order."

On the 16th of July, 1950, the Government of West Bengal served on the appellants "in continuation of the grounds already furnished on the 14th of March, 1950, supplementary grounds" in the following terms:—

"In continuation of the grounds already furnished under order No. 6163H.S., dated 14th March, 1950, you are being informed of the supplementary grounds for your detention which are as follows:—

You as the Secretary of the Bengal Chatkal Mazdoor Union, as a member of the Executive Committee of the Federation of Mercantile Employees Union, as the honorary reporter of the *Khabar* newspaper (C.P.I. organ) carried on the disruptive programme of the C.P.I. On the 29th July, 1948, you along with others led a procession at Howrah preaching discontent against Government and have been thus acting in a manner prejudicial to the maintenance of public order."

Thereafter, the detenus applied for *habeas corpus* and on 21-7-50, rule was issued on the Chief Secretary.

Held, the 'supplementary grounds' supplied on 16-7-50 were not additional or new grounds but only furnished details of the second head of the grounds furnished on 14-3-50. The fact that these details were communicated later does not necessarily show that they were not within the knowledge of the authorities when they sent the communication dated 14-3-50.²¹

In short,—

Though it was not obligatory upon the authority to disclose *all* facts other than those which he had the privilege to withhold under Art. 22 (6), the authority must, nevertheless, furnish information sufficient to enable the detenu to make representation. If the particulars supplied were not sufficient for that purpose, there was a violation of Art. 22 (5), and the detenu was entitled to be released. 'Particulars' may, however, be furnished subsequent to the communication of the grounds. But once the grounds are communicated no new or *additional* grounds may be furnished.²² In *Ujagar's case*²² it has been held that where particulars are necessary in order to make the grounds intelligible for the purpose of making a representation at the earliest opportunity, the particulars also must be furnished 'as soon as may be', so that the right under Art. 22 (5) may not be defeated.

Effect of supplying vague grounds.

It is submitted that the strict view taken by the Supreme Court in its earlier decisions, on this point, has been relaxed in later cases, to the detriment of the constitutional right to make a representation, under Cl. (5).

In the earlier cases,²²⁻²³ it was asserted, without any qualification, that when the grounds supplied to the petitioner at the time of the order are so vague (apart from questions of technical defects) as prevents the detenu to make a representation, the constitutional right of detenu to make a representation at "the earliest opportunity" [Art. 22 (5)] is infringed and this renders the detention order void *ab initio*.²³

(21) *Tarapada v. State of West Bengal*, (1951) S.C.J. 233.

(22) *Ujagar Singh v. State of Punjab*, (1950-51) C.C. 154.

(23) *State of Bombay v. Atma Ram*, (1951) S.C.R. 167.

As the Supreme Court had observed—

"When an order of preventive detention is challenged on the ground that it contravenes Art. 22 (5), the question for determination by the Court is not whether the petitioner will in fact be prejudiced in the matter of securing his release by his representation, but whether his constitutional safeguard has been infringed."²⁴

Of course, the detention is not rendered invalid by any *mistake* in the communication which *does not prejudice the detenu*, e.g., where he has been served with a true copy of the actual order.²⁵⁻¹ Similarly, where the detenu has already made a detailed representation to the Advisory Board, it is not open to him to contend before the Court that the grounds were so vague that representation was not possible.²

But the right to obtain 'particulars' as are necessary in order to make the grounds intelligible for the purpose of making a representation at the 'earliest opportunity' was deduced from the very right to make the representation, which is guaranteed by Cl. (5).³ It was, of course, acknowledged that there was nothing wrong in the detaining authority's furnishing the particulars by a communication subsequent⁴ to the communicating the grounds 'as soon as may be' and the 'earliest opportunity' of making representation was not transgressed.

In none of these cases⁴⁻⁵ was it suggested that where the detenu found the 'grounds' to be insufficient or vague for the purpose of his making the representation, it was for him to ask for further particulars. On the other hand, it was held²² that the failure to furnish grounds with the speedy addition of such particulars as would enable the detenu to make a representation at the earliest opportunity against the detention order can be considered by a court of law as the invasion of a fundamental right or safeguard guaranteed by the Constitution, viz., of being given the earliest opportunity to make a representation.²³

But, in *D'Souza v. State of Bombay*,³ the Court, speaking through Jagannadhadas J., asserted the proposition that where the grounds are vague, it is for the detenu to ask for further particulars to enable him to make the representation and "the fact that he had made no such application for particulars is . . . a circumstance which may well be taken into consideration in deciding whether the grounds can be considered to be vague".³ In other words, where the detenu fails to ask for particulars he may be debarred from urging that his constitutional right under Cl. (5) has been infringed. Of course, Jagannadhadas J. relied upon an observation in *Atmaram's case*:⁴

".....if the grounds are not sufficient to enable the detenu to make a representation, the detenu, if he likes, may ask for particulars which would enable him to make the representation".⁴

It is evident, however, that the above observation uses permissive language and emphasises the right of the detenu to obtain further particulars. It does not say that where the grounds are vague, the detaining authority has no *duty* to supply further particulars. On the other hand, in *Atmaram's*⁴ case, this duty had been emphasised in the following words—

"While the Constitution gives the Government the privilege of not disclosing in public interest facts which it considers undesirable to disclose..... there is a *clear obligation* to convey to the detained person materials (and the disclosure of which is not necessary to be withheld) which will enable him to make a representation..... Any deviation from this rule is a deviation from the intention underlying Article 22 (5) of the Constitution".⁴

In *Ram Krishan v. State of Delhi*,⁵ where the Court annulled an order of detention on the ground of vagueness, without insisting upon the fact the detenu

(24) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708.

(25) *Ex parte Green*, (1942) A.C. 284.

(1) *Re Shoilen Dey*, A. 1949 Bom. 75.

(2) *Ramnathan v. State of Hyderabad*, A. 1952 Hyd. 186.

(3) *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (390).

(5) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708 (713).

(4) *State of Bombay v. Atmaram*, (1951) S.C.R. 167 (184).

(5a) *Ujagar Singh v. State of Punjab*, (1950-51) C.C. 154.

did not ask for particulars, the Court negatived the suggestion that the detenu might have further particulars through the Advisory Board:

"The Attorney-General drew attention to the recent amendment of Sec. 10, Preventive Detention Act, as a result of which the petitioner would be entitled to be heard in person before the Advisory Board if he so desires and it was said, that he would thus have the opportunity of getting the necessary particulars through the Board who could call upon the appropriate Government to furnish particular if the Board thought that the demand for them was in the circumstances just and reasonable. The petitioner would thus suffer no hardship or prejudice by reason of sufficient particulars not having been already furnished to him. The question however is not whether the petitioner will in fact be prejudicially affected in the matter of securing his release by his representation, but whether his constitutional safeguard has been infringed. Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under Art. 22 (5), as interpreted by this Court by a majority, to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation which on being considered may give relief to him". We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained subject of course to a claim of privilege under Cl. (6) of Art. 22. That not having been done in regard to the ground mentioned in sub-para. (c) of Para. 2 of the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21. The petitioner is therefore entitled to be released and we accordingly direct him to be set at liberty forthwith."

If the right to obtain particulars, where the grounds are vague, follows from the right to make a representation guaranteed by cl. (5), are we not denying that right, if we throw the burden upon the detenu to ask for particulars? In *Ram Krishan's case*,⁶ the Court adopted the standard of an ordinary layman to determine whether a ground was vague or not. If so, it is a definite objective standard, and it is for the Court to determine on an application of this standard whether a ground is vague or not. It cannot be expected of a detenu, unaided by legal counsel, to proceed according to the view taken in judicial decisions and to ask for particulars, after having assessed his constitutional rights, at the proper stage. In *Ram Krishan's case*,⁶ the Court had observed—

"It is up to the detaining authority to make his meaning clear beyond doubt without leaving the person detained to his own resources for interpreting the grounds."

It is whittling down the constitutional guarantee if the Court now holds that whatever be the fault of the detaining authority in complying with the requirement of clause (5), the detenu would be precluded from relying upon his constitutional right if he does not ask for further particulars when the grounds were communicated to him.

What is a vague ground.

A ground which does not enable the detenu to make an effective representation against the order of detention is called a 'vague' ground. Whether a ground is vague or not would, however, depend on the circumstances of each case.⁷ In *State of Bombay v. Atmaram*,⁷ Kania C.J. observed—

"What is meant by vague? Vague can be considered as the antonym of "definite". If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It is however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. That is a matter of detail which has to be examined in the light of the circumstances of each case. *If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague.* The only argument which could be urged is that the language used in specifying the ground is so general that it does not permit the detained person to legitimately meet the charge against him because the only answer which he can make, is to say that he did not act, as generally suggested. In certain cases that argument may support the contention that having regard to the general language used in the ground he has not been given the earliest opportunity

(6) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708 (713).

(7) *State of Bombay v. Atma Ram*, (1951) S.C.R. 167 (179).

to make a representation against the order of detention. It cannot be disputed that the representation mentioned in the second part Article 22 (5) must be one which on being considered may give relief to the detained person."⁷

"(1) If the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object.

(2) While there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. For the first, the test is whether it is sufficient to satisfy the authority; for the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity."⁸

(A) A communication which is not readily intelligible by a layman without legal aid, is vague.⁹

Illustrations.

In the following cases, the grounds have been held to be vague—

1. "In pursuance of the policy of the Communist party, you are engaged in preparing the masses for violent revolutionary campaign and attend secret party meetings to give effect to this programme."¹⁰

2. "You tried to create public disorder amongst tenants in *Una Tehsil* by circulating and distributing objectionable literature issued by underground communists."¹¹

3. "That you along with your associates have been collecting and are likely to collect arms and ammunitions illegally for illegal purposes and illegal activities."

Held, the grounds were too vague to enable the detenu to make a representation; it did not mention either the time when or the place where or the purposes or activities for which the arms were collected.¹²

4. To allege, merely, that the detenu had been carrying on 'subversive' propaganda.¹³

(B) On the other hand,—

If on reading the ground furnished it is capable of being intelligently understood¹⁴ and is sufficiently definite to enable the detenu to make a representation against the order of detention, it cannot be called vague.¹⁵

Particulars of things which the person apprehended to do in the future cannot be given, in the very nature of things, with as much definiteness as of events which have already taken place.¹⁶ It is not necessary to indicate the objectionable passages of the alleged speeches delivered by the detenu if their time and place and their general nature and effect are stated.¹⁷

Illustrations.

1. Where the grounds furnished to the detenu stated that "he threatened public peace and tranquillity in a *certain* district by urging violent methods specially among the labour classes and that the speeches at public meetings and demonstrations were prejudicial to the maintenance of public order in that district", *held*, the grounds communicated were sufficient to enable the detenu to make a representation.¹⁸ It is not necessary to quote the objectionable passages in the communication.¹⁹

2. Where the ground stated—

"That you have been assisting the operations of the Communist party of India . . . which has for its object commission of rioting with deadly weapons . . . thus acting in a manner prejudicial to the maintenance of public order;

that as a member of the C.P.I., you have fomented trouble amongst the peasants of the Howrah district . . . and amongst the tramways men and other workers at Calcutta",

and in continuation of these grounds, instances of meetings and processions with dates were furnished, illustrating the attempt to foment trouble amongst workers, *held*, the grounds were not vague.²⁰

(8) *Ram Singh v. State of Delhi*, (1951) S.C.R. 451 (463).

(9) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708.

(10) *Ujagar Singh v. State of Punjab*, (1950-51) C.C. 154 (156).

(11) *Sushila v. Commissioner of Police*, (1950) 5 D.L.R. 242 (Bom.).

(12) *State of Bombay v. Atmaram*, (1951) S.C.R. 167.

(13) *Naresh v. State of W. B.*, A. 1959 S.C. 1335 (1341).

(14) *State of Bombay v. Atma Ram*, (1951) S.C.R. 167 (184).

(15) *Ram Singh v. State of Delhi*, A. 1951 S.C. 270: (1951) S.C.R. 451 (463).

(16) *Benoy v. Govt. of Assam*, A. 1950 Assam 49.

(17) *Tarapada v. State of W. Bengal*, (1951) S.C.R. 212.

3. To allege that "on the 5th October you hoarded maunds of fine paddy with intent to sell in black market"¹⁷

4. Where the ground stated—

"In furtherance of your campaign for non-payment of rent, you were instigating the people in the Belgaum district to commit acts of violence against the landlords."

and the additional particulars subsequently supplied specified the tenants of the talukas referred to by 'the people in the Belgaum district' and also specified the time of the activity, held, the grounds supplied were sufficiently specific.¹⁸

5. Where in the grounds it was stated, that with a view to prejudice the relations of India with the Portuguese Government and also the security of India, the detenu was carrying on espionage with financial help given by the Portuguese authorities in Goa, collecting intelligence about the security arrangements on the border, held, the grounds were not vague by reason of the details of the financial aid or the length of the period for which the detenu was carrying on his activities not having been given, particularly because, having regard to the nature of the activities and the strained relation between India and Goa, it was against the public interest to disclose further particulars.¹⁹

6. The grounds stated, *inter alia*—

"that you intend to proceed to Delhi on 9-10-58, and that you are likely to instigate plans which may adversely affect the personal security of the Prime Minister of India". Held that the ground was not vague because the place, date and purpose of the planned nefarious activity were clearly stated. Further details of the plan could not possibly be disclosed because those events lay in the womb of the future. Particulars of events in the offing cannot be definitely stated.²⁰

What is an 'irrelevant' ground.

1. 'Irrelevant' grounds should be distinguished from 'vague' grounds. While 'vague' grounds means grounds which are not sufficient to make an effective representation (see p. 130, *ante*), 'irrelevant' grounds means grounds which are not relevant to the object of the legislation.

2. A ground is irrelevant if it is not relevant to any of the circumstances under which preventive detention can be made [under s. 3 of the P. D. Act, read with List I, Entry 9 and List III, Entry 3],²¹ e.g., contempt of Court.²²

3. The provision for representation in cl. (5) does not exclude the right of the Court to examine the grounds given by the Government to see that they are *relevant to the object* which the legislation has in view, *viz.*, preventive detention, and that the connection is 'real and proximate'.²⁰ The detenu's right to move the Court to show that his detention is unconstitutional is guaranteed by Art. 32.

"... It is open to a detained person to contend before a Court that the grounds on which the order has been made have no connection at all with the order, or have no connection with the circumstances or class or classes of cases under which the preventive detention order could be supported under section 12. To urge this argument the aggrieved party must have a right to intimate to the Court the grounds given for the alleged detention and the representation made by him. For instance, a person is served with a paper on which there are written three stanzas of a poem or three alphabets written in three different ways. If the detained person is not in a position to put before the Court this paper, the Court will be prevented from considering whether the requirements of Art. 22 (5) are complied with and that is a right which is guaranteed to every person."²¹

Hence, any law which prevents the detenu from disclosing to the Court the grounds communicated to him under cl. (5) or the Court from obtaining such disclosure or information, is *ultra vires*.²¹

4. But in order to determine whether any ground is irrelevant, the Court must consider all the grounds taken as a whole and not any particular ground isolated from the rest.²³

Illustrations.

(i) One of the grounds in the detention order was that the Petitioner had used his position as the head of the caste, to increase his influence over the residents of the area, and had

(17) *Narasimhamurthy v. State*, (1951) 6 D.L.R. 53 (Cutback).

(18) *State of Bombay v. Purushottam*, A. 1952 S.C. 317.

(19) *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (390).

(20) *Rex v. Basudeva*, (1950) S.C.J. 47.

(21) *Gopalan v. State of Madras*, (1950) S.C.J. 147 (196-7; 245). [See also *Machindar v. The King*, A. 1950 F.C. 129 (130)].

(22) *Sodhi Shamser v. State of Pepsu*, A. 1954 S.C. 277.

(23) *Shamrao v. District Magistrate*, A. 1952 S.C. 324 (328).

created a band of obedient and trusted associates, by inflicting fines and excommunication upon those who disregarded his wishes. It was contended that this ground was irrelevant as it had no connection with 'security of the State or maintenance of public order',—the Petitioner having exercised only such powers as belonged to him as the head of the caste. *Held*, it was not irrelevant, inasmuch as the grounds read as a whole indicated the charge against the Petitioner that he aimed at setting up a parallel government in the area and that in order to achieve this end he did various acts such as intimidating the workers with threats of murder, and his own workers and associates with penalties, unless they carried out his wishes.

It was urged that the first ground, quoted below, was irrelevant to 'public order', 'security of the State' or any of the other matters specified in the law of preventive detention under which the order had been made:

"Being the President of Jamat you have used your influence over the residents of Uran Peta, have created a band of obedient and trusted associates, have inflicted heavy fines on villagers who have disregarded your wishes and have imposed on them boycott in cases of their refusal to pay the fines."

The Supreme Court held that, read with the other grounds, the first ground was not irrelevant.

"The gravamen of the charge against the Petitioner is that he aimed at setting up a parallel government in the Uran Peta area and that in order to achieve that end he did various acts such as intimidating the workers in the salt pans with threats of murder, and his own workers with threats of death, unless they carried out his orders; and among the lesser instances given to illustrate the exercise of parallel governmental authority are the ones set out in the first ground, *viz.*, the infliction of fines with the sanction of excommunication and boycott....."

(ii) Where the first ground was that the Petitioner, at a public meeting, "vented feelings of violence against the Prime Minister of India" and that "Shri Nehru should be murdered if necessary", for having turned a deaf ear to the miseries of the refugees, and the other grounds were that he exhorted the audience to "build up a strong movement against the implementation of the Nehru-Noon Pact" and "to rouse passions by alleging that the Prime Minister had no sympathy for West Bengal", *held*, that the latter grounds must be read with the first one and, when so, read, they could not be said to be irrelevant to the maintenance of 'public order'.²⁴

When one of several grounds is irrelevant, vague or non-existent.

I. It is now settled that if one of several grounds supplied to the detenu be either irrelevant²⁵⁻¹ or vague,²⁴ or non-existent,²⁵ the detention is invalid. Thus,

(a) If any of the grounds or reasons that led to the satisfaction be 'irrelevant', the detention would be invalid even if there are other relevant grounds, because it can never be certain to what extent the bad reasons operated on the authority or whether the detention order would have been made at all if only one or two good reasons had been before them.²⁵⁻¹ In such a case, the Court is bound to quash the order, unless it can be predicated that the irrelevant ground was of an unsubstantial or inconsequential nature.¹

Illustrations.

(i) In the impugned order of detention, the detaining authority mentioned two grounds, *viz.*, that the activities of the detenu were prejudicial to (a) the maintenance of supplies essential to the community; (b) maintenance of public order.

The Advisory Board, to which the case was referred, did not uphold the detention on the first ground, *viz.*, maintenance of supplies essential to the community (see s. 3 (1) (iii) of the Preventive Detention Act), and the Government revoked the detention on this ground, but confirmed it on the other ground, *viz.*, maintenance of public order.

Held, the order was vitiated as soon as the Government admitted that one of the two grounds upon which the detaining authority had acted, was non-existent.²⁵

(ii) The detention order stated the ground of detention to prevent the Petitioner from acting in a manner prejudicial to the supplies and services essential to the community and it was alleged that the Petitioner was smuggling essential goods such as shaffon cloth, Zari and mercury. It was found that shaffon cloth, and zari had not been declared 'essential goods'. The order was quashed.¹

(b) The constitutional requirement to furnish to the detenu particulars of the grounds sufficient to enable him to make a representation must be satisfied with respect to *each* of the grounds communicated to the person detained, subject, of

(24) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 708.

(25) *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418; (1952-54) C.C. 321.

(1) *Dwarka v. State of J. & K.*, (1956) S.C.R. 948.

course, to a claim of privilege under Art. 22 (6) of the Constitution. Where one of the grounds are vague, even though the Petitioner might succeed in rebutting the other grounds to the satisfaction of the Advisory Board, his representation might fail to carry conviction so far as the vague ground was concerned in the absence of particulars which he could rebut, so that the Advisory Board might recommend the continuance of his detention.²⁴

II. No doubt, the grounds are to be read together²⁻³ but the detenu, who is denied legal aid, cannot be expected to interpret a vague ground in the light of another ground just as a lawyer would have done it according to the rules of interpretation of documents.

Illustration.

The first paragraph of the statement of grounds stated—

"The Jan Sangh etc. have started an unlawful campaign in sympathy with the Praja Parishad movement of Kashmir for defiance of the law, involving violence", as evidenced by sub-paragraphs (a) to (l) which referred to incidents which are said to have ranged from the 4th to the 10th March, 1953, but they did not directly implicate the Petitioner.

The second paragraph then showed how the Petitioner was concerned in these activities: "The following facts show that you are personally helping and actively participating in the above-mentioned movement which has resulted in violence and threat to maintenance of public order."

Of the several sub-paragraphs which followed, sub-paragraph (e) stated—

"You have been organising the movement by enrolling volunteers among the refugees in your capacity as President of the Refugee Association of the Bara Hindu Rao, a local area in Delhi."

It was held that the particulars given in sub-paragraph (e) were vague as they omitted to mention the time of this activity. The contention that if the grounds were read as a whole, they could reasonably be taken to mean that the Petitioner was organising the movement by enrolling volunteers from the 4th to the 10th March, was rejected on the ground that the Petitioner, who was a layman, could not be expected to interpret the grounds just as a lawyer would have interpreted a document.³

III. The same principle is applicable to the case when one of several grounds communicated to the detenu is *non-existent*, as found by the Advisory Board or admitted by the detaining authority.⁴ Thus, where an order of detention was made on two grounds and the Advisory Board held that one of the two grounds was non-existent but confirmed the order on the other ground and the Government issued an order confirming the detention order on the latter ground, the Supreme Court held the detention order to be void.^{4a}

IV. But in applying the above principles, the Court must be satisfied that the vague or irrelevant or non-existent grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively *unessential* nature is defective that such an order based on subjective satisfaction can be held to be invalid.⁴

The reason underlying the foregoing principles was thus explained in *Dwarkanadas v. The State of J. & K.*,^{4—}

"Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some out of them are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons. To uphold the validity of such an order in spite of the invalidity of some of the reasons or grounds would be to substitute the objective standards of the Court for the subjective satisfaction of the statutory authority. In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively unessential nature is defective that such an order based on

(2) *Shamrao v. D. M. Thana*, (1952) S.C.R. 683 (695): (1952-54) C.C. 314.

(3) *Ram Krishan v. State of Delhi*, (1953) S.C.R. 706: (1952-54) C.C. 317.

(4) *Dwarkanadas v. State of J. & K.*, A. 1957 S.C. 164.

(4a) *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418.

subjective satisfaction can be held to be invalid. The Court while anxious to safeguard the personal liberty of the individual will not lightly interfere with such orders."¹

When is an order *mala fide*.

An order of detention is *mala fide* if it is made for a 'collateral' or 'ulterior' purpose, i.e., a purpose *other* than what the Legislature had in view in passing the law of preventive detention⁵ (i.e., prevention of acts prejudicial to the security of the State, maintenance of public order and so on). There is a *mala fide* exercise of the power if the grounds upon which the order is based are not proper or *relevant* grounds which would justify detention under the provisions of the law itself,⁶ or when it appears that the authority making the order did not apply his mind to it at all,⁷ or made it for a purpose other than that mentioned in the detention order.⁸

The question of *mala fides* has to be decided with reference to the facts of each case and the observations in one case cannot be regarded as a precedent in dealing with other cases.⁹

The *onus* of proving *mala fides* is upon the detenu,¹⁰ and the trend of recent decisions shows that it is not likely that the detenu may succeed in many cases.

"It is not sufficient merely to allege that the detention is not in good faith.....Facts have got to be alleged by the detenu sufficiently to persuade the Court that although the order *ex facie* indicates that everything that should have been done has been properly done, it is entitled or it is proper for the Court to call upon the Executive further to justify what is expressed to have been done in the order."^{11,12}

(A) Thus, an order of detention is not *mala fide* by reason of the following—

(i) Merely that the order of detention is made after failure to secure a conviction under the ordinary criminal law.¹³ Similarly, where there is a pending criminal case against a person,—if the case is withdrawn and an order of detention is made against him the order is not necessarily *mala fide*.¹⁴ The proper approach is to consider the facts of each case to determine whether the order was *mala fide*, or not.¹⁵ There is no rule of law that where a person can be prosecuted under the ordinary criminal law, no order of detention can ever be made against him.¹⁶ Whether the person should be prosecuted or detained, is a matter for the authorities to decide.¹⁷

For the same reason, a use of the power of preventive detention to secure the purposes of s. 144 of the Cr. P. Code is not *per se mala fide*. In the absence of other facts to show that the authority was actuated by any improper or indirect motive, the order cannot be impugned as *mala fide*.^{17a}

Further, there is no question of *mala fides* unless the charges in the criminal prosecution are shown to be identical with the grounds of detention.¹⁸

(ii) Merely that the order of detention refers to *past* activities of the detenu as giving rise to the satisfaction of the detaining authority,¹⁹⁻²⁰ or activities taking place outside the jurisdiction of the authority making the order of detention.²¹

But the past conduct or antecedent history of the person on which the authority purports to act, should ordinarily be proximate in point of time and should have

(5) *Gopalan v. State of Madras*, (1950) S.C.R. 88 (218, Sastri J.).

(6) *Ibid.*, p. 285, Mukherjea J.

(7) *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (387).

(8) *Puranlal v. Union of India*, A. 1958 S.C. 163.

(9) *Naranjan Singh v. State of Punjab*, A. 1952 S.C. 106.

(10) *Basanta v. Emp.*, A. 1945 F.C. 18.

(11) *Green v. Secy. of State*, (1942) A.C. 284.

(12) *Emp. v. Sibnath*, A. 1944 F.C. 1.

(13) *Dharmdas v. Dt. Magistrate*, A. 1960 Gujarat 43 (47).

(14) *Raman Lal v. Commr. of Police*, A. 1952 Cal. 26 (30); *Maledath v. Commr. of*

Police, A. 1950 Bom. 202; *Baboo Ram v. State*, A. 1951 All 838 (842).

(15) *Jagannath v. State of Bihar*, A. 1952 Pat. 185 (192) F.B.; *Ratanlal v. D. M. Ganjam*, A. 1952 Orissa 52.

(16) *Rambhuj v. Punjab State*, A. 1954

(17) *Jhala Jorubha v. State*, A. 1952 Sau. 12 (16).

(17a) *Ashutosh Lahiri v. The State of Delhi*, (1950) S.C.J. 433.

(18) *Thakur Prasad v. State of Bihar*, A. 1955 S.C. 631.

(19) *Bhim Sen v. State of Punjab*, (1952) S.C.R. 18 (24).

(20) *Ujagar Singh v. State of Punjab*, A. 1952 S.C. 350.

(21) *Sarju v. State*, A. 1956 All 589 (593).

a rational connection with the conclusion that the detention of the person is necessary.^{17a}

(iii) That a person has been, on the expiry of his detention under a temporary law of preventive detention, detained on the *self-same* grounds under another Act.¹⁹⁻²⁰

(iv) That *wrong* facts were placed before the authority which issued the order.^{19,23}

(v) Merely that a fresh order is made superseding a former order which was defective.²³

(vi) That there were certain disputes between the detenu and a Minister, when the Secretary who issued the detention order was not influenced by the Minister who was in charge of a different Department.²⁴⁻²⁵

(vii) Merely that the authorities did not personally like the activities of the detenu. The only relevant consideration is whether the order of detention was made for ulterior purposes or purposes other than those mentioned in the detention order.¹ Thus, where the activities cited in the order, which were relevant, were substantiated by the affidavits, the order could not be nullified as *mala fide* on the ground of basis or ill-will of the authorities.¹

(viii) That the action of the Police was *mala fide*, when there is nothing to show that the detaining authority did not apply his mind.²

(B) On the other hand, the order has been held to be *mala fide*, in the following cases—

(i) The Court reserved judgment in an application for *habeas corpus* against an order of detention and 3 days later, delivered judgment making the *rule nisi* absolute. During this interval, Government had a conference with its legal advisers and came to the conclusion that the Petitioner would, in all probability, be released by the Court on account of a technical defect in the form of the order and so passed a subsequent order of detention, which, however, was not brought to the notice of the Court. Within a few minutes after the delivery of judgment, the petitioner was re-arrested under the subsequent order of detention. *Held*, the subsequent order, not having been communicated to the Court, lacked *bona fides* and was made solely with the object of defeating the order of the Court during the pendency of the application upon the previous order.³

(ii) The petitioner was all along detained in jail as an under-trial prisoner in three cases for about 6 months. In one of them he was acquitted and in another discharged. Immediately thereafter, while the third case was still *pending*, he was served with an order of detention under the Preventive Detention Act, mentioning his past activities prior to his detention as under-trial prisoner, extending for a period of 2 years, as the ground of detention. *Held*, that the order of preventive detention was made for a collateral purpose,—either to *punish* him for his past acts or to prejudice his defence in the pending case. Hence, the order was *mala fide* and illegal.⁴

At any rate, it is improper to issue an order under the Preventive Detention Act when a person is already under detention under the ordinary law and awaiting his trial.^{22,5}

(iii) Where the detention was made simply with the object of making a secret investigation into a crime, in contravention of the provisions of the Criminal Procedure Code.⁶

“When the detaining authority makes up his mind to detain a person who is alleged to have committed an offence, then the detaining authority has made his choice, and it would

(22) *Rameshwar v. D. M.*, A. 1964 S.C. 334 (337).

(23) *Pyarelal v. State*, A. 1952 All 180.

(23) *Naranjan v. State of Punjab*, A. 1952 S.C. 106.

(24-25) *Gour Gopal v. Chief Secretary*, (1952) 50 C.W.N. 427.

(1) *Puranlal v. Union of India*, A. 1958 S.C. 163 (172).

(2) *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (387).

(3) *In re Gopalan*, (1952) II M.L.J. 690.

(4) *Ishar Singh v. The State*, A. 1953 Pepsu 111.

(5) *Ishaq v. State*, A. 1957 All. 782 (796).

(6) *Vimlabai v. Emperor*, I.L.R. (1945) Nag. 6.

not be permissible to him to investigate the offence while still keeping the person under detention and not complying with the provisions of the law with regard to investigation."⁷

(iv) Where the primary purpose of the order of detention is only to circumvent the orders of bail issued by the Court or to effect an illegal extension of the period of imprisonment served out by the prisoner.⁸

Bona fides of successive orders.

The question whether the making of a fresh order of detention after a previous order has been pronounced to be invalid by the Court or during the pendency of a proceeding to examine the validity of a previous order would be *mala fide* was raised in several cases. The question has been authoritatively settled by the Supreme Court in the case of *Naranjan Singh v. State of Punjab*,⁹ and the following propositions may be formulated in the light of this decision—

(i) Where the Court has declared, *on the merits*, the detention of a person to be without justification, a subsequent order of detention on the *same* grounds would obviously be *mala fide*. If, however, the decision proceeded simply on the ground that the *law* under which the order had been made was invalid or the order was irregular *in form*, a fresh order of detention under new legislation,¹⁰ or a fresh order of detention in a valid form based on the pre-existing grounds themselves⁹ is not *mala fide*.

(ii) In the case of a pending proceeding,—if at any time *before* the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release *merely* on the ground that at some prior stage, there was no valid cause for detention.⁹ Of course, if it appears on the facts of the case that the later order was not made *bona fide* on being satisfied that the petitioner's detention was still necessary, but was made obviously to *defeat* the pending petition challenging the validity of the earlier order, the later order would be held to be *mala fide* and the detenu released. But, in the absence of proof of bad faith, there is nothing to prevent the detaining authority to supersede a defective order by a valid order while a proceeding challenging the validity of the earlier order is pending.⁹

By reason of ss. 11 (2) and 13 (2) of the amended Preventive Detention Act (*ante*) it will not be possible to make a fresh order of detention on the *same* ground, if the Advisory Board has once reported that there is no sufficient ground for detention. Again, by reason of s. 9, it will not be possible to withhold reference to the Advisory Board by making successive orders. Any such action would be *mala fide*.

(iii) But, except where a valid order of detention is made to replace a formally defective order, an order of detention under the P. D. Act cannot be *served* upon a person who is already under detention or is in jail custody.^{10a}

The ambit of the Court's jurisdiction in cases of preventive detention.

For convenience of reference, we may now attempt to make a summary of the powers of the Supreme Court (under Art. 32) or of the High Court (under Art. 226) to question the validity of an order of preventive detention. A detenu may obtain his release if the Court holds in his favour any of the following points—

(i) The Court may examine the grounds communicated to the detenu to see if they are *sufficient* to enable him to make an effective representation, together

(7) *Bharatham v. Commissioner of Police*, A. 1950 Bom. 202.

(8) *In re Srinivasan*, A. 1949 Mad. 761; *Mani v. District Magistrate*, A. 1950 Mad. 162 (176).

(9) *Naranjan Singh v. State of Punjab*, A. 1952 S.C. 106.

(10) *Ananta v. The State*, A. 1951 Orissa 27.

(10a) *Rameshwar v. D. M.*, A. 1964 S.C. 334 (337).

with the particulars¹² supplied [p. 124, *ante*], or whether they are 'vague'.^{11,13} [p. 128, *ante*].

(ii) The Court may examine the grounds to see whether *any* of them are irrelevant^{12a} to the circumstances under which preventive detention could be supported,¹³ e.g., security of India or of a State, maintenance of public order etc.

Thus, though the Court would not undertake an investigation as to the sufficiency of the materials on which the satisfaction of the detaining authority was grounded, it would examine the *bona fides* of the order and interfere if it was *mala fide*,^{11,13} that is to say, if the law of preventive detention was used for any purpose other than that for which it was made [p. 135, *ante*]; and in this connection, the Court may examine whether the grounds served on the detenu may not possibly or rationally support the conclusion drawn against him by the detaching authority.¹³

(iii) The Court may examine if all the grounds communicated to the detenu were *in existence* at the time when the order was made.^{12,15}

(iv) The Court may see whether the grounds and such particulars as are necessary to make the representation were furnished in time so as to afford to the detenu 'the earliest opportunity of making a representation'.¹⁶

(v) The Court may examine the *validity* of the law itself (a) on the ground of *competence* of the Legislature, i.e., whether the subject-matter of the legislation is covered by the legislative Entry relating to preventive detention under which it is purported to have been made;¹⁷ (b) on the grounds of its being *ultra vires*, by reason of contravention of Art. 22 of the Constitution.¹⁷

(vi) The Court shall examine whether the order of detention contravenes Art. 21 by reason of not being in conformity with the law authorising the detention, or whether the procedural requirements of the law of preventive detention have been complied with, e.g.—

(i) Whether, in a case coming under s. 3(3) of the P. D. Act, the report to the State Government was made 'forthwith'.¹⁸

(ii) Failure to refer the detenu's case to the Board within the time fixed by s. 9 (1), even though the detenu may have been temporarily released under s. 14 (1).¹⁹

(iii) Where the period of detention was fixed in the initial order of detention.¹⁹

(iv) Where the Government revoked a previous order of detention in conformity with the opinion of the Advisory Board, but by the same order, confirmed the detention under one of the sub-clauses of s. 3 (1) (a) of the Act.¹⁴

(v) Whether the Advisory Board submitted its report within the time specified by s. 10 (1).²⁰

What the Court cannot do in an application under Art. 32 or 226 against an order of preventive detention.

From the foregoing discussion, it is clear that the Court cannot do any of the following things, when the validity of a detention order under the Preventive Detention Act is challenged before it:

1. When an order of preventive detention is challenged in a court of law, the Court is not competent to enquire into the truth or otherwise of the facts

(11) *State of Bombay v. Atmaram*, (1951) S.C.R. 167.

(12) *Shibban Lal v. State of U. P.*, (1954) S.C.R. 418.

(13) *Gopalan v. State of Madras*, (1950)

(13) *Rameshwar v. D. M., A.* 1964 S.C. 334 (337).

(15) *Dwarkadas v. State of J. & K.*, (1956) S.C.R. 948.

(16) *Ujagar v. State of Punjab*, (1950-51) C.C. 155.

(17) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

(18) *Keshav v. Commr. of Police*, (1956) S.C.R. 653.

(19) *Makhan Singh v. State of Punjab*, (1950-51) C.C. 180 (181).

(20) *Dharam Singh v. State of Punjab*, (1958) S.C.R. 996.

which are mentioned as grounds in the communication to the detenu under Art. 22 (5). Again, the sufficiency of the grounds upon which the satisfaction of the authority issuing the order of detention purports to be based, provided they have a rational probative value and are not extraneous to the scope or purpose of the legislative provision, cannot be challenged in a court of law, except on the ground of *mala fides*.¹⁴

Where the Legislature has made only the *subjective* satisfaction of the authority making the order essential for making an order of detention, it is not for the Court to question whether the grounds given in the order are *sufficient* or not for the subjective satisfaction of the authority making the order of whether that subjective decision is right or not.²² In other words, it is not open to the Court to go into the question whether *on the merits* the detaining authority had sufficient justification to make the order of detention or continue the detention.²² The Legislature did not intend that the Court should act as a revising authority in the same sense or manner in which the Advisory Board constituted under the Act²⁴ was.

"It is the satisfaction of the detaining authority which is necessary for the order of detention, and if the grounds, on which the appropriate authority has said it is so satisfied, have a rational connection with the objects which are to be prevented from being attained, the question of satisfaction cannot be challenged in a Court of law except on the ground of *mala fides*."²³

2. It cannot go into the question whether on the *merits* the detaining authority was justified to make the order of detention or to continue it.¹ Thus, the High Court cannot interfere on the ground that in view of the fact that times have changed, further detention would be unjustified.²³

3. It is for the Advisory Board and not the Courts to examine the correctness of the statements made in the affidavits in support of the order of preventive detention.²⁵

4. The Court cannot question the propriety of the exercise by the detaining authority of his discretion not to disclose prejudicial facts, under s. 7 (2) of the P. D. Act, read with Art. 22 (6).¹⁻² When this power is exercised, the detenu cannot complain of the vagueness of the 'grounds' communicated to him and he is left to the only plea of *mala fides*.²⁵

5. The Court is not concerned with the question of *reasonableness* of the legislation or of the possibility of its abuse by the Legislature.

When a law of preventive detention is challenged before the Court, the Court has got to decide on a consideration of the true nature and character of the legislation whether it is *really* on the subject of preventive detention or not. But once the legislation is held to be *really* on the subject of preventive detention and within the powers assigned to the Legislature in question, the Courts have nothing to do with the reasonableness or unreasonableness of the legislation.³

To whom the representation is to be made.

The Constitution is silent as to person to whom the representation referred to in Art. 22 (5) has to be made.

S. 7 (1) of the P. D. Act, as amended, provides that the representation is to be made to the 'appropriate Government'.

(21) *Bhim Sen v. State of Punjab*, (1952) S.C.R. 18 (24).

(22) *Maganlal v. Government of Bombay*, (1952) 54 L.R. 629.

(23) *Madan Lal v. State of Bihar*, (1951) 30 Pat. 716.

(24) Ss. 8-10 of the Preventive Detention Act, at p. 114, *ante*.

(25) *Puranlal v. Union of India*, A. 1958 S.C. 163 (171).

(1) *Bhim Sen v. State of Punjab*, (1952) S.C.R. 18.

(2) *Cf. D'Souza v. State of Bombay*, (1956) S.C.R. 382 (391).

(3) *Gopalan v. State of Madras*, (1950) S.C.R.

CLAUSE (6).

Discretion of the authority.

This clause controls cl. (5),⁴ and gives the authority making an order of preventive detention a discretion not to disclose *facts* (while informing the grounds) which he considers to be against the public interest to disclose [see under cl. (5), *ante*].

The present clause appears to be founded on the following observations made by Lord Maugham in *Liversidge v. Anderson*:⁵

"It is beyond dispute that he can decline to disclose information on which he has acted on the ground that to do so would be contrary to the public interest . . . There must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature."

The question is whether the Court can interfere on the ground that the facts supplied after exercise of the above disclosure are insufficient to enable the detenu to make a representation. In some cases⁶ prior to the Constitution, it was held that where the authority gives no facts at all, or gives insufficient facts, the Court can interfere on the ground that the discretion of the authority has been exercised *capriciously*. But the Constitution has precluded such a view by separating 'facts' from 'grounds' in two separate cls. (5) and (6).

While it is obligatory upon the authority to disclose all the 'grounds', it has been given an absolute discretion to withhold facts which it would be against the public interest to disclose, *according to the opinion of such authority*.⁷⁻⁸ The Court has no power to impose its opinion as to whether it is against the public interest or not to disclose any particular fact or facts. Once the authority refuses to disclose any fact or facts in the 'public interest', the Court shall have no power to declare (a) that it was not against the public interest to disclose those facts,⁷⁻⁸ or (b) that the order of detention is based because the *facts* which have been communicated, after exercise of the privilege, are vague and do not enable the detenu to make a representation.⁴

In short, the right of the detenu, under cl. (5), to complain of the insufficiency of information for the purpose of enabling him to make a representation, is practically lost where the detaining authority exercises his power under cl. (6), with respect to the material facts.

Nor should it be supposed that since cl. (6) permits the withholding of facts which are considered not desirable to be disclosed in the public interest,—the authorities are bound to disclose *all other* facts save those which are so withheld under cl. (6). As has been already explained p. 120, *ante*, the sole test for determining the sufficiency of the facts disclosed is the sufficiency for giving an opportunity to make representation:⁷

"They are given a special privilege in respect of facts which are considered not desirable to be disclosed in public interest. As regards the rest, their duty is to disclose facts so as to give the detained person the earliest opportunity to make a representation against the order of detention."

At the same time, the discretion to withhold, under cl. (6), is with respect to 'fact'; it does not absolve the detaining authority to disclose the 'grounds', or conclusions from facts, as required by cl. (5), together with other materials (as regards which the discretion under Cl. (6) has not been exercised), "which will enable him to make a representation".⁷ "Any deviation from this rule is a deviation from the intention underlying Art. 22 (5) of the Constitution".⁷

While the decision that further particulars cannot be furnished to the detenu without prejudice to the public interest must be taken by the detaining authority

(4) *D'Souza v. State of Bombay*, (1956) S.C.R. 382 (391).

(5) *Liversidge v. Anderson*, (1942) A.C. 206 (237).

(6) *Nek Md. v. Province of Bihar*, A. 1949 Pat. I (II) (F.B.); *Durgadas v. Rex*, A. 1949 All (152) (F.B.).

(7) *State of Bombay v. Atmaram*, (1951) S.C.R. 167: (1950-51) C.C. 139; *Ujagar v. State of Punjab*, (1950-51) C.C. 155 (157).

(8) *D'Souza v. State of Bombay*, (1956) S.C.R. 382.

at the time when the grounds are furnished, there is no obligation on his part to communicate to the detenu that such a decision has been taken, unless the detenu, feeling the grounds to be vague, asks for further particulars.⁸

CLAUSE (7).

Legislative power of Parliament.

This clause gives exclusive power to Parliament to legislate on the three matters included in sub-cl. (a) to (c), as regards all cases of preventive detention whether it has been made under orders of the Government of India or of a State Government.

Sub-cl. (a).—This sub-cl. empowers Parliament to prescribe the circumstances under which or the class or classes of cases in which a person may be detained for more than three months without obtaining the opinion of an Advisory Board.⁹ In this sub-cl., the word 'and' must be read in a disjunctive sense.¹⁰

"Circumstances ordinarily mean events or situation extraneous to the actions of the individual concerned, while a class of cases mean determinable groups based on the actions of the individuals with a common aim or idea . . . It is obvious that the classification can be by grouping the activities of people or by specifying the objectives to be attained or avoided."¹¹

"By 'classes of cases' we mean certain determinable groups, the individuals comprised in each group being related to one another in a particular way which constitutes the determining factor of that group. 'Circumstances' on the other hand, connote situations or conditions which are external to the persons concerned, e.g., war, rebellion, communal disturbances and things like that."¹²

Sub-cl. (b).—Under power conferred by the present clause, Parliament has inserted s. 11A in the Preventive Detention Act, prescribing that detention under an order of preventive detention shall in no case extend beyond 12 months from the date of detention.¹³

The words 'any person' in sub-cl. (b) do not imply that individual attention is to be paid to each case. The sub-cl. empowers Parliament to prescribe the maximum for a class taken as a whole. Nor does the sub-section imply that once Parliament has exercised the power to fix the maximum, the power exhausts itself, and cannot be exercised again in respect of the same detention. In short, in exercise of this power Parliament can extend the period of detention by periodic amendments (of the law of preventive detention) and thus enable the Government to continue detentions indefinitely.¹⁴

Sub-cl. (c).—The procedure to be followed by an Advisory Board is prescribed by sec. 10 of the Preventive Detention Act, 1950. This, in short, is: (a) The Board shall consider the representation of the detenu, and the materials placed before it by the Government, and the Board shall be competent to call for further information either from the Government or the detenu; (b) The Board must submit its report to the Government concerned within 10 weeks from the date of detention; (c) The detenu shall have no right to appear through a legal representative, but the Board may, if it considers necessary or the detenu so desires, hear the detenu in person; (d) The proceedings and the report of the Board shall be confidential, excepting only its opinion in favour of or against the detention, which shall be specified in a separate part; (e) In case of difference of opinion in the Board, the opinion of the majority shall be the opinion of the Board.

It has been held¹⁵ that all the above provisions of s. 10 of the Act are valid inasmuch as the Constitution gives unlimited power to Parliament [Art. 22 (7) (c)] to lay down the procedure to be followed by the Advisory Board. There is no

(9) *The Preventive Detention Act, 1950, as it now stands, contains no provision to this effect.*

(10) *Gopalan v. State of Madras*, (1950) S.C.J. 174 (194-195); *Kania C.J.*; 244. *Shastri J.*; 282, *Mukherjea J.*; 309, *Das J.*; *Krishnan v. State of Madras*, (1951) S.C.R. 621.

(11) *Ibid.*, p. 195, *Kania C.J.*

(12) *Ibid.*, pp. 282-3, *Mukherjea J.*

(13) Decisions to the effect that a detenu may be kept in detention for any indefinite period of time are, therefore, no longer good law.

(14) *Shamrao v. D. M. Thana*, (1952) S.C.R. 683 (694).

right to challenge the decision of the Advisory Board in Court, unless the Board acts contrary to the rules of natural justice.¹⁵

INDEX TO COMMENTS

ARTICLE 22.

Arts. 21 and 22, 97; Arts. 19 and 21-22, 98.

Scope of Art. 22: Safeguards against arbitrary arrest and detention. (A) Ordinary Law, 98; (B) Law of preventive detention, 98.

Clause (1).

Other Constitutions:

(A) U.S.A., 99; (B) England, 101; (C) Japan, 102; (D) Czechoslovakia, 102; (E) West Germany, 102; (F) Pakistan, 102.

India:

Scope of Cl. (1), 102; 'Arrested', 103; 'Detained', 104.

Right to be informed of the grounds, 104; 'As soon as may be', 104.

Right to consult a legal practitioner, 105.

Right to be defended by a legal practitioner, 105.

Clause (2).

Other Constitutions:

(A) England, 105; (B) Rumania, 105; (C) Czechoslovakia, 105.

India:

Scope of Cl. 2: Right to be produced in Court Magistrate, 106; Whether the rights in Art. 22 (1)-(2) extend to arrests under warrant, 107.

Clause (3).

Other Constitutions:

(A) England, 109; (B) Eire, 109; (C) U.S.A., 109.

India:

Enemy Aliens and detenus, 109; Enemy Aliens, 109.

The place of Preventive Detention in a Chapter on Fundamental Rights, 105; Preventive detention, 111; Grounds for preventive detention: (A) England, 111; (B) Australia, 112; (C) U.S.A., 112; (D) India, 113.

A history of the law of Preventive Detention in India, 113.

Preventive detention Act, 1950 (IV of 1950) as Amended by Subsequent Acts up to Act 61 of 1961, 115; The Preventive Detention Act of Jammu & Kashmir, 120.

Clause (4).

Sub-cl. (a), 122.

Scope of Advisory Board, 122; 'Qualified to be appointed as Judges of a High Court', 123;

Sub-cl. (b), 123.

Clause (5).

Scope of Cl. (5), 123.

The right of representation, 124; 'As soon as may be', 124.

The right to be informed of grounds: 'Grounds', 'facts' and 'particulars', 124; Scope for a second communication, 126.

Effect of supplying 'vague' grounds, 128; What is a vague ground, 130; What is on 'irrelevant' ground, 132; When one of several grounds is irrelevant, vague or non-existent, 133.

When is an order mala fide, 135; Bona fides of successive orders, 137.

The ambit of the Court's jurisdiction in cases of preventive detention, 137; What the Court cannot do in an application under Art. 32 or 226 against an order of preventive detention, 138.

To whom the representation is to be made, 139.

Clause (6).

Discretion of the authority, 140.

Clause (7).

Legislative power of Parliament, 141; Sub-cl. (a), 141; Sub-cl. (b), 141; Sub-cl. (c), 141.

Right against Exploitation

23. (1) Traffic in human beings and *beggar* and other similar forms

Prohibition of traffic in human beings and forced labour. of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service

(15) *Gopalan v. State of Madras*, (1950) S.C.J. 174 (193-4).

the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

CLAUSE (I).

OTHER CONSTITUTIONS¹⁶

(A) U.S.A.—The Thirteenth Amendment (1865) to the Constitution of the United States says—

"(1) Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

'Involuntary servitude' has been interpreted to include any kind of "control by which the personal service of one man is disposed of or served for another's benefit".¹⁷ But the involuntary servitude that is forbidden is such as would not be tolerated by the free principles of the common law, and would not include the following: (i) Regulation of service in the domestic relations.¹⁸ (ii) A statute requiring seamen to carry out the terms of their agreement, inasmuch as their employment demands special regulations.¹⁹ (iii) Duties of citizenship, such as compulsory military service,²⁰ compulsory work on the public highways;²¹ compulsory jury service;²² (iv) Forced labour as a punishment for crime,²³ or as a part of prison discipline;²⁴ (v) Punishment for or injunction against an illegal strike.²⁵

The protection from involuntary servitude is not confined to members of any particular race but extends to every individual.²⁶

It follows from the above guarantee that every labourer or worker has the right to quit his work and that he cannot be compelled to work under any employer, even though he may be liable in damages for breach of contract.¹

Cl. (2) of the Thirteenth Amendment empowers Congress "to enforce this article by appropriate legislation". Under the above provision, Congress has prohibited (1867) 'peonage' or the voluntary or involuntary service or labour of any person in liquidation of any debt or obligation.¹⁸ The provisions of the Thirteenth Amendment have, therefore, to be read along with this statute.

Even where there is a voluntary contract to render service in payment of a debt, the State cannot compel the debtor to render that service by punishment or other coercive process, though the debtor may be liable in damages for breach of the contract.²⁻³ "It may not make failure to labour in discharge of a debt any

(16) Art. 4 of the Universal Declaration of Human Rights says—

"No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

Article 8 of the Covenant on Human Rights, 1950 says.

"1. No one shall be held in slavery; slavery and the slave trade shall be prohibited in all their forms.

"2. No one shall be held in servitude.

"3. No one shall be required to perform forced or compulsory labour except pursuant to a sentence to such punishment for a crime by a competent court.

"4. For the purposes of this Article, the term "forced or compulsory labour" shall not include:

(a) any work, not amounting to hard labour, required to be done in the ordinary course of prison routine by a person undergoing detention imposed by the lawful order of a court;

(b) any service of a military character or, in the case of conscientious objectors, in countries where they are recognised, exacted

in virtue of laws requiring compulsory national service;

(c) any service exacted in cases of emergencies or calamities threatening the life or well-being of the community;

(d) any work or service which forms part of the normal civic obligations".

(17) *Bailey v. Alabama*, (1911) 219 U.S. 207.

(18) *Clyatt v. U. S.*, (1905) 197 U.S. 207.

(19) *Robertson v. Baldwin*, (1897) 165 U.S. 275.

(20) *Selective Draft Law Cases*, (1918) 245 U.S. 366 (390); *U. S. v. Brooks*, (1944) 54 F. Supp. 995.

(21) *Butler v. Perry*, (1916) 240 U.S. 328.

(22) *U. S. v. Reynolds*, (1914) 235 U.S. 133, 396.

(23) *Ex parte Karstendick*, (1876) 93 U.S. 396.

(24) *Dorchy v. Kansas*, (1926) 272 U.S. 306; *Auto Workers v. Wisconsin Board*, (1949) 336 U.S. 245.

(25) *Hodges v. U. S.*, (1906) 203 U.S. 1.

(1) *International Union v. Wisconsin Board*, (1949) 336 U.S. 245.

(2) *Clyatt v. U. S.*, (1905) 197 U.S. 207.

(3) *U. S. v. Reynolds*, (1914) 235 U.S. 133.

part of a crime. It may not directly command involuntary servitude, even if it was voluntarily contracted for",⁴ and the Court would quash a conviction even where the accused pleads guilty to a statute which makes it a crime to refuse to serve under any such contract.⁴

(B) *Japan*.—Art. 18 of the Japanese Constitution, 1946, provides—

"No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited."

(C) *West Germany*.—Art. 12 (2)-(3) of the West German Constitution (1948) provide—

"2. No one may be compelled to perform a particular kind of work except within the frame work of an established general compulsory public service equally applicable to everybody.

3. Forced labour shall be admissible only in the event of imprisonment ordered by court."

INDIA

Scope of Cl. (1): Prohibition of traffic in human beings and forced labour.

This clause prohibits not only forced labour, but also 'traffic in human beings', which is evidently a very wide expression. It would include not only the prohibition of slavery but also of traffic in women for immoral or other purposes.⁵ A law for the suppression of such traffic would be valid by reason of the present Article even though it may restrict the freedom of business and profession guaranteed by Art. 19 (1) (g).⁶

In the U.S.A., the word 'slavery' has been interpreted to include not only involuntary but also voluntary servitude, such as the rendering of voluntary personal service in liquidation of a debt (p. 143, *ante*).

The word 'slavery' has not been used in Art. 23 (1) of our Constitution and the expression '*begar*' and 'similar forms of forced labour' both refer to involuntary servitude. A voluntary contract for rendering of personal service in liquidation of a debt can, therefore, come under the constitutional prohibition in the present Article only if the word 'traffic' is liberally interpreted to include such voluntary servitude. That there is still such practice current in some parts of India is evident from a Government Bill for the abolition of the system of '*sagri*' or '*hali*' introduced in the Rajasthan Assembly recently. The Statement of Objects and Reasons of this Bill will speak for itself—

"The *sagri* or *hali* system of advancing loans prevails in some parts of the State. Under this system a creditor gives a loan to a debtor on the condition that until the loan is repaid, with interest the debtor or any other member of his family shall render labour or personal service to the creditor or any other person nominated by him. By the practice of this system several families have practically become slaves and the Government considers it desirable to abolish this system and penalize those who advance money under it."

'*Begar*'.—It means involuntary work without payment. Under the Zemindary system, tenants, particularly of the lower classes, are sometimes compelled to render free service to their landlord.⁷

'*Similar forms of forced labour*'.—The words 'similar forms' indicate that the forced labour which is prohibited must be similar to *begar*.⁸ Hence, forced labour as a punishment for a criminal offence is not prohibited.

Similarly, there is no *begar* or forced labour within the inhibition of Art. 23 where the Petitioners had voluntarily agreed to do extra work by entering into a contract for additional remuneration and other benefits.⁹ Nor is a law which prohibits strikes in essential services within the prohibition of this Clause.^{9a}

(4) *Pollock v. Williams*, (1944) 322 U.S. 4.

(5) *Raj Bahadur v. Legal Remembrancer*, A. 1953 Cal. 522.

(6) *Sharma v. State of M. P.*, A. 1959 All. 57.

(7) Cf. Constitutional Proposals of the Sapru Committee, pp. 222, 234; See also

Constituent Assembly Debates, Vol. VII, pp. 809-811.

(8) *State v. Banwari*, A. 1951 All. 515.

(9) *Dubar v. Union of India*, A. 1952 Cal. 496.

(9a) *Vasudevan v. Mittal*, A. 1962 Bom. 53 (67).

'Prohibited'.—The first part of the Article is couched in general language. If an individual imposes *begar* or forced labour upon another, he would be punishable according to the law which is contemplated by the second part of the Article. On the other hand, if the State passes a law which, in effect, imposes forced labour¹⁰ or gives its sanction to a contract for forced labour,¹¹ it would be void.

'Punishable in accordance with law'.—See Art. 35 (ii). *post.* No legislation has yet been made by Parliament to punish an offence under Art. 23 (1).

Existing law.—S. 374 of the Indian Penal Code says—

"Whoever unlawfully compels any person to labour against the will of that person, shall be punished . . ."

The Bihar Harijans (Removal of Civil Disabilities) Act, 1949 makes it an offence to compel a Harjan to labour against his will or without wages or adequate wages. Similar laws have been made in many other Provinces, e.g., U.P. Removal of Social Disabilities Act, 1947.

CLAUSE (2).

Scope of Cl. (2) : Compulsory service for public purpose.

This clause is an exception to the bar imposed by cl. (1), on the ground of 'public purposes'. Under this clause the State will be free to require compulsory service for public purposes. The latter part of the clause enjoins that while imposing compulsory service for public purposes, the State cannot exempt anybody simply on the ground of race, religion, caste or class, and consequently, no citizen shall be entitled to avoid such service on any of these grounds. Hence, conscription for national defence cannot be avoided on grounds of religion.¹²⁻¹³

'Public purposes'.—This would include compulsory military service¹⁴ or conscription, for there can be no higher public purpose than the defence of the State itself. "Just government . . . includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it".¹⁵ For the same reason, it would include police service.¹⁴

The expression public purposes is wide enough to cover conscription also for social services,¹⁰ e.g., for removal of illiteracy amongst the masses. It includes any purposes in which the general interest of the community, as opposed to the particular interest of individuals is directly and vitally concerned.¹⁶

To compel a Government servant to continue in service even after the age of superannuation, pending the conclusion of a departmental inquiry, would be valid under this Clause.¹⁷

It is to be noted that while there is provision [Art. 31 (2)] for payment of compensation for compulsory acquisition of property, there is no question of compensation for compulsory service for public purposes, the reason being that it will be imposed upon all classes. But the imposition of compulsory service, without payment, for the carrying of a load of Government property, in *normal times*, has not been upheld under Art. 23 (1).¹⁰

Compulsory military service or conscription.

(A) *England.*—At Common law, the Crown possesses the prerogative to demand personal service within the realm in case of sudden invasion or formid-

(10) Cf. *State v. Jorawar*, A. 1953 H.P. 18 (19).

(11) *Bailey v. Alabama*, (1911) 219 U.S. 219.

(12) *Murdock v. Pennsylvania*, (1943) 319 U.S. 105; *In re Summers*, (1945) 324 U.S. 561.

(13) *Krygger v. Williams*, (1912) 15 C.L.R. 366.

(14) *Dulal v. Dt. Magistrate*, A. 1958 Cal. 365 (372).

(15) *Selective Draft Law Cases*, (1913) 245 U.S. 366 (390).

(16) *Framjee v. Secy. of State*, (1914) 39 Bom. 279 (P.C.); see also under Art. 31 (2), *post.*

(17) *Pratap Singh v. State of Punjab*, A. 1964 S.C. 72 (100).

able insurrection.¹⁸ In modern times, however, the power of conscription is conferred by statute. Thus, during World War II, a host of legislation was passed to authorise the Executive to conscribe men for military service within the United Kingdom as well as abroad.¹⁹

(B) *U.S.A.*—The power to impose compulsory service has been held to belong to Congress under its power 'to raise and support armies' [Art. I. Sec. 8 (12)],²⁰ and this power is not taken away by the Thirteenth Amendment.²¹

(C) *Australia*.—The power to impose compulsory training does not offend against the 'free exercise of religion' guaranteed by s. 116 of the Australian Constitution Act.²²

(D) *India*.—Under *our* Constitution, too, Parliament has, under Entry I of List I, the power to raise forces by conscription, if necessary, for defence or prosecution of war.

INDEX TO COMMENTS

ARTICLE 23.

Other Constitutions:

(A) *U.S.A.*, 143; (B) *Japan*, 144; (C) *West Germany*, 144.

India:

Scope of Cl. (1): Prohibition of traffic in human beings and forced labour, 144; Begar, 144; 'Similar forms of forced labour', 144; 'Prohibited', 145; 'Punishable in accordance with law', 145; Existing law, 145.

Scope of Cl. (2): Compulsory service for public purpose, 145; 'Public purposes', 145;

Compulsory military service or conscription: (A) *England*, 145; (B) *U.S.A.*, 146; (C) *Australia*, 146; (D) *India*, 146.

Prohibition of employment of children in factories, etc.

24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

OTHER CONSTITUTIONS

(A) *U.S.A.*—There is no constitutional prohibition against employment of children in any industries. But the authority of Congress to regulate the employment of children in industries engaged in *inter-State* commerce has been upheld by the Supreme Court.²³ Thus, the Fair Labour Standards Act of 1938, which has been upheld as valid,²³ excludes from *inter-State* commerce the commodities in the production of which children under certain specified ages had worked. Thus, youths between the ages of 16 and 18 are excluded from hazardous employments, e.g., in explosive plants or coal mines; motor-driving, occupations involving exposure to radioactive substances.

(B) *England*.—The employment of children in factories and mines is prohibited by the Factories Act, 1937 and the Mines and Quarries Act, 1954.²⁴ Apart from these, the Children and Young Persons Act, 1933, prohibits the employment of children in dangerous public performances, driving motor vehicles and the like.

INDIA

Prohibition of child labour.

Our Constitution goes in advance of that of the *U.S.A.* by laying down a constitutional prohibition against employment of children (i.e., below 14 years) in

(18) Wade & Phillips, *Constitutional Law*, p. 129.

(19) E.g., The National Service (Armed Forces) Act, 1939; the Armed Forces (Conditions of Service) Act, 1930; the National Service Act, 1941; the National Service (Foreign Countries) Act, 1942.

(20) *Selective Draft Law Cases*, (1918) 245 U.S. 366.

(21) *Butler v. Perry*, (1916) 240 U.S. 328 (333).

(22) *Krygger v. Williams*, (1912) 15 C.L.R. 366.

(23) *U. S. v. Darby Lumber Co.*, (1941) 312 U.S. 100.

(24) *Halsbury*, 3rd Ed., Vol. 21, pp. 300-301.

(a) factories, (b) mines as well as (c) any other hazardous employment. The expression 'any other hazardous employment' has to be construed by the rule of *ejusdem generis*. Employments connected with transport would come within this expression. So, a child, in India, has a fundamental right not to be employed in such hazardous works and anything which may require such employment would be void.

Existing law.—The Employment of Children Act (XXVI) of 1938 prohibits employment of children below 15 years in any occupation connected with the transport of passengers, goods or mails by railways or in any port. The Factories Act (LXIII of 1948), similarly prohibits the employment of children below 14 years in factories.

Legislation by Parliament.—S. 45 of the Mines Act (XXXV of 1952) prohibits the employment of children below 14 years where mining operations are being carried out or in any mine, below ground.

Analogous Provisions.—See Art. 39 (e).

Legislative Power.—See Entry 24 of List III, Sch. VII.

INDEX TO COMMENTS

ARTICLE 24.

Other Constitutions :

(A) U.S.A., 146 ; (B) England, 146.

India :

Prohibition of child labour, 146 ; Existing law, 147 ; Legislation by Parliament, 147 ; Analogous Provisions, 147 ; Legislative Power, 147.

Right to Freedom of Religion

25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Freedom of conscience and free profession, practice and propagation of religion.

(2) Nothing in this article shall effect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

OTHER CONSTITUTIONS²⁵⁻¹

(A) U.S.A.—The First Amendment to the Constitution (1791) says—

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

(25) See also Arts. 49 (1), 50 (1) of the Swiss ; 135 of Weimar ; 15-17 of the Czech ; 12 of Jugoslav ; 96 of Danzig, Constitution.

(1) Art. 19 of the United Nations Declaration of Human Rights says—
"Everyone has the right to freedom of

This clause guarantees two things—It not only (a) 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship', but also (b) safeguards the free exercise of the chosen form of religion'.²

In particular,—

(I) The prohibition against 'establishment of religion' has been interpreted to mean—

"Neither a State nor the Federal Government can set up a Church. Neither can pass laws which aid *one* religion, aid *all* religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever form they may adopt to teach or practise religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or *vice versa*."³

"... complete separation between the State and religion is best for the State and best for religion."⁴

There is no 'official' Church in the U.S.A. as in England and no particular religion is entitled to governmental support.

This clause forbids not only governmental preferences of one religion over another, but also an impartial government assistance to *all* religions.⁴ Hence, no religious instruction can be imparted in State-aided school premises even by non-governmental bodies and beyond the school hours.⁴

On the other hand, it would not debar the State from appropriating public moneys in aid of a hospital managed by a corporation according to the statute by which it was incorporated, merely because the persons operating the corporation belonged to a particular Church.⁵ Observance of the Christian Sunday has also been enforced by legislation.^{5a}

(II) The guarantee of 'free exercise of religion' means that there are no restraints upon the free exercise of religion according to the dictates of conscience, or upon the free expression of religious opinions, save those imposed under the Police power,⁶ against "acts inimical to the peace, good order and morals of society".⁷

"No man in religious matters is to be discriminated against by the law, or subjected to the censorship of the State or of any public authority; and the State is not to inquire into or take notice of religious belief or expression so long as the citizen performs his duty to the State and to his fellows, and is guilty of no breach of public morals or public decorum."⁸

The 'free exercise of religion' has been interpreted to involve three concepts: (a) Freedom of religious belief; (b) Freedom of practice; (c) Freedom of propagation of religious views.

(a) *Freedom of religious belief*.—This means the right to 'worship God according to the dictates of one's conscience'.⁸ "Man's relations to his God was made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views".⁹ Hence, in the

thought, conscience and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion, or belief in teaching, practice, worship and observance."

Article 16 of the Covenant on Human Rights, 1950 says—

"1. Everyone has the right of freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion, or belief in teaching, practice, worship and observance."

"2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are pursuant to law and are reason-

able and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."

(2) *Cantwell v. Connecticut*, (1940) 310 U.S. 296.

(3) *Everson v. Board of Education*, (1947) 330 U.S. 1 (59).

(4) *McCullum v. Board of Education*, (1948) 333 U.S. 203.

(5) *Bradfield v. Roberts*, (1899) 175 U.S. 907.

(6) *Cooley*, Constitutional Limitations, 8th Ed., Ch. XIII; *Cooley*, Constitutional Law, p. 260.

(7) *Davies v. Beason*, (1890) 133 U.S. 333.

(8) *Downes v. Bidwell*, (1901) 182 U.S. 244.

United States, no man can be punished for 'heresy', and none can be put to the proof his religious doctrines or beliefs.⁹ The First Amendment, on the other hand, "forestalls compulsion by law of the acceptance of any creed or practice of any form of worship."¹⁰

Religious belief cannot, however, be held up to avoid those duties which every citizen owes to the nation, e.g., to receive military training;¹¹ to take an oath expressing willingness to perform military service.¹²

(b) *Freedom of practice.*—Though the above article offers the right of 'free exercise' of the chosen form of religion, unrestricted by any qualification, Courts have interpreted the clause to be subject to some limitations which are necessary in the interests of the society itself. Thus, it has been held that while the freedom of religious belief is absolute, the right to act in the exercise of a man's religious belief cannot override the interests of the peace, good orders or morals of the society and that it is competent to the legislature to suppress such religious practices which are dangerous to public morals, safety, health or good order.⁷ "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."⁷ Thus—

"Crime is not less odious because sanctioned by what any particular sect may designate as religious."⁷

(i) Polygamy or bigamy may be prohibited¹³ or made a ground of disqualification for the exercise of political rights,⁷ notwithstanding the fact that it is in accordance with the creed of a religious body.

(ii) Similarly, an individual would not be allowed to advance a claim to supernatural powers to conquer disease, poverty, misery or the like, not to use the Postal services for the purpose of procuring money under such a claim.⁹ Proof of the truth of such a claim is not permitted in a trial for such use of the mails.⁹

(iii) On the other hand, the State may enforce health regulations such as vaccination,¹⁴ compulsory medical examination for admission of students to public schools;¹⁵ isolation of contagious diseases and the like, even against persons who believe only in faith cure;¹⁶ blood transfusion.¹⁷

(iv) Again, the State may legislate for the protection of minor children, founded upon its position as *parens patriae*, even though such legislation runs *contra* to a particular parent's religious beliefs.¹⁸ Thus, the right to practise religion freely does not include liberty to expose the children to ill-health or death.¹⁶ Similarly, a law forbidding children to sell merchandise on the streets cannot be challenged on the ground that it interferes with the freedom to disseminate religious literature.¹⁸

"Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose that one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."¹⁹

(v) Nor can religious beliefs stand in the way of State regulation of child labour,²⁰ in the interest of the healthy growth of young people.

(9) *U. S. v. Ballard*, (1944) 322 U.S. 78.

(10) *Cantwell v. Connecticut*, (1939) 310 U.S. 296 (303).

(11) *Hamilton v. Regents of the University of California*, (1934) 293 U.S. 245.

(12) *In re Summers*, (1945) 325 U.S. 561.

(13) *Reynolds v. United States*, (1878) 98 U.S. 145.

(14) *Jacobson v. Massachusetts*, (1905) 197 U.S. 11.

(15) *Halcomb v. Armstrong*, (1952) 239 F. 2d. 545.

(16) *People v. Pierson*, (1903) 176 N.Y. 201.

(17) *Wallace v. Labrenz*, (1952) 344 U.S. 824.

(18) *Prince v. Massachusetts*, (1944) 321 U.S. 158.

(19) *Reynolds v. United States*, (1878) 98 U.S. 145.

(20) *Prince v. Massachusetts*, (1944) 321 U.S. 158.

But when State action impinges upon religious freedom, it must be shown to be necessary for the protection of the community against some 'clear and present danger',²¹ and the regulation must not be arbitrary or unreasonable.²²

(c) *Freedom of propagation of religious views.*—The freedom to act in the exercise of one's religious belief includes the freedom to propagate that belief.

(i) If such propagation does not transgress the limits imposed by the law for the preservation of public order,²³ safety²⁴ and morals, the State cannot wholly deny the right to preach religious views, by imposing a tax otherwise.²⁵ Regulation of religious propaganda on the streets or at public meetings, thus, comes under the ordinary law relating to public meetings, etc., and no discrimination is made in the case of religious purposes.

(ii) Nor can religious activity be subjected to censorship or prior restraint.^{21,1} (See Vol. I, p. 534).

Neither a State nor a municipality can completely ban the distribution of religious literature on the street or public places or to subject it to a permit²¹ or payment of a licence tax.² Though the State is not debarred from taxing the income or property of religious groups or preachers,²⁵ a tax cannot be laid specifically on the exercise of the freedom of religious propaganda or preaching. Thus, the State cannot levy a license tax as a condition for the exercise of the right of preaching sermons or of distributing religious literature, whether free or on sale.²⁵

"The mere fact that the religious literature is 'sold' does not transform evangelism into a commercial enterprise."²³

A licence tax cannot be imposed even on the occupation of a lay book agent who lives on the sale of religious literature.

"The inherent vice and evil of the flat licence tax is that it restrains *in advance* those constitutional liberties and inevitably tends to suppress their exercise."²³

The right of carrying on religious propaganda is, however, not available in respect of *private* property without the assent of the owner,⁴ but it extends to *public* places even though they may be privately owned.⁵ But parades and processions in public parks⁶ or highways⁷ may be regulated by municipal authorities in the interest of the safety and convenience of the general public in the use of those public places (see also Vol. I, p. 534).

"The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction."⁴

In short, the freedom of religious propaganda or solicitation may be regulated by the State in the interests of public safety, peace, comfort or convenience, or for the prevention of fraud,²¹ provided the restriction is not arbitrary or excessive and does not place in the hands of an administrative authority a discretionary power to determine religious matter.²¹

The above provisions relating to religious freedom and separation of the Church from the State are reinforced by Art. VI which says—

"... no religious test shall ever be required as a qualification to any office or public trust under the United States".

(B) *Australia.*—S. 116 of the Australian Constitution Act says—

"The Commonwealth shall not make any law for establishing religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

(21) *Cantwell v. Connecticut*, (1940) 310 U.S. 296. [As to the meaning of 'clear and present danger', see Vol. I, pp. 534-7].

(22) *Jacobson v. Massachusetts*, (1905) 197 U.S. 11.

(23) *Chaplinsky v. New Hampshire*, (1942) 315 U.S. 568.

(24) *Arver v. U. S.*, (1918) 245 U.S. 366.

(25) *Murdock v. Pennsylvania*, (1943) 319 U.S. 105, overruling *Jones v. Opelika*, (1942) 316 U.S. 584.

(1) *Kunz v. N. Y.*, (1951) 340 U.S. 290.

(2) *Coleman v. Griffin*, (1938) U.S. 414.

(3) *Follett v. McCormick*, (1944) 321 U.S. 573.

(4) *Martin v. Struthers*, (1943) 319 U.S. 141.

(5) *Marsh v. Alabama*, (1945) 326 U.S. 501.

(6) *Poulos v. New Hampshire*, (1953) 345 U.S. 395 (405).

(7) *Cox v. New Hampshire*, (1941) 312 U.S. 569 (574).

Commenting upon this section, the Australian High Court has observed⁸ that 'free' exercise of religion does not mean absolute freedom from any restrictions:

"... the meaning and scope of s. 116 must be determined, not as an isolated enactment, but as one of a number of sections intended to provide in their inter-relation a practical instrument of government, within the framework of which laws can be passed for organizing citizens of the Commonwealth in national affairs into a civilized community, not only enjoying religious tolerance, but also possessing adequate laws relating to those subjects upon which the Constitution recognises that the Commonwealth Parliament should be empowered to legislate in order to regulate its internal and external affairs."⁹

Hence, it would not include the freedom to commit acts subversive to the community itself or prejudicial to the prosecution of war.⁸

What s. 116 means is that a man shall not be denied the right to follow his own religious beliefs because others may differ from him as to the propriety of such belief or of the conduct prescribed by such belief:

"S. 116 must be regarded as operating in relation to all these aspects of religion irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion or as to the propriety of any particular religious observance. What is religion to one is superstition to another It is not for a Court, upon some *a priori* basis, to disqualify certain beliefs as incapable of being religious in character."⁹

(C) *Eire*.—Art. 44 (2) of the Constitution of 1937, says—

"1. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

2. The State guarantees not to endow any religion.

3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."

Though the above provides freedom of conscience to every person and also declares that the State will not endow any particular religion, the Constitution does, in fact, recognise the special position of a particular religion, namely, the Roman Catholic religion. Apart from the Preamble (see Vol. I, p. 52), Art. 44 (1)² says—

"The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens."

The Supreme Court has, however, observed that the above provisions do not confer upon the members of the Roman Catholic Church any privileged position *before the law*.⁹

(D) *U.S.S.R.*—Art. 124 of the Soviet Constitution, 1936, says—

"Freedom of religious worship and freedom of *anti-religious* propaganda is recognised for all citizens."

(E) *Fourth and Fifth French Republic*.—Cl. (10) of the Declaration of Rights of 1789, which is adopted by the Preamble of the Constitutions of 1946 and 1958, says—

"No one ought to be disturbed on account of his opinion, even religious, provided their manifestation does not derange the public order established by law."

(F) *West Germany*.—Art. 4 of the West German Constitution (1948) provides—

"1. Freedom of faith and conscience and freedom of religious and ideological (*weltanschauliche*) profession shall be inviolable.

2. Undisturbed practice of religion shall be guaranteed.

3. No one may be compelled against his conscience to perform war service as a combatant. Details shall be regulated by a federal law."

(G) *Japan*.—Art. 20 of the Constitution of 1946, says—

"Freedom of religion is guaranteed to all No person shall be compelled to take part in any religious act, celebration, rite or practice."

(8) *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116.

(9) In the matter of *Tilson*, (1951) Ir. R. 1.

(H) *Ceylon*.—S. 29 (2) of the Ceylon (Constitution) Order in Council, 1946, provides—

“No such law (*i.e.*, law made by Parliament) shall (a) prohibit or restrict the free exercise of any religion; or (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion, any privilege or advantage which is not conferred on persons of other communities or religions.....”

(I) *England*.—The English system is to be read in the present context for the purpose of *contrast*. There is no separation of Church and State in England. The Church of England (*i.e.*, the Protestant Church) is an ‘established’ Church, and the Crown of England is the supreme head of this Church and the patron of all its clergy within the United Kingdom.

The Church of England (*i.e.*, the Protestant Church) has been, by the Acts of Supremacy and Uniformity, “by law established”, *i.e.*, built into the fabric of the English Constitution. “The process of establishment means that the State has accepted the (Protestant) Church as a religious body in its opinion truly teaching the Christian faith and given to it a certain legal position and to its decrees . . . certain legal sanctions”.¹⁰

Its entire organisation is sanctioned by law which establishes it and recognises its property and other rights to the exclusion of any other system.¹¹ It has deliberative and judicial powers and its Acts and decrees are given legal sanction. The members of the Church have special privileges such as relating to marriage. Again, a clergyman, belonging to the established Church cannot be called upon to serve in any temporal office, in war or on a jury.

The official Church is entitled to public financial support, *e.g.*, from a financial levy on landowners called ‘tithe’, legalised by statute (Tithe Act, 1936).

On the other hand, there are still some political disabilities attached to Roman Catholics and other nonconformists. Thus, Roman Catholics and those who marry Roman Catholics are excluded from the Throne (Act of Settlement, 1701). Only the Bishops of the Church of England have seats in the House of Lords.

The ordinary law, again, makes a discretion between the Christian religion and other religions in so far as the offence of blasphemy is committed if a person denies and ridicules the Christian religion in such terms as is likely to lead to a breach of the peace;¹² but an attack on any other religion is not similarly punished.

Subject to the above it may be said that every person has the freedom of conscience and profession of his own religion and the freedom goes to the extent of propaganda for a non-religious society.¹³

(L) *Pakistan*.—Though the Constitution of Pakistan of 1956 contained certain safeguards for the religious rights of all communities, it did not provide for a secular State. The promotion of Islam was a duty of the State and even laws must be in conformity with the Injunctions of Islam. Arts. 197-8 of the Constitution provided—

“197.—(1) The President shall set up an organization for Islamic research and instruction in advanced studies to assist in the reconstruction of Muslim society on a truly Islamic basis.

(2) Parliament may by Act provide for a special tax to be imposed upon Muslims for defraying expenses of the organization set up under clause (1), and the proceeds of such tax shall not, notwithstanding anything in the Constitution, form part of the Federal Consolidated Fund.

198.—(1) No law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah, hereinafter referred to as Injunctions of Islam, and existing law shall be brought into conformity with such Injunctions.

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in clause (3).

(10) *Marshall v. Graham*, (1907) 2 K.B. 112 (126).

(11) *Free Church of Scotland v. Overtown*, (1904) A.C. 515.

(12) *R. v. Gott*, (1922) 16 Cr. App. Rep. 87.

(13) *Bowman v. Secular Society*, (1917) A.C. 406.

- (3) Within one year of the Constitution Day, the President shall appoint a Commission—
 (a) to make recommendations—
 (i) as to the measures for bringing existing law into conformity with the Injunctions of Islam, and
 (ii) as to the stages by which such measures should be brought into effect; and
 (b) to compile in a suitable form, for the guidance of the National and Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

The Commission shall submit its final report within five years of its appointment, and may submit any interim report earlier. The report, whether interim or final, shall be laid before the National Assembly within six months of its receipt, and the Assembly after considering the report shall enact laws in respect thereof.

(4) Nothing in this Article shall affect the personal laws of non-Muslim citizens, or their status as citizens, or any provision of the Constitution.

Explanation.—In the application of this Article to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect."

INDIA

Art. 25 : Freedom of conscience and religion.

This Article secures to every person, subject to the restrictions to be noted presently, a freedom not only to entertain such religious belief, as might be approved by his judgment and conscience, but also to exhibit his belief in such outward acts as he thought proper and to propagate or disseminate his ideas for the edification of others.¹⁴

"Subject to the restriction which this Article imposes, every person has a fundamental right under *our* Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether this propagation is made by a person in his individual capacity or on behalf of any church or institution."¹⁵

The special feature of Art. 25 of *our* Constitution is that our Constitution-makers have embodied the limitations which have been evolved by judicial pronouncements in *America* or *Australia*, in the Constitution itself, and the language of Arts. 25-26 is sufficiently clear to enable us to determine without the aid of foreign authorities what matters come within the purview of religion and what do not.¹⁴

The restrictions which may be imposed by the State upon the right guaranteed by this Article are those imposed on the grounds of—

(i) public order, morality and health; (ii) other provisions of Part III of the Constitution; (iii) regulating non-religious activity associated with religious practice; (iv) social welfare and reform; (v) throwing open Hindu religious institutions of a public character to all classes of Hindus.¹⁶

Art. 25 corresponds to the latter part of the First Amendment to the *American* Constitution, prohibiting the free exercise of religion. There is nothing in *our* Constitution embodying the earlier part, namely, prohibiting the establishment of religion, but there are specific provisions, such as Arts. 27, 28 (1), (3), which prevent the State from promoting particular religions.

CLAUSE (1).

'Subject to public order, morality, health'.

As has been held in the *United States* (p. 150, *ante*), freedom of religious belief and to act in the exercise of such belief cannot override the interests of the peace, order or morals of the society, and to that extent, the freedom of religion is subject to the control of the State.¹⁷

(14) *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005.

(15) *Ratilal Panchand v. State of Bombay*, (1954) S.C.R. 1055.

(16) *Venkataramana v. State of Mysore*, 1958 S.C. 255 (267).

(17) *Davis v. Beason*, (1890) 133 U.S. 333; *Board of Education v. Barnette*, (1943) 319 U.S. 624 (643).

Thus, freedom of religion would not allow a man to commit human sacrifice,^{17a} even though human sacrifice is sanctioned by some religious creeds (*i.e.*, some of the Tantras); or to commit an act which is a crime under the law;¹⁸ or to outrage the religious feelings of another class, with a deliberate intent.¹⁹

"Whilst legislation for the establishment of a religion is forbidden and its free exercise permitted, it does not follow that everything which may be so called can be tolerated.²⁰ Crime is not the less odious because sanctioned by what any particular sect may designate as religion.²¹

It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."²²

On the other hand, in the name of imposing restrictions in the interests of the society, the State cannot deprive the individual of the substance of his religious freedom. Explaining the First Amendment, the *American Supreme Court*²³ thus observed—

"The Amendment embraces two concepts: the freedom to *believe* and the freedom to *act*. The first is absolute but in the nature of things the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be exercised as *not*, in attaining a permissible end, *unduly to infringe the protected freedom*. No one would contest the proposition that a State may not, by statute, *wholly* restraint would violate the terms of the guarantee."²⁴

Similarly, *our* Supreme Court has observed²⁵—

"What sub-cl. (a) of cl. (2) contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices."²⁶

'Public order' in the present context would also include the security of the State, and a law of conscription cannot be resisted on grounds of religious belief.¹⁸

[As to the meaning of 'public order and morality', see Vol. I, pp. 544-557 and Entry I of List II, Sch. VII].

Existing Law.—Sec. 34 of the Police Act (V of 1861), prohibits the slaughter of cattle or indecent exposure of one's person on any road, thoroughfare or other public place. These acts cannot be justified on the plea of practice of religious rites.

Ss. 295-8 of the Indian Penal Code deal with the offences relating to religion. These acts cannot be committed by a person even though they may be sanctioned by the tenets of his own religion, *e.g.*, injuring or defiling a place of worship, with intent to insult the religion of any class, disturbing a religious assembly, trespassing on burial places etc., uttering words or making representations with deliberate intent to wound religious feelings of another person or class.

'Subject to the other provisions of this Part'.

The freedom of conscience and profession guaranteed by Art. 25 (1) is subject to the other Fundamental Rights. The result is that—

In the exercise of the freedom of religious practice a person would not be allowed to commit an act which is punishable as 'untouchability' under Art. 17 or to take part in a traffic in human beings [Art. 23 (1)], *e.g.*, in the system of devadasis.²² Nor can a citizen avoid 'service for public purposes' on ground of

(17a) *Saifuddin v. State of Bombay*, A. 1962 S.C. 853 (863).

(18) *Arver v. U. S.*, (1918) 245 U.S. 366.

(19) Cf. *Ramji Lal v. State of U. P.*, A. 1957 S.C. 620.

(20) *Cantwell v. State of Connecticut*, (1940) 84 L. Ed. 1213 (1218).

(21) *Ratilal v. State of Bombay*, (1954) S.C.A. 538 (546).

(22) See in this connection, Madras Act V of 1929.

(23) This principle is embodied in Art. 77 of the Constitution of Denmark, Art. 11 of Estonia, Art. 49 of Switzerland, Art. 12 of Yugoslavia—that religious conviction cannot be pleaded in justification of non-fulfilment of civic duties.

religion [Art. 23 (2)].²³ Nor does this Article exempt religious property from the power of eminent domain conferred by Art. 31.²⁴

As is clear from the language of Cl. (2) of Art. 25 itself, the freedom guaranteed by cl. (1) is subject to the power conferred upon the State by cl. (2) (b).²⁵

"All persons".

The freedom of religion conferred by the present Article is not confined to citizens of India but extends to all 'persons', including aliens,¹ and individuals exercising their rights individually or through institutions.^{1,2}

Hence, the head of a religious institution can complain of the infringement of the right conferred by this Article.³

"Freedom of conscience".

The freedom of conscience of the individual follows from the ideal of a secular State envisaged by the framers of the Indian Constitution. A secular State is based on the idea that the State, as a political association, is concerned with the social relations between man and man and not with the relation between man and God which is a matter for the individual conscience. A secular State therefore means a State which has no religion of its own and which refrains from discrimination on grounds of religion. No particular religion would receive any special patronage from such a State,⁴ nor could anybody be compelled to accept or abandon any creed or belief.

In this respect, our Constitution is more secular than the Constitutions of *Eire* and *Burma* and even that of the U.S.A. Thus, Art. 44 (1)² of the Constitution of *Eire* says—

"The State recognises the *special position* of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the great majority of the citizens."

Similarly, Art. 21 (1) of the Constitution of *Burma* (1946) declared—

"The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union."

Similarly in interpreting the prohibition against 'establishment of religion' in the First Amendment to the Constitution of the United States, *Cooley* observes—

"By establishment of religion is meant the setting up or recognition of a State Church, or at least the conferring upon one Church of special favours and advantages which are denied to others.^{3a} It was never intended by the Constitution that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion was always recognised in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly."⁴

In *India*, on the other hand, no religion is specially recognised as such and the personal laws based on religion, in so far as they are still in force, govern only the followers of the respective Faiths.

'To profess and practise'.

Freedom of conscience would be meaningless unless it were supplemented by the freedom of unhampered expression of spiritual conviction in word and action. Matters of conscience come in contact with the State only when they become articulate. While freedom of 'profession' means the right of the believer

(24) *Suryapal Singh v. State of U. P.*, (1952) S.C.R. 1056 (1090).

(25) *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 (267).

(1) *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005; (1952-54) 2 C.C. 191.

(2) *Ratilal Panchand v. State of Bombay*, (1954) S.C.R. 1055.

(3) Cf. *Murdock v. Pennsylvania*, (1943) 319 U.S. 105.

(3a) For the 'Established Church' in England, see p. 148, *ante*.

(4) *Cooley*, Constitutional Law, pp. 250-260; Willis, Constitutional Law, 1936, p. 501.

to state his creed in public, freedom of practice means his right to give it expression in forms of private and public worship.¹ Both imply a right to active intervention in the public sphere. Hence, these freedoms are guaranteed by our Constitution 'subject to public order and morality', as by the Constitution of *Eire*.² None would be allowed to disturb the public peace or to offend against public decency in the name of religious liberty.

'Profession' of religion means the right of the person who believes in a religion, to state his creed. The 'practice' of religions is the practical expression of his belief in the form of private or public worship. He may himself carry on worship or partake in a worship carried on by others.³

Under the present Article, thus,

"every person has a fundamental right not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others,"

subject, of course, to the restrictions specified in Article 19.

The right to take out a religious procession, subject to public order, thus follows from Art. 25.^{4a}

'To propagate'.

As has been held in the *United States* (p. 150, *ante*), our Constitution acknowledges that the freedom to act in the exercise of one's religious belief includes the freedom to propagate that belief, without let or hindrance from any other individual or the State, except that it must not transgress the limits imposed by the State for the preservation of public order, safety and morals. As Pandit Lakshmikanta Maitra observed,⁵ the very foundation of society in India being religion, India would lose all her spiritual values and heritage unless the right to practise and propagate religion was recognised as a fundamental right. The right to propagate is not given to any particular religion or community alone. It is given to all, subject to the right and duty of the State to see that these rights are not exercised in a manner that would upset the order, morality and health of the country. 'Propagation', again, does not mean 'conversion' but conveyance of one's own beliefs to another by exposition or persuasion, without any element of coercion.⁶ It may be noted that the right to hold religious discourses, associations and propaganda, would also follow from the freedoms guaranteed in Art. 19 (1) (a) and (c).

'Religion'.

Our Constitution does not define the word 'religion'. Though the guarantee in Art. 25 incorporates the different aspects of the freedom of religion as explained by American decisions, our Supreme Court⁶⁻⁷ has refused to follow American definition of religion. In *Davies v. Beason*,¹⁰ the American Supreme Court held that

"the term 'religion' has reference to one's views of his relation to his Creator and the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with *cultus* or form of worship of a particular sect, but is distinguishable from the latter."

Our Supreme Court has,¹² on the other hand, approved of the observations of Latham C. J. of the Australian High Court:¹¹

(5) Cf. Kohn's Constitution of the Irish Free State, 1932, p. 164.

(6) *Shrirur Mutt v. Commissioner*, (1952) 1 M.L.J. 557 (587).

(7) *Ratilal v. State of Bombay*, (1954) S.C.R. 1055.

(7a) *Siddiqui v. State*, A. 1954 All. 756.

(8) Constituent Assembly Debates, Vol. VII, p. 832.

(9) Cf. Constituent Assembly Debates, Vol. VII, pp. 833, 837.

(10) *Davies v. Beason*, (1890) 133 U.S. 333 (342).

(11) *Adelaide Company v. Commonwealth*, (1943) 67 C.L.R. 116 (127).

* "It is sometimes suggested in discussion on the subject of freedom of religion that, though the civil government should not interfere with religious *opinions*, it nevertheless may deal as it pleases with any *acts* which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of s. 116. This section refers in express terms to the *exercise* of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also *acts done in pursuance of religious belief as part of religion*."

On the one hand, our Supreme Court has observed, religion is a matter of faith but is not necessarily theistic and there are well-known religions in India like Buddhism and Jainism which do not believe in God. On the other hand, though a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, it would not be correct to say that religion is nothing else but a doctrine of belief.¹²

"A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and *observances, ceremonies and modes of worship which are regarded as integral parts of religion*, and these forms and observances might extend even to matters of food and dress."¹²

"Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines."¹²

Similarly, freedom of religion would not extend to political doctrines associated with particular creeds, which cannot be said to be the essence of religion. Thus, a man cannot be allowed, in the exercise of his freedom of religious practice and profession, to carry on an anti-war propaganda, subversive to the effective prosecution of war when the nation is engaged in a War;¹¹ nor would it, as already stated, enable a man to avoid compulsory military training for purposes of defence [see p. 149, *ante*].

But, as our Supreme Court has pointed out,¹² it is by no means an easy task to determine what constitutes the essence of a particular religion and not set formula can be laid down for this purpose. Thus, in India, it would not be correct to say that the essence of religion has reference to "one's views of his relation to his Creator", for there are religions in India (e.g., Buddhism and Jainism) which do not believe in God or in 'any Intelligent First Cause'. Hence,

"What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character What Art. 25 (2) (a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality but regulation of *activities which are economic, commercial or political in their character though they are associated with religious practices*."¹²

What constitutes the essential part of a religion is, therefore, primarily to be ascertained with reference to the doctrines of that religion itself,¹³ keeping apart secular and superstitious practices.¹⁴

Illustrations.

If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26 (b).¹²

(12) *Commr. H. R. E. v. Lakshminidra*, (1954) S.C.R. 1005.

(13) *Ratilal v. State of Bombay*, (1951) S.C.R. 1055.

(14) *Durgah Committee v. Hussain Ali*, (1961) II S.C.A. 171 (196).

On the other hand—

(a) The sacrifice of a cow is not an obligatory overt act enjoined by the Muslim religion.¹⁵

(b) The right to elect members to a Committee for the administration of Gurudwara property cannot be said to be a matter of religion for the Sikhs.¹⁶

(c) A power given to the Board of Religious Trusts to modify the Budget relating to a trust or to give directions to the trustee, in order to carry out the wishes of the founder of the trust (in so far as it is not repugnant to the law governing such trusts), cannot be said to be an interference with the freedom of due observance of religious practices in the *math* or temple concerned.¹⁷

(d) Marrying a second wife during the lifetime of the first wife cannot be said to be an integral part of the Hindu¹⁸ or Muslim¹⁹ religion.

(e) There is nothing in the Hindu or Muslim religion to prohibit photographs of women to be taken, for electoral purposes.²⁰

(f) The right to ex-communicate a member of a community is not of the essence of any religion.²¹

CLAUSE (2).

Scope of Cl. (2) : Restrictions upon the freedom of religion.

The freedoms guaranteed by cl. (1) are subject to the exceptions provided by sub-cl. (a) and (b) of cl. (2).

Read with cl. (1), the grounds for restricting the freedom guaranteed by cl. (1) are—

- (i) Public order, morality or health.
- (ii) Other provisions of Part III of the Constitution.
- (iii) Regulation of non-religious activity associated with religious practice.
- (iv) Social welfare.
- (v) Social reform.
- (vi) Throwing open of Hindu religious institutions of a public character to all classes and sections.

Sub-Cl. (a) : Secular activities.

Sub-cl. (a) is particularly an exception to the freedom of *practice*. The freedom of practice would extend only to those rites and observances which are of the *essence* of religion and would not cover secular activities which go by the name of religion and are no part of true religion. Such matters, for example, are those that come within the scope of the expression 'personal law', e.g., relating to marriage,²² adoption and the like, as regards which the Hindu and Mahomedan laws²³ are founded on religious scriptures, and yet they do not form the *essence* of either religion. Hence, matters of personal law are subject to regulation or restriction by the State in the larger interests of society. The legislative power in this respect is conferred by Entry 5 of List III of Sch. VII.

What sub-cl. (a) of cl. (2) contemplates is not State regulations of the religious practices as such which are protected unless they run counter to public health or

(15) *Quareshi v. State of Bihar*, (1959) S.C.R. 629.

(16) *Sarup v. State of Punjab*, A. 1959 S.C. 860 (866).

(17) *Moti Das v. Sahi*, A. 1959 S.C. 942 (949).

(18) *Ramprasad v. State of U. P.*, A. 1957 All. 411; A. 1961 All. 334.

(19) *Badruddin v. Aisha*, (1957) A.L.J. 300.

(20) *Nirmal v. Chief Electoral Officer*, A. 1961 Cal. 289 (296).

(21) *Saifuddin v. Tyebji*, A. 1953 Bom. 183.

(22) *Ram Prasad v. State of U. P.*, A. 1957 All. 334.

(23) In the Constituent Assembly, the Muslim members insisted that personal law was a part of the Muslim religion and that the Muslims would never submit to any interference with their personal law [VII C.A.D., pp. 722, 756, 759]. The suggestion to guarantee the inviolability of personal law was not, however, accepted [VII C.A.D., pp. 781-2]. Under the present clause, therefore, the State retains the power to introduce social reform by changing personal laws.

morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.²⁴

For the application of the present sub-clause, therefore, it is necessary to classify religious practices into such as are *essentially* of a religious character and those which are not.²⁵ Only those practices are protected by Art. 26 (b) which are regarded by the *religion* in question as its essential and integral part.¹ Whether a religious practice is an essential part of a religion is an objective question to be determined by the Court: the view of the religious denomination itself is not final.¹

'Political activity'.

Nor can the State allow subversive activities to be carried on in the name of religion and action may be taken against the anti-war activities of religious associations, if the safety of the State is really prejudiced by such activities.²

In short, the provision for protection of religion is not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery.³

Analogous Provisions.—As to prohibition of discrimination on ground of religion, see Arts. 15, 16, 29 (2). While the present Article deals with the freedoms of conscience, profession, practice and propagation of religion, Arts. 26-28 deal with three other allied freedoms relating to religion.

Sub-Cl. (b) : 'Social Reform'.

This clause provides that where there is conflict between religious practice and the need of social reform, religion must yield. As Dr. Ambedkar explained,⁴ the conception of religion in this country is so vast as to cover every aspect of life from birth to death. If the State were to accept this conception of religion, the country would come to a standstill in regard to reforms. It may be expected that no sensible State, in the name of social reform, would affect the very *essence* of any religion. The legislation would only touch questionable practices, dogmas and the like which stand in the way of social progress of the country as a whole, e.g., the system of *devadasis*.

'Social reform' means eradication of practices or dogmas which stand in the way of the country's progress as a whole but do not form the essence of religion. Thus, the State may prohibit bigamy⁵ amongst the Hindus because the need of having a natural son by marrying a second wife on the failure of the first wife to get a son was not of the essence of Hindu religious belief, as the purpose might be served by taking an adopted son.³

It has been held by a majority of the Supreme Court⁴ that the banning of excommunication which is made solely on *religious* grounds cannot be considered to promote welfare and social reform because it is a right belonging to a religious denomination under Art. 26 (b); but it may be so where the law bars excommunication on non-religious grounds, e.g., for the breach of some obnoxious social rule or practice,⁴ or as a punishment for a crime punishable under the law of the land.⁵

3. In short, the expression 'social welfare and reform' does not enable the Legislature to 'reform' a religion out of existence or identity. It does not extend to the basic and essential practices of religion,⁶ which is guaranteed by Art. 25 (1) itself.⁶

(24) *Ratilal v. State of Bombay*, (1954) S.C.R. 1055: A. 1954 S.C. 388.

(25) *Saifuddin v. State of Bombay*, A. 1962 S.C. 853 (864).

(1) *Durgah Committee v. Hussain*, A. 1961 S.C. 1402 (1415).

(2) *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116 (150-160).

(3) *Srinivasa v. Saraswati*, A. 1952

Mad. 193 (196); *State v. Narasu*, (1951) 53 Bom. L.R. 779: A. 1952 Bom. 84.

(4) Constituent Assembly Debates, Vol. VII, p. 781.

(4) *Saifuddin v. State of Bombay*, A. 1962 S.C. 853 (870), reversing *Saifuddin v. Tayebji*, A. 1953 Bom. 183.

(5) *Ibid.*, p. 874.

(6) *Ibid.*, pp. 875-6.

'Throwing open of Hindu religious institutions'.

Cl. (2) (b) has been interpreted not only to confer a power upon the State in a limitation of the freedom guaranteed by cl. (1) but also to confer a corresponding right, in so far as the latter part is concerned.⁷

I. It empowers the State to override religious injunctions prohibiting certain classes from entering into temples or other religious institutions. The obvious object is to remove a potent cause of disunion and inequality. It is confined to 'public' institutions, *i.e.*, those institutions which have been dedicated to the Hindu public either by grant or user (*see* Vol. I, p. 518). It would not extend to family endowments or institutions. 'Hindu' religious institutions include Sikh, Jaina and Buddhist religious institutions [*Expl. II*].

But an institution 'of public character' need not necessarily be dedicated to the entire mass of the general public. It would include temples founded for the benefit of particular sections of the Hindus, as referred to in Art. 26. Hence, though under Art. 26 (b) the trustees of a Hindu denominational temple would be entitled to exclude people of other sections according to the ceremonial law of that temple, the State may override that right by enacting a law under the present clause,—in which case member of the Hindu public would have a right to enter the temple for worship.⁸

II. It also confers a right upon "all classes and sections of Hindus" to enter into a public temple, and this right is available whether it is sought to be exercised against an individual under Art. 25 (1) or against a denomination under Art. 26 (b). The provision in Art. 25 (2) (b) thus controls both Arts. 25 (1) and 26 (b).⁷

While cl. (1) of Art. 25 deals with rights of individuals, cl. (2) (b) is much wider in its contents and has reference to the rights of *communities* and controls both Art. 25 (1) and Art. 26 (b).⁷

The right conferred by Art. 25 (2) (b) is a right to enter a temple for purposes of worship. But it is not an absolute or unlimited right. This provision must be construed, in so far as possible, to harmonise it with that in Art. 26 (b) so as not to render unsubstantial the right conferred upon a denomination by the latter provision.⁷

Hence, while the members of the public cannot be totally excluded from worshipping in the temple, no member of the Hindu public can claim that a temple must be kept open for worship at all hours of the day or night, or that he should perform those services which the priests or those specially initiated alone can perform, according to the tenets of denomination.⁷

The present clause would not, therefore, justify the Legislature in conferring an unregulated or unrestricted right of entry to *any part* of a temple, *at any hour*, regardless of the customary restrictions imposed by the institution for the due performance of the spiritual functions, rites and ceremonies. Thus,

"It is a traditional custom universally observed not to allow access to any outsider (*i.e.*, a person not connected with the spiritual functions) to the particularly sacred parts of a temple, as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any member of the public is allowed."⁸

'Religious institutions of a public character'.

As stated already, the power conferred upon the State to throw open a temple to all sections of Hindus applies only to institutions of a *public* character as distinguished from private or family temples and the like. But it does not exclude denominational temples or temples founded for the benefit of particular sections of the Hindus, as referred to in Art. 26.

The test is whether the temple can be said to be 'public' or private. The word 'public' includes any section of the public. Hence, the expression 'of a public character' includes not only temples dedicated to the public as a whole but also

(7) *Venkataramana v. State of Mysore*,
A. 1958 S.C. 255: (1958) S.C.R. 895.

(8) *Commr., H. R. E. v. Lakshmindra*,
(1954) S.C.R. 1005.

to those founded for sections thereof,⁹ e.g., one which is dedicated to the Gowda Saraswath Brahmins.⁹ [See s. 2 (d) of the Untouchability (Offences) Act, 1955, below]. Hence, though under Art. 26 (b), the trustees of a Hindu denominational temple would be entitled to exclude people of other sections according to the ceremonial law of that temple, the State may override that right by enacting a law under Art. 25 (2) (b), in which case, any member of the Hindu public would have a right to enter the temple for worship.⁹

Legislation by Parliament.—Parliament has enacted the Untouchability (Offences) Act, 1955, s. 3 of which provides—

"Punishment for enforcing religious disabilities.—Whoever on the ground of "untouchability" prevents any person—

(a) from entering any place of public worship which is open to other persons professing the same religion or belonging to the same religious denomination or any section thereof, as such person; or

(b) from worshipping or offering prayers or performing any religious service in any place of public worship, or bathing in, or using the waters of, any sacred tank, well, spring of water-course, in the same manner and to the same extent as is permissible to other persons professing the same religion, or belonging to the same religious denomination or any section thereof, as such person; shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Explanation.—For the purposes of this section and section 4 persons professing the Buddhist, Sikh or Jaina religion or persons professing the Hindu religion in any of its forms or developments including Virashaivas, Lingayats, Adivasis, followers of Brahmo. Prarthana, Aitya Samaj and the Swaminarayan Sampraday shall be deemed to be Hindus."

Under the corresponding provision of the Bombay Harijan Temple Entry Act, 1947, it was held that the Act did not obliterate the distinction between Hindus and Jains, so that neither a caste Hindu nor a Hindu Harijan could claim a right of entry into a Jain temple.¹⁰

But the Explanation to s. 3 of the present Act is differently worded than the definition of Hindu in the Bombay Act. A Sikh or Jain is 'deemed to be a Hindu' for the purposes of this Act. In the result, a Hindu and a Jain shall be deemed to be persons professing the same religion for the purposes of s. 3 (a) and, accordingly, a Scheduled Caste belonging to the Hindu community cannot be denied entry into a Jain temple.¹¹⁻²⁵ Of course, a person so entering cannot insist that he shall worship in the Jain temple according to the practices of a religion other than Jain.¹

A place of public worship is thus defined in s. 2 (d) of the present Act—

"place of public worship' means a place, by whatever name known, which is used as a place of public religious worship or which is dedicated generally to, or is used generally by, persons professing any religion or belonging to any religious denomination or any section thereof, for the performance of any religious service, or for offering prayers therein; and includes all land and subsidiary shrines appurtenant or attached to any such place."

(9) *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 (263); (1958) S.C.R. 895 (917).

(10) *Bhaichand v. State of Bombay*, A. 1952 Bom. 233.

(11-25) Contrary is the view taken by the Madhya Pradesh High Court in *State v. Puranchand*, A. 1958 M.P. 352. The result of such view would be that a Harijan shall not have a right to enter a Jain temple unless he is 'Jain' Harijan. The M.P. High Court assumes that a caste Hindu has no right to enter a Jain temple, and, therefore, it would be anomalous to hold that a Harijan Hindu would have right. But, merely because the Untouchability Act is directed to the special problems of Harijans, it does not follow that caste Hindus shall have no right to enter Jain temples. If this were so, Expl. II of Art. 25 would have little meaning. According to Cl. (2)(b), read with Expl. II,

A Jain, is a Hindu and a Jain religious institution shall be deemed to be a Hindu religious institution, for the purposes of Cl. (2) (b), under which the State may throw open a Hindu religious institution of a public character to 'all classes and sections of Hindus'. It would follow, therefore, that it is competent for the Legislature to provide that Jain temples should be open to any class or section of Hindus, though they are not Jains. As has been observed in *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 (267-8), Art. 25(2) (b) applies to denominational temples as well and Art. 26 (b) cannot be construed to confer a right upon a denomination to refuse entry in its temples to persons not belonging to such denomination.

(1) *Tejraj v. State of M. B.*, A. 1958 M.P. 115 (127).

Explanation 1. —The right of the Sikhs to carry *kripans* was acknowledged by the Nehru Committee (1928), as well as the Sapru Committee (1945, para. 363).

Kripan means a sword and its size or shape has not been prescribed by the Sikh religion.² Hence, a Sikh is entitled to carry a sword of any size or shape. But neither the Sikh religion nor the Expl. to Art. 25 of the Constitution entitles a Sikh to possess, without licence, *more than one* sword. For extra swords, he must obtain licence. Otherwise, the object of the Arms Act would be defeated in the name of religion.³

INDEX TO COMMENTS

ARTICLE 25.

OTHER CONSTITUTIONS:

(A) U.S.A., 147; (B) Australia, 150; (C) Eire, 151; (D) U.S.S.R., 151; (E) Fourth & Fifth French Republics, 151; (F) West Germany, 151; (G) Japan, 151; (H) Ceylon, 152; (I) England, 152.

India:

Art. 25: Freedom of conscience and religion, 153.

Clause (1).

'Subject to public order, morality, health', 153; 'Existing law', 154; 'Subject to other provisions of this Part, 154; 'All persons', 155; 'Freedom of conscience', 155; 'To profess and practice', 155; 'To propagate', 156; 'Religion', 156.

Clause (2).

Scope of Cl. (2): Restrictions upon the freedom of religion, 158.

Sub-cl. (a): Secular activities, 158, 'Political activity', 159; Analogous Provisions, 159.

Sub-cl. (b): 'Social reform', 159; 'Throwing open of Hindu religious institutions', 160; 'Religious institutions of a public character', 160; Legislation by Parliament, 161.

Explanation I, 162.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire moveable and immoveable property; and
- (d) to administer such property in accordance with law.

OTHER CONSTITUTIONS

(A) U.S.A.—It has been held that the freedom of religion guaranteed by the First Amendment (p. 147, *ante*) includes the right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association⁴ and that as regards matters relating to the discipline and practice of a church, the courts are bound by the judgment of the church body and will not interfere in any strictly ecclesiastical matter except when conflicting claims arise respecting the use of property.⁴

(B) Eire.—Art. 44 (2) of the Constitution of 1937 provides—

"Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, moveable and immoveable, and maintain institutions for religious or charitable purposes.

The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation."

(2) Cf. Macauliffe, *The Sikh Religion*, 1908 Ed., Vol. V, p. 95.

(3) *Rex v. Dhyani Singh*, A. 1952 All. 53; *Hari Singh v. Emp.*, A. 1924 Lah. 600.

(4) *Watson v. Jones*, (1872) 13 Wall. 679.

(C) *Ceylon*.—Sec. 29 (2) (d) of the Ceylon Constitution Order in Council, 1946, lays down—

"No such law shall alter the constitution of any religious body except with the consent of the governing authority of that body: Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body."

INDIA

Freedom to manage religious affairs and institutions.

This Article guarantees to every religious denomination or section, the right to maintain religious and charitable institutions of its own, including the right to own, acquire and administer property for such purposes. Such right is enforceable by or on behalf of a denomination.⁵ It is to be noted that (a) the above right is subject to the limitations of public order, morality and health; (b) that a corresponding right to maintain *educational* institutions of its own is guaranteed to every religious denomination or section by Art. 30 (1); (c) that it does not prevent acquisition of such property by the State [see *post*].

'Religious denomination or section thereof'.

'Denomination' means a religious sect or body having a common faith and organisation and designated by a distinctive name.⁶ Art. 26 contemplates not only a denomination but also a *section* thereof. Hence, the different sects and sub-sects of the Hindu religion having a common faith and a common spiritual organisation, would come within the purview of this Article,⁶ e.g., the followers of Ramanuja, Madhwacharya, and the Gowda Saraswat Brahmin Community.⁵

It is not necessary, that in order to claim the benefit of Art. 26 a religious denomination should be capable of holding all the four rights in the four sub-cl. of the Article. Each clause recognises a distinct and separate right. The denomination may exercise all or any of those rights and it is unnecessary that it should own all the rights before it can claim recognition as a religious denomination.⁷

Pleading.

This Article cannot be invoked unless the Petitioner claims the property in question on behalf of a denomination and that denomination is specified in the pleading.⁸

Cl. (a) : Freedom to establish and maintain religious institutions.

The word 'institution' refers to organisations for religious and charitable purposes, such as temples, mosques, maths, monasteries and the like, and the words 'establish and maintain' suggest that unless they contravene the interests of public order, morality and health, they cannot be abolished by the State altogether.

Cl. (b) : Right to manage own affairs in matters of religion.

While the right to administer property under cl. (d) is subject to be regulated by laws the right to manage religious affairs under cl. (b) cannot be regulated by the Legislature⁹ except on the ground of 'public order, morality or health';⁶ or to enforce the purposes of the trust itself.¹⁰

(5) *Devaraja v. State of Madras*, A. 1954 S.C. 282.

(6) *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005, affirming *Shrirur Mutt v. Commr.*, (1952) 1 M.L.J. 557 (590).

(7) *Shrirur Mutt v. Commr.*, (1952) 1 M.L.J. 557 (590).

(8) *Bira Kishore v. State of Orissa*, A. 1964 S.C. 1501 (1510).

(9) *Sarup Singh v. State of Punjab*, (1960) 1 S.C.A. 163 (174).

(10) *Moti Das v. Sahi*, A. 1959 S.C. 942 (950).

This clause guarantees to each religious denomination the right to manage its domestic affairs in matters which are concerned with religion and the State cannot interfere in these affairs unless the denomination so exercises its right as to interfere with public order, morality or health.

The freedom guaranteed by the present clause is not confined to religious beliefs only, but includes the freedom to carry on religious practices according to tenets of the school to which the religious denomination belongs, subject only to the limitations imposed by the other provisions of the Constitution.¹¹

This right of management includes—

(a) Complete autonomy to decide what rites and observances are essential according to its religion, though the secular aspects, *e.g.*, the scale of expenses to be incurred in connection with such observances, may be regulated by the competent legislature;¹¹ inasmuch as it cannot be the injunction of any religion to destroy the institution and its endowment by incurring wasteful expenditure.¹¹

The State may, therefore, control such expenditure as is likely to deplete the endowed property or affect the stability of the institution.¹¹ But, if in controlling such expenditure, the State altogether takes away from the religious denomination the right to manage its own affairs or to administer its own property, there will be a violation of Art. 26.¹¹

(b) The right to spend the trust property or its income for religion and religious purposes and objects indicated by the founder or established by usage obtaining in a particular institution.¹² To divert the trust property or funds to other purposes, although the original objects of the founder can still be carried out, is an unwarrantable encroachment upon the right guaranteed to a religious institution by this clause,¹¹ even though such other purposes are charitable.¹³

But there is no contravention of cl. (b) where the law seeks to implement the purposes of the trust itself and to prevent mismanagement and waste by the trustee.¹⁰

The State can step in only when the trust fails or is incapable of being carried out wholly or in part. Accordingly, a law which empowers a Charity Commissioner to divert the funds of a religious endowment to other purposes whenever the Charity Commissioner (with the confirmation of the Court) is of opinion that the original intentions of the author of the trust or the purposes for which the trust was created are not 'expedient, practicable, desirable or necessary', must be held to be void owing to contravention of the present clause.¹²

(c) The right to determine, according to the ceremonial law relating to temples, the persons who are entitled to enter into them for worship,¹⁴ where they are entitled to stand,¹⁴ the hours when the public are to be admitted, how the worship is to be conducted.¹⁴

But where a religious denomination seeks to deprive a member of his legal rights and privileges, *e.g.*, to expel or excommunicate him, it cannot be said to be managing its own affairs in matters of religion, for religion has nothing to do with excommunication or expulsion. Such a right cannot be claimed under Art. 26.¹⁵

'Matters of religion'.

It is clear that this expression would not cover the secular aspects of a religion (see p. 157, *ante*).

At the same time, it is not confined to mere ethical rules or matters of belief but includes all 'rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion'.¹⁶

(11) *Venkataramana v. State of Mysore*, A. 1958 S.C. 255; (1958) S.C.R. 805.

(12) *Ratilal v. State of Bombay*, (1954) S.C.R. 1055; (1952-54) 324 (330); A. 1954 S.C. 388.

(13) *Ram v. State of Orissa*, A. 1959 Orissa 5 (16).

(14) *Venkataramana v. State of Mysore*, A. 1958 S.C. 255.

(15) *Saifuddin v. Tyebji*, A. 1953 Bom. 183.

(16) *Commr. H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005 (1026).

Hence,—each religious denomination enjoys complete autonomy in the matter of deciding what rites and ceremonies are essential according to the tenets of the religion it holds, subject, of course, to public order and morality.¹⁷ But the Court has the right to determine whether a particular rite or observance is regarded as essential by the tenets of a religion.^{17a}

(a) It is a traditional custom almost universally observed in Hindu temples that outsiders are not allowed access to the particularly sacred parts of the temple where the deity is located and the public are also not admitted during hours of rest of the idol. Hence, if any law empowers the Commissioner of Endowment Board or his staff to enter into *any part* of the temple and at *any hours* of the day, it is invalid owing to contravention of Art. 26 (b).¹⁸ But a provision for entry for search of account books, subject to statutory safeguards so as to present interference with the sanctity of the inner sanctuary or with worship in the institution, is not unconstitutional.¹⁸

(b) According to the ceremonial law relating to temples, the persons who are entitled to enter into them for worship, where they are entitled to stand and how the worship is to be conducted, are all matters of all religion.¹⁹

On the other hand—

The *mode* of representation to the Board for management of a Sikh Gurudwara²⁰ is not a matter of religion, even though the right of the Sikh community to be represented on the Board may be.²⁰

Where the Board consists exclusively of Sikh members, the fact that the electorate for electing such members included certain non-Sikh members is far too remote and indirect to constitute an infringement of the right guaranteed by Art. 26 (b).²⁰

Cls. (b) and (d): There is a marked difference between the implications of the two clauses. In regard to affairs in matters of religion [cl. (b)], the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property [cl. (d)] which a religious denomination is entitled to own and acquire, it has the right to administer such property but only 'in accordance with law'.¹⁶

Arts. 25(2)(b) and 26(b).

Effect must be given to both these provisions without rendering either of them nugatory.¹⁹

Hence, the right of a Hindu denominational institution to exclude any section of the Hindus may be superseded by a law made under Art. 25 (2) (b),¹⁹ in so far as the right to *enter* a temple for the purposes of worship is concerned. Such a law cannot, however, provide that a person not initiated in the cult to which the institution belongs should be entitled to perform those religious ceremonies or services which can, according to that cult, be performed only by those who have been specially initiated.¹⁹

"..... the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Art. 26 (b), must yield to the overriding right declared by Art. 25 (2) (b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from *certain religious services*, they being limited by the rules of the foundation to the members of the denomination, then the question is not whether Art. 25 (2) (b) overrides that right so as to extinguish it, but whether it is possible so to regulate the rights of the persons protected by Art. 25 (2) (b) as to give effect to both the right".¹⁹

(17) *Quareshi v. State of Bihar*, A. 1958 S.C. 731.

(17a) *Durgah Committee v. Hussain*, A. 1961 S.C. 1402 (1415).

(18) *Narayanadoss v. Neeladri*, A. 1959 A.P. 148 (150).

(19) *Venkataramana v. State of Mysore*, A. 1958 S.C. 255 (265): (1958) S.C.R. 895.

(20) *Sarup v. State of Punjab*, A. 1959 S.C. 860 (866).

Cl. (c): Right to own property.

Cls. (c) and (d) give constitutional protection to rights relating to property which a religious denomination possessed independent of the Constitution. They do not *create* any right in any denomination which it never had.^{20a}

Subject to the above, this Clause guarantees to every religious denomination the right to own and acquire property but does not prevent property belonging to a religious body being acquired by authority of law.^{20b} [See also p. 207, *post*].

Cl. (d): Right to administer property in accordance with law.

Under this clause, it is the fundamental right of a religious denomination to administer its properties *in accordance with law*. The law must, therefore, leave the *right of administration* to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed by the present clause.²¹ Similarly, a law which requires that *sanction* of the Commissioner of Endowments should be necessary for spending the surplus income for the propagation of the religious tenets of the order which is one of the primary functions of the Mahant to discharge, would be void.²¹

On the other hand, in so far as a religious endowment is in the nature of a public trust, some amount of control or supervision over its administration and due appropriation of its funds is necessary in the interests of the public and is valid provided it does not interfere with the customary rights of the Mahant as the *spiritual* head of the institution.

In short, in the exercise of the power to regulate the administration of trust property, the Legislature cannot interfere with matters which are essentially religious.²² The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. But in case of doubt, the Court should take a commonsense view and be actuated by considerations of practical necessity. The broad principle is that if the tenets of a particular religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities.²² No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate. Of course, the *scale of expenses* to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides.²² This is the measure of protection afforded by Art. 26 (d) of the Constitution.²²

(b) Nor is the State competent to make law within the meaning of Art. 26 which provides for the diversion of the denominational property for the use of persons who have been excluded from the denomination on grounds of religion.^{22a}

Cls. (c)-(d).

These clauses do not *create* rights in any denomination rights which it never had. They merely safeguard and guarantee the continuance of rights which such

(20a) *Durgah Committee v. Hussain Ali*,
(1961) II S.C.A. 171 (189).

(20b) *Suryapal v. Govt. of U. P.*, A. 1951
All 674.

(21) *Commr. H. R. E. v. Lakshmindra*,
(1954) S.C.R. 1005 (1029; 1064).

(22) *Ratilal Panchand v. State of Bombay*,
(1954) S.C.R. 1055 (1065).

(22a) *Saifuddin v. State of Bombay*, A.
1962 S.C. 853 (873).

denomination had. If the right to administer properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it, these clauses cannot be successfully invoked.²³

Thus, if under the terms of the endowment, or where the terms are not available, the history of the endowment clearly shows that the management of the properties were always in the hands of officers appointed by and answerable to, the State, the denomination cannot be heard to say that it has acquired the right of management under Art. 26(c)-(d).²³

Arts. 25 and 26.— While the right guaranteed by Art. 25 is a right of the individual, the right conferred by Art. 26 is a right of the community or section thereof.

Arts. 26 and 19(1)(f): Proprietary rights of the head of a Hindu religious endowment and the power of the State to impose restrictions thereupon.—See Vol. I, pp. 624-4.

INDEX TO COMMENTS

ARTICLE 26.

Other Constitutions :

(A) U.S.A., 162 ; (B) Eire, 162 ; (C) Ceylon, 163.

India :

Freedom to manage religious affairs and institutions, 163 ; 'Religious denomination or section thereof', 163 ; Cl. (a) : Freedom to establish and maintain religious institutions, 163 ; Cl. (b) : Right to manage own affairs in matters of religion, 163 ; Matters of religion, 164. Cls. (b) and (d), 163 ; Arts. 25 (2) (b) and 26 (b), 165 ; Cl. (c) : Right to own property, 166 ; Cl. (d) : Right to administer property in accordance with law, 166.

Arts. 25 and 26, 167 ; Arts. 26 and 19 (1) (f) : Proprietary rights of the head of a Hindu religious endowment and the power of the State to impose restrictions thereon, 167.

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Freedom as to payment of taxes for promotion of any particular religion.

OTHER CONSTITUTIONS

(A) U.S.A.—The First Amendment (1791) enjoins that Congress shall make 'no law respecting establishment of religion'. By reason of this prohibition, Congress cannot make appropriations in aid of religious bodies, including educational institutions under the management of and engaged in disseminating the religious doctrines of any particular sect. But the mere fact that a hospital is managed by Roman Catholics is no bar to its incorporation by Congress ; and provision of money for its management would not be a 'law respecting establishment of religion', provided the institution is carried on in accordance with the Constitution and the hospital is open to everyone.²⁴ Nor does the above prohibition debar the State from exempting religious bodies from taxation, if the basis of the exemption is public welfare and not the religious character of the institutions concerned.²⁴ Similarly, the fact that particular schools would be indirectly benefited does not debar the State from providing free text-books²⁵ or free transportation¹ to all school children. It is not an aid to religion but to children.^{25,1}

The prohibition applies to 'public funds' but not to funds held by the State as trustee.²

(23) *Durgah Committee v. Hussain, A.* 1962 S.C. 1402 (1416).

(24) *Bradfield v. Roberts*, (1889) 175 U.S. 291.

(25) *Cochran v. Louisiana State Board*, (1930) 281 U.S. 370.

(1) *Everson v. Board of Education*, (1947) 330 U.S. 1.

(2) *Quick Bear v. Leupp*, (1908) 210 U.S. 50.

But—

"no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practise religion".¹

(B) *Switzerland*.—Art. 40 of the Swiss Constitution, 1874, provides—

"No person may be compelled to pay taxes the proceeds of which are specifically appropriated in payment of the purely religious expenses of any religious community of which he is not a member."

(C) *Japan*.—Art. 22 of the Constitution of 1946 says—

"..... No religious organization shall receive any privileges from the State, nor exercise any political authority"

(D) *England*.—Every landowner is subject to a levy called 'tithe' for the benefit of the Established Church (Tithe Act, 1936) (see p. 152, *ante*).

INDIA

Freedom from payment of taxes for the promotion of any particular religion.

This Article secures that the public funds raised by taxes shall not be utilized for the benefit of any particular religion or religious denomination. Thus, a local authority, which raises taxes from persons of all communities residing within its jurisdiction, would not be entitled to aid or maintain an educational institution which decides to give instruction relating to any particular religion, even though the majority of students receiving education from that institution belong to that religion. In the present Article, *our* Constitution embodies the principle which has been arrived at in the *U.S.A.* by judicial decision, *viz.*, that

"no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they adopt to teach or practise religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."²

It is to be noted that what the present article of *our* Constitution prohibits is taxation or the specific appropriation of the proceeds of any tax for the promotion of any *particular* religion or religious denomination.³ It would not bar any provision by which religious institutions are benefited along with secular ones, without any discrimination,² or by which all religious institutions are benefited alike.³

Nor is there any question of Art. 27 being attracted when a contribution or a 'fee' is levied *upon* Hindu religious endowments, not with the object of favouring any particular religion or religious denomination but for the purpose of ensuring that the endowments attached to the religious institutions are properly administered.⁴⁻⁵

Illustration.

S. 70 (1) of the Bihar Hindu Religious Trusts Act, 1951 provides that "for the purposes of defraying the expenses incurred or to be incurred in the administration of this Act, the trustee of every religious trust shall, in each financial year, pay to the Board such fee as the Board may determine". *Held*, that it was a 'fee' and not a 'tax' and did not contravene Art. 27 inasmuch as the contribution was levied to meet the expenses of an administrative body created by the State to supervise the administration of the endowments and not for the promotion or maintenance of any religion or religious denomination.⁶

The scope of s. 27 was thus explained in *Lakshmindra's* case^{6a}—

"What is forbidden by the Article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religious

(3) This view of the Author, expressed at p. 195 of the 2nd Edition of this Commentary, now finds support from *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005 (1045).

(4) *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005

(5) *Jagannath v. State of Orissa*, (1954) S.C.R. 1046.

(6) *Moti Das v. Sahi*, A. 1959 S.C. 942 (950): (1959) Supp. (2) S.C.R. 563.

(6a) *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005.

denomination. The reason underlying this provision is obvious. Ours being a secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination. But the object of the contribution under section 76 of the Madras Act is not fostering or preservation of the Hindu religion or any denomination within it. The purpose is to see that religious trusts and institutions, wherever they exist, are properly administered. It is a secular administration of the religious institutions that the legislature seeks to control and the object, as enunciated in the Act, is to ensure that the endowments attached to the religious institutions are properly administered and their income is duly appropriated for the purposes for which they were founded or exist. There is no question of favouring any particular religion or religious denomination in such cases.^{6a}

It does not prohibit the levy of a 'fee' for the defraying of expenses of the State for regulating the secular administration of religious institutions. Art. 27 is not attracted to such a case as there is no question of favouring any particular religion or religious denomination, by such imposition.^{6-6a}

'Person'.—Obviously, this word, in the present Article, includes human beings as well as corporations.

Distinction between a 'tax' and a 'fee'—See under Art. 277, *post*.

INDEX TO COMMENTS

ARTICLE 27.

Other Constitutions :

(A) U.S.A., 167 ; (B) Switzerland, 168 ; (C) Japan, 168 ; (D) England, 168.

India :

Freedom from taxes for the promotion of any particular religion, 168 ; 'Person', 169.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

OTHER CONSTITUTIONS

(A) U.S.A.—In the United States, it has been deduced from the prohibition against 'establishment of any religion' in the First Amendment (see p. 144, *ante*), that classrooms in a public school cannot be used for religious instruction,⁷ nor can the public school use its power to further a religious programme by releasing its pupils on condition that they attend the religious classes.⁷ If, however, the public school simply offers the opportunity to its pupils to join the religious classes held *outside* the school premises, without the use of any sort of coercion, there is no unconstitutionality.⁸

The Supreme Court has not interfered with a decision that the reading of a number of verses from the Old Testament as a Prayer at the opening of the

(7) *McCullum v. Board of Education*, (1948) 333 U.S. 203.

(8) *Zorach v. Clauson*, (1952) 343 U.S. 306.

school day in a public school is not a form of 'religious teaching' which is forbidden by the Constitution.⁹

(B) *Eire*.—Art. 44 (2) of the Constitution of 1937 provides—

"Legislation providing State aid for schools shall not . . . be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction in that school."

(C) *Japan*.—Art. 20 of the Japanese Constitution, 1946, says—

"... The State and its organs shall refrain from religious education or any other religious activity."

(D) *West Germany*.—Art. 7 (2)-(3) of the West German Constitution (1948) provide—

"2. Those entitled to bring up a child shall have the right to decide whether it shall receive religious instruction.

3. Religious instruction shall form a part of the curriculum in state schools with the exception of nonconfessional schools. Religious instruction shall, without prejudice to the state's right of supervision, be given according to principles of religious societies. No teacher may be obliged against his will to give religious instruction."

(E) *U.S.S.R.*—Art. 124 of the Constitution of the U.S.S.R., 1936, says—

"In order to ensure to citizens freedom of conscience the Church in the U.S.S.R. is separated from the State and the school from the Church."

(F) *Burma*.—The Constitution of Burma, 1948, does not debar the State from imparting religious education but prohibits the abuse of religion for political purposes [s. 21 (4)] and guarantees that no religious instruction shall be 'compulsorily imposed' on any minority [s. 22].

(G) *Indonesia*.—The Constitution of Indonesia, 1950, goes further than the Burmese provision just quoted. Art. 31 (3) provides that one of the objects of public education by the State shall be—

"the provision within school hours of the opportunity for religious teaching in accordance with the parents' wishes."

(H) *Pakistan*.—Cls. (1) and (2) of Art. 13 of the Constitution of Pakistan, 1956 correspond to cls. (2) and (3) of Art. 28 of *our* Constitution, with a somewhat different language:

"(1) No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend any religious worship, if such instruction, ceremony or worship relates to a religion other than his own.

(2) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination."

Read with cl. (3), which is reproduced under *our* Art. 29(2), *post*, it appears that if an institution received aid from the State, admission into it cannot be denied to persons belonging to any religion, but religious instruction could be imparted in such institution to pupils belonging to a particular religion, provided only the pupils of other religions were not compelled to attend.

But there was nothing corresponding to cl. (1) to Art. 28 of *our* Constitution which completely prohibits religious instruction in any institution '*wholly maintained out of State funds*'.

INDIA

Religious instruction in educational institutions.

This Article is confined to educational institutions maintained, aided, or recognised by the State. It does not relate to institutions other than these, which have no connection with the State.

Cl. (1) relates to institutions wholly maintained by State funds. Cl. (2) relates to educational institutions which are administered by the State under some

(9) *Doremus v. Board of Education*, (1950)

endowment or trust. Cl. (3) refers to institutions receiving aid out of State funds, and institutions which are simply recognised by the State. No institution, maintained by State funds exclusively, shall impart religious instruction of any kind. But institutions which are maintained *partly* by public funds or are recognised by the State shall be free to impart religious instruction, provided they do not *compel* members of other communities to follow or attend such courses without their consent.

The attitude of the Constitution towards religion as expressed by this Article, is a compromise between two opposite considerations: (a) On the one hand, there has been much exploitation of society in the name of religion, and the conflict between the exclusive dogmas of the different religions and different Schools within the same religion has been detrimental to the society. Again, owing to the multiplicity of religions, it is not possible for the State itself to impart religious instruction, even if it be minded to do so. (b) On the other hand, religion forms the basis of the entire morality and culture of the society in India, and in some form or other religious instruction is necessary, so that the State, though a secular State, cannot ban religious instruction altogether.

The Constitution, therefore, adopts a *via media*. It totally bans religious instruction in State-owned educational institutions, but does not ban it in other denominational institutions. But even as regards those other institutions, it seeks to prevent the fostering of religious dogmas, by Art. 28 (3) and Art. 29 (2). On the other hand, in institutions which are not maintained either wholly or in part by the State but are merely administered by the State as a trustee under a trust or endowment created for the purpose of imparting religious instruction, there *cannot* reasonably be any bar to the provision for religious instruction, for the State does not thereby lose its secularity or impartiality.

Cl. (1): 'Religious instruction'.

What this clause bans is the imparting of religious instruction in institutions wholly maintained by the State funds. It does not ban *moral* instruction,¹⁰ dissociated from any denominational doctrines, which is an essential part of training in citizenship, maintenance of law and order in the State, and growth of social cohesion. In fact, the provision for primary education being a duty of the State [Art 45], it is all the more essential that the State will impart moral education to the future citizens, in their formative years. At the same time, the task of differentiating morality from religion will not be an easy one, in a country where almost every part of a man's life is inextricably blended with religion, according to the scriptures.

'Wholly'.—In order to bring an institution within the scope of cl. (1), it must be wholly maintained out of State funds. If it is not wholly maintained out of State funds, it would come under cl. (3) relating to aided institutions. 'State' in this context obviously comprises all the authorities mentioned in Art. 12.

Cl. (2): Institutions administered by the State under endowment or trust.

Cl. (2) engrafts the only exception to the absolute prohibition of religious education contained in cl. (1). But this is not really an exception to that clause. For cl. (1) lays down the prohibition as regards institutions maintained "*out of State funds*".

The Proviso refers to institutions which are not maintained out of State funds, but are only *administered* by the State as trustee, e.g., the Benares Hindu University. Thus, if a donor of a religious endowment or trust provides that religious instruction shall be given in an institution created by or under the endowment, the State, if it happens to be the trustee of such management, would

(10) This view of the Author, expressed at p. 328 of Vol. I of the Third Ed., now

finds support from *Nambudripad v. State of Madras*, A. 1954 Mad. 385.

not be debarred from carrying out the terms of the endowment or the trust. Otherwise, it would not have been possible for the State even to take up the management of such a trust, without committing breach of trust.

Cl. (3): State-aided or recognised institutions.

This clause enables any community or religious denomination, who wanted to give religious education to their children, to establish educational institutions for that purpose, and also to seek aid from the State, provided that they should not be in a position to *force* these instructions on any other community. The State is free to offer the aid or not; but a condition necessary for the State aid is that the religious instruction given in such institution shall not be compulsory upon children belonging to other communities (who may be receiving general education in such institution), unless and until the consent of the pupil (if adult) or of his guardian is obtained.

Another condition of State aid has been indirectly introduced by cl. (2) of Art. 29. A religious community may maintain educational institutions of its own and give religious instruction there; but if it wants State aid, it cannot prevent citizens of other communities from getting admission into the institution; and when the latter are admitted, the exclusive character of the institution will be gone, for under Art. 28 (3), the pupils of those other communities shall be free not to take the religious instruction given in that institution.

INDEX TO COMMENTS

ARTICLE 28.

Other Constitutions :

(A) U.S.A., 169 ; (B) Eire, 170 ; (C) Japan, 170 ; (D) West Germany, 170 ; (E) U.S.S.R., 170.

India :

Religious instruction in educational institutions, 170.

Cl. (1): 'Religious instruction', 171, 'Wholly' 171.

Cl. (2): Institutions administered by the State under endowment or trust, 171.

Cl. (3): State-aided or recognized institutions, 172.

Cultural and Educational Rights

29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Amendment and Effects thereof.

It has been already pointed out (see Vol. I, p. 453) that Art. 29 (2) has been controlled by the **Constitution (First Amendment) Act, 1951**, by inserting cl. (4) in Art. 15.

Prior to this amendment, the Supreme Court held¹¹ that the Madras Communal G. O. was *ultra vires* inasmuch as it distributed seats in State educational institutions amongst communities according to a certain proportion per community.

In that decision it was further observed that Art. 29 (2) is not controlled by Art. 46 and that the Constitution does not intend to protect the interests of the backward classes in the matter of admission to educational institutions.

Cl. (4) was added to Art. 15 by the Constitution (First Amendment) Act, 1951, to bring Arts. 15 and 29 in line with Arts. 16 (4), 46 and 340, and to make

(11) *State of Madras v. Champakam*, (1951) S.C.R. 525.

it constitutional for the State to *reserve* seats for backward classes of citizens, Scheduled Castes and Tribes in public educational institutions.

It is to be noted, however, that Art. 15 (4) does not validate communal reservation or distribution on communal lines, but only validates *reservation* for members of the backward classes and Scheduled Castes and Tribes.

CLAUSE (1).

OTHER CONSTITUTIONS

U.S.A.—Though there is no specific provision in the American Constitution similar to the present clause, the principles laid down in some of the American decisions would be of interest in the present context.

It has been held that a statute which forbids the use of any language other than a specified one in all schools in a State constitutes an unreasonable restriction upon the 'liberty' guaranteed by the 'Due Process Clause' in the Fourteenth Amendment as it interferes, *inter alia*, "with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own".¹² The liberty of parents to direct the upbringing and education of their children and to choose schools where their children would receive appropriate education has also been relied upon in invalidating a statute which made it an offence for parents to refuse to send their children below a particular age to *public* schools.¹³

It was observed that while the State possesses the unquestionable power reasonably to regulate *all* schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend *some* school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare,¹³—the child was "*not* the mere creature of the State" and that the State had *no* "general power to *standardize* its children by forcing to accept instruction from the public teachers only".¹³

INDIA

Protection of cultural rights of minorities.

The object of this clause is to give cultural protection not only to the 'technical minorities' or religious communities in the minority, but also to linguistic minorities. The clause makes it clear that if there is a cultural or linguistic minority, which wanted to preserve its own language and culture, the State would not by law impose upon it any other culture which might be local or otherwise.

Where a law passed by a State Legislature extends to the whole of the State, the 'minority' must be determined with reference to the population of the entire State.¹⁴

A minority community can effectively conserve its language etc. only through educational institutions. The right to establish and maintain educational institutions of its choice is a necessary concomitant of the right conferred by cl. (1). This right is, however, subject to the limitation in cl. (2), if such institution receives State aid.¹⁴

The right conferred by this clause, read with the right guaranteed by cl. (1) of Art. 30, implies the further right of a minority group to impart instruction to the children of their own community in their own language.¹⁵ "To hold otherwise will be to deprive Arts. 29 (1) and 30 (1) of the greater parts of their contents".¹⁵

The police power of the State to determine the medium of instruction must yield to this fundamental right to the extent it is necessary to give effect to it.¹⁵

(12) *Meyer v. Nebraska*, (1923) 262 U.S. 390.

(13) *Pierce v. Society of Sisters*, (1925) 268 U.S. 510.

(14) Kerala Education Bill, *in re*, A. 1958 S.C. 956.

(15) *State of Bombay v. Bombay Education Society*, (1955) 1 S.C.R. 568.

The right to conserve a language includes the right to agitate for the protection of that language, including political agitation.¹ The right conferred by Cl. (1) is, again, an absolute right and cannot be subjected to a reasonable restriction like the rights enumerated in Art. 19 (1).¹ Hence, the political agitation to conserve the language of a section of the citizens cannot be made a 'corrupt practice' within the meaning of s. 123 (3) of the Representation of the People Act.¹

CLAUSE (2).

INDIA

No discrimination as to admission in educational institutions.

This clause is a counterpart of the equality clauses of Art. 15. There should be no discrimination against any citizen on the ground of religion, etc., in the matter of admission into any educational institution maintained or aided by the State.

While cl. (1) protects the rights of a section of the citizens, the right conferred by cl. (2) is an individual right given to the citizen as such and not as a member of any community.¹⁶ The present clause gives an aggrieved person, who has been denied admission on the ground of his religion etc., a remedy even though other members of his religion, etc., have been admitted. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under Art. 29 (2). But, on the other hand, if he has the academic qualifications but is refused admission *only* on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right under the present clause.¹⁶

It is not correct to say that Art. 29 (2) confers a fundamental right only upon members of minority groups and not on *every* citizen. According to the Supreme Court,¹⁷ cl. (1) of Art. 29 already protects the interests of minority groups and cl. (2) is intended to protect the interest of citizens generally and without any limitation. Hence,

"To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination."¹⁷

On the other hand, the Article does not take away the right of an institution to refuse admission¹⁸ or to expel¹⁹ a student on the ground of indiscipline or the like, provided the discretion is not abused.

'Aid'.

The word 'aid' not having been defined in the Constitution, must be taken in its ordinary meaning and will, accordingly include the 'grant' given to Anglo-Indian institutions under Art. 337.²⁰ [Art. 337 has ceased to operate since 26-1-60.]

'Only of religion, race, caste, language'.

These words show that the educational institutions coming within this clause are not debarred from imposing beneficial conditions or limitations, such as previous training, age, physical fitness, vaccination, dissociation from injurious associations and the like.²¹

(1) *Jagdev Singh v. Pratap Singh*, A. 1965 S.C. 183 (188).

(16) *State of Madras v. Champakam*, (1951) S.C.R. 525; (1950-51) C.C. 183.

(17) *State of Bombay v. Bombay Education Society*, (1955) 1 S.C.R. 568.

(18) *Vikaruddin v. Osmania University*, A. 1954 Hyd. 25.

(19) *Ramesh v. B. B. Intermediate College*, A. 1953 All. 90.

(20) Reference on the Kerala Education Bill, A. 1958 S.C. 956 (976).

(21) Cooley, Constitutional Law, pp. 294-5.

But in determining whether the right of admission has been denied *only* on the ground of religion, race, caste or language, the *object* of the denial is not a relevant consideration, for the Court is not concerned with State policy, but with the question how that object is intended to be secured or, in other words, what is "the immediate ground and *direct cause* for the denial" of the right conferred by Art. 29 (2). If that offends against the Article, the Court is bound to give relief.²²

Illustration.

The Government of Bombay issued an order which directed that, subject to certain exceptions, no primary or secondary school receiving aid from Government should admit to a class where English was the medium of instruction any pupil other than a pupil belonging to a section of the citizens the language of which was English, namely Anglo-Indians and citizens of non-Asiatic descent.

Held, that the immediate ground for denial of admission of a pupil to such a School where English was the medium of instruction was that the mother-tongue of the pupil was *not* English. It was, thus, a denial of the right conferred by Art. 29 (2) *only* on the ground of the language of the pupil. The argument that the object of the denial was to promote the introduction of Hindi or any other Indian language as the medium of instruction in the Schools was immaterial in determining whether Art. 29 (2) had been contravened.²³

Arts. 15 (1) and 29 (2).

As has been stated earlier Art. 29 (2) is a counterpart of the equality clauses of Art. 15.

While Art. 15 is a protection against discrimination generally, Art. 29 (2) is a protection against a particular species of wrong, namely, denial of admission into educational institutions of the specified kind. Art. 29 (2) confers a special right on all citizens (whether they belong to the majority or minority groups) for admission into educational institutions maintained or aided by the State.²⁴ Another point of difference is that while Art. 15 (1) is available against the State, Art. 29 (2) is available not only against the State but also against any person or authority who may deny the right conferred by it.²⁵

Comparing Art. 15 (1) with Art. 29 (2), it appears that while 'sex' and 'place of birth' are specified in Art. 15 (1), they are omitted from Art. 29 (2). Hence, the question arises,—which is the controlling provision,—Art. 15 (1) or Art. 29 (2)?

Both the possible views were taken in the High Courts:

(a) In *Anjali v. W. B.*,²⁶ the Calcutta High Court has held that the general provision against Art. 15 (1) is *not* controlled by anything in Art. 29 (2), or, in other words, the omission of 'place of birth' and 'sex' from Art. 29 (2) does not suggest by implication that the Constitution authorises the exclusion from any educational institution of any person on the ground of his or her place of birth or sex.

(b) In *University of Madras v. Shanta Bai*,²⁷ on the other hand, the Madras High Court has held that Art. 29 (2) being a *special* provision relating to admission to educational institutions, the maxim '*generalia specialibus non derogant*' should apply and Art. 29 (2) should be regarded as the controlling provision and not Art. 15 (1).

The Madras view now gains support from the observation of the Supreme Court in *State of Bombay v. Bombay Education Society*²⁸ to the effect that—

"Article 15 protects all citizens against discrimination generally, but Article 29 (2) is a protection against a *particular species of wrong*, namely denial of admission into educational institutions."²⁹

It is reasonable to infer from the above that the maxim *generalia specialibus non derogant* (Vol. I, p. 32) should apply and that, accordingly, in the matter of admission into educational institutions maintained or aided by the State, Art. 29 (2) is to be regarded as the exclusive provision. The result of this view is that it is constitutionally permissible for the State to reserve an educational institution for persons of a particular locality or belonging to either sex.²⁴⁻²⁵

(22) *State of Bombay v. Bombay Education Society*, (1954) S.C. 787 (796).

(24) *University of Madras v. Shanta Bai*, A. 1954 Mad. 67 (70).

(23) *Anjali v. W. B.*, A. 1952 Cal. 822.

(25) *Joseph v. State of Kerala*, A. 1958 Ker. 33 (35).

In the Madras case^{25a} it was observed—

"The omission (of the words 'place of birth' from Art. 29 (2) is clearly deliberate and there is a purpose behind it. A State might be minded to open an institution for the advancement of knowledge in a particular region which might be backward and for carrying out this object it might restrict admission into the institution to persons of the locality . . . In the same manner, the omission of the word 'sex' in Art. 29 (2) would appear to be a deliberate departure from the language of Art. 15 (1) and its object must have been to leave it to the educational authorities to make their own rules suited to the conditions and not to force on them an obligation to admit women".

Special Provisions for backward classes and Scheduled Castes & Tribes.

As has been stated earlier (p. 172, *ante*), the right guaranteed to every citizen by Art. 29 (2) in the matter of admission into a State maintained or aided educational institution has been abridged by the insertion of cl. (4) of Art. 15. In other words, if any special provision is made for the advancement of the backward classes or the Scheduled Castes or Tribes, a citizen not belonging to such classes or castes cannot complain of the infringement of his right not to be discriminated against, under Art. 29 (2).¹

But a provision will come within the protection of Art. 15 (4) if it is really for the 'advancement' of such classes or Castes. If the provision in effect operates *against* such rights as they have as ordinary citizens, the special provision must be held to contravene Arts. 29 and 15 (4).¹

Illustration.

Where a G.O. directed that a 'maximum of 15% of the total number of seats' in a medical faculty be reserved for backward class candidates, and a backward class candidate was refused admission on the ground that the maximum number of seats (15%) reserved for the backward classes had been filled up, even though he had secured marks higher than candidates who were admitted as a result of the general competition, *held* that the provision for the reservation of a fixed *maximum* was *not* for the advancement of the backward classes and that the Petitioner was entitled to have his right under Art. 29 (2) enforced by being considered along with other candidates selected from the general pool.¹

In this case,¹ it was suggested that a proper way of reconciling the provisions of Arts. 15 (4) and 29 (2) would be to pool all the candidates (backward class or otherwise) together and then guaranteeing minimum seats for those belonging to the backward classes. Thus,

If there are 100 applicants, they would be arranged in order of merit on the results of a general competition and if more than the quota deserved for the backward classes (say, 15%) could be selected *on merit* alone, they would be so selected.

If, however, out of these who succeed on merit, the number of backward candidates falls short of 15%, the deficiency would be filled up by selecting (on the basis of merit) from amongst the other backward candidates down in the list, even though they secure less marks than boys belonging to the other communities, who cannot be admitted.

But a candidate of the backward class, who fails to secure a seat in the general competition and also to secure a reserved seat (being in excess of the 15%), has no fundamental right to admission under either Article.¹

Arts. 29 (2) and 25.

Art. 29 (2) merely confers a right of admission, upon every citizen, into a state-aided educational institution. It does not confer upon those admitted any right to practise and propagate their religion within the precincts of such institutions.²

(25a) *University of Madras v. Shanta Bai*,
A. 1954 Mad. 67 (70).

(1) *Raghuramulu v. State of A. P.*, A.
1958 A.P. 129.

(2) *Sanjib v. St. Paul's College*, A. 1957
Cal. 524.

INDEX TO COMMENTS

ARTICLE 29.

Amendment and Effects thereof, 172.

Cl. (1).

Other Constitutions : U.S.A., 173.

India :

Protection of cultural rights of minorities, 173.

Cl. (2).

No discrimination as to admission in educational institutions, 174 ; 'aid', 174 ; 'Only of religion, race, caste, language', 174.

Arts. 15 (1) and 29 (2), 175.

Special Provisions for backward classes and Scheduled Castes and Tribes, 176.

Right of minorities to establish and administer educational institutions.

30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

OTHER CONSTITUTIONS.

Eire.—Art. 42(3) of the Constitution of 1937 says—

"The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State or to any particular type of school designated by the State."

Art. 44 (2)⁴, again provides—

"Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations."

INDIA

Cl. (1) : Right of minorities to establish educational institutions.

This Clause is a counterpart of the rights guaranteed by Art. 26. While Art. 26 guarantees to a minority the right to maintain *religious* and *charitable* institutions, the present clause guarantees the right to establish its own *educational* institutions. Again, the present Clause is complementary to Art. 29 (1). While Art. 29 (1) gives a minority community the right to maintain its language or script, the present Clause enables it to run its educational institutions, and thus tries to solve the problem of linguistic minorities. This Clause also implies a prohibition upon the State not to ban the teaching of the language of the minority in institutions maintained by them.³

In other words, it implies the right of a minority community to impart instruction to the children of its own community *in its own language*, and if such right is infringed, an institution run by the community may seek relief under Art. 32 or 226.³

The present Clause also involves a corresponding right in a person belonging to a linguistic minority community to attend such denominational institutions to

(3) This view of the Author, expressed at p. 199 of the 2nd Ed. of this Commentary, now finds support from the Supreme

Court decision in *State of Bombay v. Bombay Education Society*, (1955) 1 S.C.R. 568.

the exclusion of State institutions.⁴ Hence, in making primary education compulsory (Art. 45), the State cannot compel that such education must take place only in the schools owned, aided or recognised by the State so as to defeat the guarantee given by the present Article.⁵

'Minority'.

The word 'minority' is not defined in the Constitution. According to the popular sense of the term, therefore, it should refer to any community which is numerically less than 50% of the population of the State concerned, when the law which is impugned as violating Art. 30 is a State law, applicable to the territory of the State as a whole. It is not correct to hold that it refers only to such communities as are in a numerical minority in that particular area or region where the educational institution involved is situated.⁵

It refers both to linguistic and religious minorities.⁵

'The right to establish'.

This expression has to be interpreted in harmony with the substance of the right conferred by the Article. While Art. 29 (1) gives a minority community the right to conserve its language or culture, Art. 30 (1) confers on a religious or linguistic minority the right to establish educational institutions of their own choice and it is through the education of the children that the group culture can be maintained. But the scope and object of Art. 30 (1) is wider than the mere conservation of the culture, script etc., which is indicated by the word 'choice'. The right is to establish institutions which will effectively serve the needs of the community and the scholars who resort to such institutions. The right would be nugatory if the scholars of such institutions are debarred from the opportunities for higher education or for a useful career in life.⁵

It would also include the right to select its own medium of instruction; hence, a legislation which would penalise by disaffiliation from the University any institution which uses a language as the medium of instruction other than the one prescribed by it, offends against Art. 20 (1).^{5a}

'Of their choice'.

The key to the understanding of the meaning of the clause is the expression 'of their own choice' and the content of the clause is as wide as the choice of the particular community may make it.⁵

It follows that in order to claim the right conferred by the clause it is not necessary that the curriculum of the institution must be confined to the teaching of religion only or of the language of the minority community. There is no limitation on the subjects to be taught at such institution, and they are not debarred from giving general education as well at such institution.⁵

Conditions for the application of Cl. (1).

Cl. (1) confers two rights—(a) the right to establish an institution; (b) the right to administer it.⁵

(a) The right to establish such institution must, of course, be sought to be exercised after the commencement of the Constitution.⁵

(b) In order to claim the right to administer an institution, the community must establish (a) that it is a religious or linguistic minority and (b) that the institution was established by it. Without establishing these two conditions, it cannot claim the guaranteed right to administer it.⁷ If these two conditions are satisfied, the right extends to institutions established prior to the Constitution as to those established after its commencement.⁵

(4) Cf. *Pierce v. Society of Sisters*, (1925) 268 U.S. 510.

(5) Reference on the Kerala Education Bill, A. 1958 S.C. 956 (976; 979).

(5a) *Shri Krishna v. Gujarat University*, A. 1962 Guj. 88 (117).

But in the case of neither of the two rights coming under cl. (1) it is necessary that the educational institution must be for the benefit of the minority community exclusively or that not a single member of a non-minority community must be admitted into it.⁵

Limits to the right under Cl. (1) : Regulatory power of the State.

1. Though apparently there is no limitation imposed upon the right conferred by Art. 30 (1), it does not follow that the right is absolute in the sense that the State shall have no right to regulate the administration of the institutions established by the minority communities. Some of the limitations are inherent in the right itself. Thus, the right to administer cannot obviously include the right to maladminister.⁶ Thus, as a condition for granting aid or recognition to an institution coming under Art. 30 (1), the State may impose *reasonable* regulations for the purpose of ensuring sanitation, competence of teachers, maintenance of discipline⁷ and the like.⁸ But the regulation cannot go to the extent of virtually annihilating the right guaranteed by Art. 30 (1).⁶

In the words of Venkatarama Iyer J.⁹—

"Now cls. (14) & (15) operate to put an end to the right of private agencies to establish and maintain educational institutions and cannot be upheld as within the power to *regulate or control*. The State is undoubtedly free to stop aid or recognition to a school if mismanaged. It can, even as an *interim measure*, arrange in the interests of the students to run that school, pending its making other arrangements to provide other educational facilities. It can also resume properties which had been acquired by the institutions with the aid of State grant. But it cannot itself *compulsorily take over the school* and run it as its own . . ."

2. Hence, even though there is no constitutional right to receive State aid outside Art. 337, if the State does in fact grant aid to educational institutions, it cannot impose such conditions upon the right to receive such aid as would, virtually, deprive the members of a religious or linguistic community of their right under Art. 30 (1). It *cannot* be held that the right under Art. 30 (1) is available only so long as the community is in a position to run the institution with its own resources and that if they seek State aid, they must submit to *any* terms which the State may impose. While the State has the right to impose reasonable conditions, it cannot impose such conditions as will substantially deprive the minority community of its rights guaranteed by Art. 30 (1). Surrender of fundamental rights cannot be exacted as the price of aid doled out by the State.⁹ Thus, the State cannot prescribe that if an institution, including one entitled to the protection of Art. 30 (1), seeks to receive State aid, it must be subject to the condition that the State may take over the management of the institution or to acquire it on its subjective satisfaction as to certain matters,—for such condition would completely destroy the right of the community to administer the institution.⁶

3. Similarly, in the matter of the right to establish in relation to recognition of an institution by the State, though there is no constitutional or other right for an institution to receive State recognition and though the State is entitled to impose reasonable conditions for receiving State recognition, e.g., as to the qualifications of teachers to be employed by the institution, the State cannot impose conditions the acceptance of which would virtually deprive a minority community of their right guaranteed by Art. 30 (1).^{6, 9}

Where, therefore, the State regulations debar scholars of unrecognised educational institutions from receiving higher education or from entering into the public services, the right to establish an institution under Art. 30 (1) cannot be effectively exercised without obtaining State recognition. In such circumstances, the State cannot impose it as a condition precedent to State recognition that the institution must not receive any fees for tuition in the primary classes. For, if there is no

(6) Ref. on the Kerala Education Bill, A. 1958 S.C. 956.

(7) *Ramnikanta v. Gauhati University*, A. 1951 Assam 163.

(8) *A. P. Subba v. State of Bihar*, A. 1958 Pat. 359 (365).

(9) Venkatarama Aiyar J. *dissenting*, held that no right to recognition is implied in Art. 30 (1) and that, accordingly, the State could impose any terms for recognition by the State, without violating Art. 30 (1).

provision in the State law or regulation as to how this financial loss is to be recouped, institutions solely or primarily dependent upon the fees charged in the primary classes cannot exist at all. Such a condition would thus be void for contravention of Art. 30 (1).¹⁰

4. For the same reason, it is not competent for the State to remove the trustees of a denominational school and appoint an *ad hoc* committee for the management thereof.¹¹

Arts. 29 and 30 (1).

1. The right conferred by cl. (1) of Art. 30 is complementary to the right guaranteed by cl. (1) of Art. 29 because a minority can effectively conserve its language etc. only if it has the right to establish educational institutions of its choice.¹²

2. On the other hand, the right conferred by Art. 30 (1) is subject to the limitation imposed by Art. 29 (2), so that if a minority institution receives State aid, it cannot deny admission to such institution to any person outside that minority community only on ground of religion, caste etc.¹²

Art. 30 (1) and the Directive Principles.

Though a Directive principle cannot override a fundamental right, an attempt should be made to give effect to both if that be possible. An attempt should, therefore, be made to reconcile the right of the minority community to establish and administer educational institutions of its own and the duty of the State to promote education and to introduce free and compulsory education under the Directives in Arts. 41, 45 and 46.¹²

Thus, while the State has a solemn obligation to introduce free and compulsory education, it is possible for the State to discharge that obligation through State owned or State aided schools and Art. 45 does not require that obligation to be discharged at the expense of the minority communities, by acquiring or taking over the management of the schools established by the minority communities which they have the right to administer under Art. 30 (1).¹²

Arts. 30 (1) and 351.

The power of the State to determine the medium of instruction must yield to the fundamental right of a minority community to impart instruction in their own language.¹³

Even though Hindi is the national language of India and Art. 351 provides a special directive upon the State to promote the spread of Hindi, nevertheless, the object cannot be achieved by any means which contravenes the rights guaranteed by Art. 29 or 30.¹³

(10) Ref. on the Kerala Education Bill, A. 1958 S.C. 956. [According to Venkatarama Aiyar J. (dissenting), such a view would place the minorities in a more favoured position than the majority communities and would render Art. 45 a dead-letter for, while a prohibition to charge fees in the primary classes would be void as regards institutions established by the minority communities, such a prohibition would be valid as regards those established by the majority communities, and if such a prohibition could not be enforced against institutions of minority communities by way of condition for State recognition or State aid, there was no other way of introducing free primary education in such institutions. As regards the argument that such prohibition would compel the

minority institutions to close down, Venkatarama J. expressed the view that it was possible for the minority communities to run their institutions by means of voluntary subscriptions, and if there was no fundamental right to receive State aid or State recognition, such prohibition could not be held to be violative of Art. 30 (1). It may be expected that questions like these will receive further consideration when some litigation *inter partes* under Art. 30 (1) comes before the Supreme Court in future].

(11) *A. P. Sabha v. State of Bihar*, A. 1958 Pat. 359 (365).

(12) Reference on the Kerala Education Bill. A. 1958 S.C. 956 (976).

(13) *State of Bombay v. Bombay Education Society*, (1952-4) 2 C.C. 336.

Object of Cl. (2) : No discrimination in granting aid.

This is another prohibition against discrimination by the State. In granting aid to educational institutions, the State shall not discriminate against institutions managed by any minority,—religious or linguistic. So, minority institutions will be entitled to State aid in the same way as other institutions.

If the State, therefore, makes regulations for recognition of educational institutions, it has to treat *all* of them alike, without discriminating against any institution on the ground of religion or language.¹⁴

INDEX TO COMMENTS**ARTICLE 30.**

Other Constitutions : Eire, 177.

India :

Cl. (1):

Right of minorities to establish educational institutions, 177; 'Minority', 178; 'The right to establish', 178; 'Of their choice', 178.

Conditions for the application of Cl. (1), 178; Limits to the right under Cl. (1): Regulatory power of the State, 179.

Arts. 29 and 30 (1), 180.

Art. 30 (1) and the Directive Principles, 180.

Arts. 30 (1) and 351, 180.

Cl. (2):

Object of Cl. (2): No discrimination in granting aid, 181.

BEFORE 27-4-55*Right to Property*

31. (1) No person shall be deprived of his property save by authority of law.

Compulsory acquisition of property.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

AFTER 27-4-55*Right to Property*

31. (1) No person shall be deprived of his property save by authority of law.

Compulsory acquisition of property.

(2) *No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law¹⁵ which provides for compensation for the property so acquired or requisitioned¹⁵ and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.¹⁶*

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.¹⁶

(14) Ref. on the Kerala Education Bill, A. 1958 S.C. 956 (990).

(15) Amended by the Constitution (Fourth Amendment) Act, 1955.

(16) Added by the Constitution (Fourth Amendment) Act, 1955.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies; it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

Amendment.

Cl. (2) has been amended and cl. (2A) has been inserted by the **Constitution (Fourth Amendment) Act, 1955**, which came into operation on April 27, 1955.

Objects of Amendment.

(A) Cl. (2).

(a) The amendment in the first part of the clause is somewhat verbal. This has been made in order to distinguish the scope of Cl. (2) from Cl. (1) which had been blurred by the interpretation given by the Supreme Court in the cases of *Subodh Gopal*¹⁷⁻¹⁸ and *Dwarkadas*¹⁹ that the two clauses relate to the same subject.

(b) The italicised words at the end of the clause have been inserted on the recommendation of the Select Committee—

"The Committee feel that although in all cases falling within the proposed clause (2) of Art. 31 compensation should be provided, the quantum of compensation should be left to be determined by the legislature, and it should not be open to the courts to go into the question on the ground that the compensation provided by it is not adequate."

(B) Cl. (2A).—This clause has been inserted with a view to supersede the decisions in the cases of *Subodh Gopal*,¹⁷⁻¹⁸ *Dwarkadas*¹⁹ and *Saghir Ahmed*.²⁰ It will no longer be possible for the Courts to take any extended view of 'acquisition' as was taken in the above cases. The words 'taking possession of' in cl. (2) have also been substituted by the word 'requisitioned' with the same object.

Effects of amendment.

(A) Cl. (2).—The changes introduced in this clause are—

(i) The words 'movable or immovable', which were a surplusage, have been omitted. The generic word 'property' would include all species of property.

(ii) The words 'including any interest in, or in any company owning, any commercial or industrial undertaking' have been omitted, for, these interests are taken to have been included in the word 'property'.

(iii) In place of the words 'taken possession of or acquired' the words "compulsorily acquired or requisitioned" have been substituted, and an explanation of the words 'acquired and requisitioned' have been provided in cl. (2A). All this has been done in order to override the extended meaning given to the original words in the cases of *Subodh Gopal*¹⁸ and *Dwarkadas*.¹⁹

(iv) The words 'under any law authorising the taking of such possession or such acquisition' have been substituted by the words 'save by authority of a law', in order to make the provision more explicit.

(v) The words "and no such . . . adequate" have been added at the end of cl. (2) in order to make the question of adequacy of the compensation provided by the law, non-justiciable.

(B) Cl. (2A).—Cl. (2A) now completely excludes the possibility of importing the *American* doctrine of 'taking' in the matter of interpreting Art. 31 of our Constitution. The obligation to pay compensation under cl. (2) will no longer arise unless either the ownership or the right to possession of the individual is transferred to the State or to a corporation owned or controlled by it.

The following consequences, accordingly, emerge—

(a) To determine whether an obligation to pay compensation arises under Art. 31 (2), it will no longer be relevant to enquire whether the individual has been 'substantially dispossessed' or whether his right to use and enjoy the property has been 'seriously impaired' or the value of the property has been 'materially reduced' by the impugned State action.

(17-18) *State of W. Bengal v. Subodh Gopal*, (1954) S.C.R. 587: (1952-4) 2 C.C. 403.

(19) *Dwarkadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674: (1952-4) 2 C.C. 420.

(20) *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707: (1952-4) 2 C.C. 284.

(b) The new cl. (2A) not only explains cl. (2) but also differentiates the scope of cl. (1). It will no longer be possible to contend that cls. (1) and (2) relate to the same subject and that they are co-extensive. While all cases of 'deprivation' are included within the purview of cl. (1), the cases of *acquisition* and *requisition*, involving transference of ownership or right to possession to the State, are specifically dealt with in cl. (2) and no other mode of deprivation can, accordingly, be held to attract the operation of cl. (2).

No liability for compensation can, accordingly, arise not only in cases of regulation or restriction of the rights of ownership, however substantial it may be, or in cases of harm or injury caused to the proprietary rights of an individual owing to the exercise by the State of its legitimate powers, but also in cases of a total destruction of property without involving any transfer of dominion to the State.

(c) It is now placed beyond doubt that the *only* cases where compensation is payable under Art. 31 are—where any property is physically or constructively *transferred* to the State or to a corporation owned or controlled by the State.

Amendment not retrospective.

The Fourth Constitution (Amendment) Act, 1955 is, however, *not* retrospective in operation,²¹ and the old law will, accordingly, apply to orders relating to acquisition or taking possession of property, which were made prior to the date of operation of the Fourth Constitution (Amendment) Act, *i.e.*, 27-4-55. A history of the Article is, accordingly, necessary to appreciate its implications before and after the amendment.

A short history of Arts. 31-31B.

When Art. 31 was adopted in the Constitution, it was, to all intents and purposes, an embodiment of the English concept of private property and the draft of Cls. (1) and (2) was substantially made on the basis of sub-secs. (1) and (2) of s. 299 of the Government of India Act, 1935, with certain improvements which will be explained just now.

Cl. (1) reproduced sub-sec. (1) of s. 299 of the Act of 1935 and no change was intended. It simply codified the English common law principle that the Executive could not take away private property, without the authority of law. The American concept of 'due process' was avoided by adopting the phrase 'by authority of law'. Apparently, the interpretation put by the Supreme Court in *Gopalan's case*²² on a similar expression in Art. 21 was intended by the framers of the Constitution, for, under English law, there is no judicial review of the reasonableness or propriety of a law, made by Parliament, to take away private property.

Cl. (2), as stated above, sought to improve upon sub-sec. (2) of s. 299 of the Act of 1935, on certain points only, in order to avoid the difficulties which had been experienced owing to the deficiencies of the language in that sub-section. *Firstly*, that sub-section did not extend to movable property, and was not, accordingly, comprehensive enough to protect all private property from being taken by the Legislature for public purposes, without payment of compensation. Art. 31 (2), therefore, specifically mentioned 'property, movable or immovable'. *Secondly*, sub-sec. (2) of s. 299 referred only to 'acquisition' and it was, accordingly, held that cases of 'requisition' were not covered by it (see p. 203, *post*). The makers of the Constitution, therefore, inserted the words 'taken possession of', to include requisitioning within the ambit of the Clause.²³ *Thirdly*, for the words 'provides for payment of compensation', the words 'provides for compensation' were used and for the words 'to be determined', the words 'to be determined and given' were used in the Constitution. These were verbal changes made to enable the

(21) *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 328 (333); *Attar Singh v. State of U. P.*, A. 1959 S.C. 564.

(22) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

(23) *Cf. Kameshwar v. Prov. of Bihar*, A. 1950 Pat. 392 (416).

Legislature to provide for the giving of compensation by bonds or in kind instead of by payment in cash.²⁴

It will be seen that none of these changes proposed to depart substantially from the 1935 standpoint: (a) The words 'taken possession of' were inserted to include cases of 'requisition' and not to incorporate the American view of 'taking' as being comprised in the doctrine of Eminent Domain. (b) The adjective 'just' which qualifies the word 'compensation' in the corresponding provisions of the American and Australian Constitution (pp. 200, 205, *post*) was not adopted by the framers of *our Constitution* and there was no intention to enlarge the duty of the Legislature beyond what was understood under the 1935 provision.

I. Shortly after the commencement of the Constitution, laws enacted by the State Legislatures for the abolition of the *zamindaris* (proprietaryship in land, introduced by the Permanent Settlement of 1793), were challenged in the various High Courts on the ground that the provisions made therein offended against the fundamental rights guaranteed by Arts. 14,²⁵ 19^{24, 25} and 31.²⁴

In *Kameshwar v. State of Bihar*,²⁴ the Patna High Court (on a petition under Art. 226) held that the Bihar Land Reforms Act, 1951 contravened Art. 14 in that it accorded differential treatment to landowners in the matter of compensation.¹

Similar challenge to the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 was made but dismissed in *Surya Pal v. State of U.P.*^{2, 3}

A zamindar of Madhya Pradesh impugned the constitutionality of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1951, directly before the Supreme Court, by a petition under Art. 32.⁴

By Art. 39, however, the Constitution had directed the State to effect a distribution of its material resources in such manner as best to subserve the common good. It was, therefore, essential for the State early to legislate for agrarian reforms so that the large blocks of land concentrated in the hands of the zamindars, since the time of the Permanent Settlement, were distributed amongst the agricultural community. Litigation of the nature referred to above, raising questions of constitutionality, was obstructing and delaying the move for such agrarian reforms, and the infant Republic got restive.

The Constitution (First Amendment) Act, 1951 was therefore enacted with a view to eliminating all litigation (past or future) challenging the validity of legislation for the abolition of proprietary and intermediary interests in land, on the ground of contravention of the fundamental rights contained in Art. 14 or 19 or 31. For this purpose, the Amendment Act inserted Art. 31A in the Constitution, precluding such attack.

In order to validate State Acts which had already been held to be void on such grounds by the various High Courts, the Amendment Act inserted Art. 31B and the Ninth Schedule, specifically enumerating such Land Reform Acts and immunising them, retrospectively, from unconstitutionality on the ground of contravention of *any* of the Fundamental Rights. [See under Arts. 31A-31B, *post*].

II. (A) The idea of shielding particular classes of legislation necessary for the economic development of the nation from constitutional invalidity on the ground of contravention of the fundamental rights in Arts. 14, 19 and 31 could not stop here. The success of Art. 31A in the Courts⁵ encouraged the Government to widen the scope of Art. 31A, by the Constitution (Fourth Amendment) Act, 1955. Certain other items were, therefore, added to the original estate abolition clause, to include 'essential welfare legislation' within the blanket cover of

(24) Cf. *Kameshwar v. State of Bihar*, A. 1951 Pat. 91 (95).

(25) *Kameshwar v. Prov. of Bihar*, A. 1950 Pat. 392.

(1) Came up to Supreme Court, on appeal, as *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(2) *Surya Pal v. U. P., Government*, A. 1951 All. 674.

(3) On appeal, *Surya Pal v. State of U.P.*, (1952) S.C.R. 1057.

(4) *Visheswar v. State of M. P.*, (1952) S.C.R. 1020.

(5) Cf. *Shankari Prasad v. Union of India*, (1952) S.C.R. 89.

Art. 31A, e.g., legislation affecting rights in the mineral resources of the country, reforms in the company administration and the State management of commercial or industrial undertaking for temporary periods, in the public interest. As will be shown under Art. 31A, each of these additional clauses was inserted with the object of combating decisions in which legislation of this nature had been thwarted on the ground of contravention of the Fundamental Rights.

(B) The Amendment Act of 1955 also added some other specific enactments in the Ninth Schedule so as to attract the protection of Art. 31B to them.

(C) The most important achievement of the 1955 Amendment, however, was to introduce changes in Art. 31 (2) itself, in order to negative the judicial widening of its scope since the commencement of the Constitution, beyond what the framers of the Constitution had intended its purpose to be. Several questions had been agitated in the Courts, leading to divergent judicial opinion, since 1950, in relation to Art. 31:

(i) The first was whether compensation was payable in cases under Cl. (1), viz., cases of deprivation or substantial restriction of proprietary interests even though the act of the State did not involve 'acquisition' or 'requisitioning', i.e., a transfer of the title or possessory interest to the State?

In the twin cases of *Subodh Gopal*⁶ and *Dwarkadas*⁷ by a liberal interpretation of the word 'taking possession of' in Cl. (2), came to the view that any substantial restriction of the rights of a private owner amounted to 'taking', as held in the U.S.A. But, as has been already pointed out (p. 185, *ante*), the object of the framers of the Constitution in introducing the words 'taking possession' in Cl. (2) was not to import the American doctrine of 'taking' but to cover 'requisitioning' which was outside the purview of s. 299 (2) of the Government of India Act, 1935. Apart from this, the makers of the Constitution did not intend that compensation was to be paid in any larger class of cases of State interference with property rights than it was under the Act of 1935.

The Amendment Act of 1955, accordingly, substituted the words 'taken possession of' by the word 'requisitioned' to make it clear that the obligation to pay compensation under Cl. (2) was confined to cases of 'acquisition' and 'requisitioning' by the State.

Cl. (2A) was inserted to explain what exactly was meant by 'acquired' and 'requisitioned' in Cl. (2).

(ii) The next question was as to the justiciability of the quantum of compensation.

It has been stated earlier (p. 185, *ante*), that the makers of the Constitution omitted the word 'just' to qualify the word 'compensation' in order to indicate that they did not want to engraft any innovation upon the 1935 situation in this respect.

As to the object behind Art. 299 (2), it would be relevant to quote from the Report of the Joint Committee on Indian Constitutional Reforms.⁸ Though this Report did not favour the idea of guaranteeing individual rights in a written Constitution (see Vol. I, p. 144), it did indeed recommend the introduction of some safeguards for rights of property:

"We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation, in order to quiet doubt which have been aroused in recent years by certain Indian utterances . . . We think that it should secure that legislation expropriating, or authorizing the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes, and if compensation is determined, either in the first instance or on appeal, by some independent authority."

(6) *State of W. Bengal v. Subodh Gopal*, A. 1954 S.C. 92: (1952-4) 2 C.C. 403.

(7) *Dwarkadas v. Sholapur Spinning Co.*, A. 1954 S.C. 119: (1952-4) 2 C.C. 420.

(8) Followed in *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707.

(9) Rep. of the Joint Parliamentary Committee on Indian Constitutional Reforms, 1934, Vol. I, para. 369.

The suggestion of setting up an independent authority for the assessment of compensation was not, however, adopted in the Government of India Act, 1935, for the following reason advanced by the Attorney-General:¹⁰

"In answer to the suggestion that it would be more satisfactory to have an independent body to assess compensation, perhaps I may say that even that provision would not be effective. If there is a mind to confiscate without compensation, all that the Legislature has to do is to say that compensation shall be assessed on the basis of paying the owner 1 per cent of the market value at the final payment, and then where would you be with regard to your independent assessment of compensation? You cannot find a way of this difficulty, and a veto on the part of the Governor-General is really the most effective proposal that has emerged".

As to how the veto should be exercised by the Governor-General, the Attorney-General explained at the Third Reading of the Bill—

"The Amendment now proposed will require that the law should either fix the amount of compensation or fix the principles upon which it is to be assessed by some arbitrator or tribunal. In either case it will result in notice being given to the person or company whose property is to be taken and will enable the Governor-General to form an opinion as to the nature of the legislation for the purposes of the discharge by him of his duty in connection with the power of withholding his assent."¹¹

It is evident from the above that the makers of the Constitution Act of 1935 did not advocate judicial review as a remedy for inadequacy of compensation provided for by the Legislature but relied on the veto power of the Governor-General before a confiscatory or illusory measure could be put on the statute book.

As we shall see hereafter (p. 203, *post*), it was only after the commencement of the Constitution and, particularly, subsequent to the Supreme Court decision in *Bela Banerjee's case*¹² that the question was raised as to whether the word 'compensation' in s. 299 (2) of the Act of 1935 meant the same thing as in Art. 31 (2), as interpreted in *Bela Banerjee's case*, namely, a full and fair compensation on the basis of the market value of the property acquired, and whether the Courts, under the Act of 1935, could equally invalidate a law which failed to provide such full compensation. But during the entire period of the working of the Act of 1935, up to the commencement of the Constitution, there was not a single decision in which it had been held that an enactment was to be struck down because of the inadequacy of compensation provided by it.

When Art. 24 of the Draft Constitution (corresponding to Art. 31 of the Constitution) was before the Constituent Assembly, there was a difference of opinion amongst the leading members as to the possible interpretation of the Article. One view was that the word 'compensation' "by itself carries with it the significance that it must be equivalent in money value of the property on the date of the acquisition, i.e., its market value".¹³

The other view was—

"... taking the clause as it is which refers to the law specifying the principles which and the manner in which the compensation is to be determined, it gives a latitude to the Legislature in the matter of formulating the principles on which and the manner in which the compensation is to be determined The expression 'just' which finds a place in the American and in the Australian Constitution is omitted in s. 299 (2) and in article 24 Of course, if the legislation is a colourable device, a contrivance to outstep the limits of the legislative power or to use the language of private law, is a fraudulent exercise of the power, the Court may pronounce the legislation to be invalid or *ultra vires*".¹⁴

In this context, it is important to note what Pandit Nehru understood¹⁴ by the Draft Clause when he explained it in the Constituent Assembly—

"The next clause says that the law should provide for the compensation for the property and should either fix the amount of compensation or the manner in which the compensation is to be determined. . . . There is no reference in this to any Judiciary coming into the picture. . . . Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in."¹⁴

(10) (1935) 300 H. C. Deb., 1071-90.

(11) *Ibid.*, 1084.

(12) *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

(13) Vide Alladi Krishnaswami's speech in C.A.D., Vol. IX, pp. 1271-2.

(14) IX C.A.D., p. 1193.

This much is clear from the above that a section amongst the framers of the Constitution supposed that if the language of s. 299 (2) of the Act of 1935 were retained, without introducing the adjective 'just', the 1935 position would remain in tact, and that position was assumed to be that no judicial review of a legislation was permissible on the ground that it provided for an 'inadequate compensation', i.e., something short of the full money equivalent, though the Court might interfere if it was a colourable legislation or a mere cloak for a confiscatory legislation.

It may be that under the Act of 1935, the validity of a law of acquisition on the point of quantum of compensation was not challenged owing to the lack of avenues of judicial review.¹⁵ But the Constitution introduced Arts. 32 and 226 and the judicial writs of *mandamus*, *certiorari* and the like. Hence, came an immediate scope for determining whether the dictionary meaning of the word 'compensation' and its significance in English common law,¹⁶ imported into Art. 31 (2) an obligation to provide for full monetary equivalent of the property acquired.^{16a}

In the early case of *Kameshwar v. State of Bihar*,¹⁷ the Patna High Court rejected the contention that the validity of the Bihar Land Reforms Act, 1950 could not be challenged because the Legislature had done its duty by laying down the principles on which compensation was to be assessed, and held that the Court was bound to strike down a law under Art. 31 (2), if it did not provide for 'compensation' which (even without the qualification 'just') meant a money equivalent of the value of the property taken over by the State, provided, of course, the legislation did not come within one of the exception cls. (4)-(6) of that Article. Similar view was taken by the Calcutta High Court in *W. B. Co-operative Society v. Bella*.¹⁸ Both these cases¹⁷⁻¹⁸ came up before the Supreme Court. In *Kameshwar's case*,¹⁹ the Court did not come to a direct conclusion on the point because it was held that in the facts of the case, the challenge grounded on anything in Art. 31 (2) was precluded by the provisions of Arts. 31 (4), 31A and 31B [which had been introduced by the Amendment Act of 1951].

But in *Bela Banerjee's case*,^{19a} a direct decision could not be avoided inasmuch as it was found that the impugned Act was not saved by Cl. (6) or (5) (a) of Art. 31. Hence, it was necessary to decide whether the compensation provided for by the impugned Act satisfied the requirement of Cl. (2) of the Article. It was held that whether 'compensation' had been provided for by any legislation was a justiciable issue and that the word 'compensation' in the Clause meant 'a just equivalent of what the owner has been deprived of'.

As a result of this decision,^{19a} the Courts became free to invalidate a legislation coming under Art. 31 (2) not only on the ground that it had provided 'illusory' compensation, thereby committing a fraud on the Constitution, but also on the ground that it was *inadequate*. As has been stated above, a section of the members responsible for the drafting of Art. 31 had not contemplated such a situation. In any case, here was another obstacle in the way of effecting social and economic legislation which the nation was badly in need of, and the situation appeared to be the same as that which had led to the passing of the Constitution (First Amendment) Act, 1951. The Select Committee, to which the Amendment Bill of 1954 was referred, inserted the words at the end of Cl. (2) which precluded any judicial review of a law of acquisition or requisitioning on the ground that the compensation provided for it was *inadequate*.

(15) It was also partly due to the fact that no legislation of the nature of 'agrarian reform' was possible in view of the bar in s. 299 (3) of the Act of 1935.

(16) Cf. *In re an Arbitration*, (1909) 1 K.B. 16 (29).

Thus, even s. 299 (2) of the Act of 1935 has been held to import 'just compensation', in post-Constitution cases [cf. *Jeejeebhoy v. Asstt. Collector*, (1964) S.C. [C.A. 775/62].

(17) *Kameshwar v. State of Bihar*, A. 1951 Pat. 91 (97).

(18) *W. B. Co-operative Society v. Bella*, A. 1951 Cal. 111.

(19) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(19a) *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

Scope of Art. 31 : Protection of private property.

Subject to certain exceptions, this Article guarantees protection to private property. It not only provides that no person can be deprived of property by the Executive without legislative sanction but, further, that even the Legislature cannot transfer to the State the ownership or possession of an individual's property unless there is a public purpose and then only on payment of compensation.^{19b}

The protection of the Article extends to property of any kind, belonging to any person, situate within the territorial jurisdiction of India. It is not confined to citizens of India and extends to a company, incorporated out of India, but owning property in India.²⁰

Analysis of Art. 31.

Cl. (1) provides that private property can only be taken pursuant to law. It guarantees that a person cannot be deprived of property by executive fiat. In other words, this clause is designed to protect the rights of property against deprivation by the State acting through its executive organ, the Government.²¹⁻²²

Cl. (2) imposes two further limitations on the Legislature itself. It is prohibited from making a law authorising expropriation except for public purposes and on payment of compensation for the injury sustained by the owner,²¹⁻²² but the adequacy of the amount of compensation is not justiciable.

Cl. (2A) explains the nature of the expropriation which will attract the operation of Cl. (2).

Cl. (3) places an additional limitation on State laws enacted on this subject.²¹

Cl. (4) limits the justiciability on the question of public purpose as well as of compensation in certain cases.²¹

Cl. (5) is a saving clause. It saves from the operation of cl. (2) laws made on certain subjects, such as laws made in the exercise of the 'police powers' of the State and of the power of taxation.²¹

Cl. (6) takes out laws enacted within 18 months prior to the commencement of the Constitution from the scope of cl. (5) (a) and makes exclusive provision regarding such laws.

Relation between Cls. (1) and (2) of Art. 31.

The views of the Supreme Court on the present question have been oscillating between two extremes—(a) that Cl. (1) is the genus of which Cl. (2) is a species; (b) that Cls. (1) and (2) are exclusive of each other; and the latest decision appears to have shifted to the latter.

I. In *Chiranjit Lal's case*,²³ Das J., asserted the proposition that cl. (1) dealt with the exercise of the 'police power' of the State, while cl. (2) related to the exercise of the power of 'eminent domain'²³ and that compensation was payable only when property was 'acquired' or 'taken possession of' by the State for 'public purposes'. No question of compensation arose when property was taken or destroyed in the exercise of 'police power'²³⁻²⁴ e.g., for prevention of danger to life or property, or the promotion of public health.²⁵

II. In the twin case of *Subodh Gopal*²² and *Dwarkadas*,²¹ Das J., being in the minority, reiterated the view expressed by him in *Chiranjit Lal's Case*.²³ But the majority took the view that both cls. (1) and (2) of Art. 31 related to the same

(19b) *Vajravelu v. Special Dy-Collector*, (1964) S.C. [W. P. 144/63].

(20) *Burrakar Coal Co. v. Union of India*, A. 1961 S.C. 954 (956).

(21) *Dwarkadas v. Sholapur Spinning Co.*, (1954) S.C.A. 132 (146-7), Mahajan J.; cf. *State of Bihar v. Rameshwar*, A. 1961 S.C. 1649.

(22) *State of W. Bengal v. Subodh Gopal*, (1953) S.C.A. 65 (82), Sastri C.J.

(23) *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (925), Das J.

(24) *Nabhirajiah v. State of Mysore*, (1952) S.C.R. 744 (755).

(25) This view was fully explained by Das J. himself in *Subodh Gopal's case*, (1954) S.C.A. 65 (104-5; 112-4).

subject, viz., the exercise of the power of 'eminent domain', but imposed different limitations upon the exercise of that power.

"Clauses (1) and (2) of Art. 31 are thus not mutually exclusive in scope and content, but should, in my view, be read together and understood as dealing with the same subject, viz., the prosecution of the right to property by means of the limitations on the State power referred to above—the deprivation contemplated in cl. (1) being no other than the acquisition or taking possession of property referred to in cl. (2)."^{1,2}

According to this view, the right to destroy property in the exercise of 'police power' without payment of any compensation is conferred by cl. (5) (b) (ii), exhaustively and exclusively. But Das J.⁴ pointed out certain defects or anomalies in the above line of reasoning all of which, it is submitted, have not been fully met by the judgment of Sastri C. J. Nevertheless, the view of Sastri C. J., on this point, was accepted as established, in the later case of *Saghir Ahmad v. State of U. P.*⁴

The most serious of these anomalies pointed out by Das J. was as follows—

Cl. (5) (ii) only mentions—(a) promotion of health and (b) prevention of danger to life or property.

But the exercise of 'police power' may require deprivation or destruction of property on *other* grounds as well, e.g., morality, public order. Hence, if the view be taken that compensation must be paid in every case of deprivation unless it comes under any of the exceptions enumerated in cl. (5), compensation has to be paid in the following cases,—which would lead to an unthinkable situation—e.g., where obscene literature or pictures have to be destroyed; where possession of a public utility concern like a tramway has to be taken and run by military personnel (to save the public from *inconvenience*), when its working has been stopped by a labour dispute; where goods are confiscated under s. 167 (8) of the Sea Customs Act. Similar is the case of taking over the property of a disqualified owner or lunatic.⁵

On the other hand, the view of Das J. is open to this criticism that according to that view, 'police power' must be considered to have been dealt with by the makers of the Constitution in two clauses of Art. 31, viz. cl. (1) and (5) (b) (ii), in which case, cl. (5) (b) (ii) must be taken as either redundant or enacted *ex abundante cautela*.¹

III. In this state of the case-law, the Legislature intervened.

The majority in *Subodh Gopal*¹ and *Dwarkadas*² were prompted to take the view that compensation under Cl. (2) was payable also in cases of deprivation otherwise than in exercise of the power of Eminent Domain by reason of their interpretation of the expression 'taking possession of' in Cl. (2). But this latter expression was substituted, by the Constitution (Fourth Amendment) Act, 1955, by the word 'requisitioned',—leaving no scope for giving an extended meaning to Cl. (2). Cl. (2), which lays the obligation to pay compensation, was not definitely confined to cases of 'acquisition' and 'requisitioning'. It is made clear that compensation is not payable in any case coming under Cl. (1), not being cases of acquisition and requisitioning. This was pointed by a unanimous Court in the *Bombay Dyeing Case*.^{3a}

Now came *Kochuni v. State of Madras*.⁶ Speaking for the majority (Sinha C.J., Subba Rao and Shah J.J.), Subba Rao J. observed that though he did not agree that Cl. (1) of Art. 31 embodied the 'police power' in the American sense, it must be held to be subject to the standard of reasonableness in Art. 19. At the same time, the amendment of 1955 made it clear that Cls. (1) and (2) dealt with *two different subjects* and that 'acquisition' and 'requisitioning' did not come within

(1) *State of W. Bengal v. Subodh Gopal*, (1953) S.C.A. 65 (82-3; 85), Sastri, C.J.

(3) *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (925), Das J.

(4) *Saghir Ahmad v. State of U. P.*, (1954) S.C.A. 1218 (1237).

(5) According to Mahajan J., compensa-

tion has to be paid in such cases, under cl. (2) [*Dwarkadas v. Sholapur Spinning Co.*, (1954) S.C.A. 132 (149)].

(5a) *Bombay Dyeing Co. v. State of Bombay*, (1958) S.C.R. 1122 (1131).

(6) *Kochuni v. State of Madras*, A. 1960 S.C. 1080 (1094-5).

Cl. (1). It followed, therefore, that Cl. (1) dealt with cases of deprivation of property *otherwise* than by acquisition and requisitioning.

It is evident that since the 1955 amendment, it is *no longer necessary* to tack on Cl. (2) with Cl. (1). The only requirement of Cl. (1) is that all deprivation of property must be 'by authority of law'. Prior to 1955, the requirement of the authority of law in Cl. (2) was not expressed in an exclusive language as might emphasise that it was an absolute condition for acquisition or taking possession of property though, of course, under common law principles it could hardly be argued by anyone that it could be effected otherwise than by law. Anyway, from the standpoint of an express language, it might have been supposed that the requirement of law even for cases coming under Cl. (2) was contained in Cl. (1). But after the amendment of Cl. (2) in 1955, this is no longer necessary, for the requirement of legislation is laid down in express language in Cl. (2) itself.

Cl. (2), as amended, also lays down that compensation will be required to be paid under Art. 31 only in cases of acquisition and requisitioning, and not to cases coming under Cl. (1), which must, accordingly, be construed as dealing with cases other than those covered by Cl. (2).

It is submitted, with respect, that the view of Subba Rao J. is in consonance with the present text of the Article.

Arts. 31 and 19(1)(f).

The right to property is dealt with in two Articles of the Constitution. In Art. 19 (1) (f), it is mentioned as a 'right to freedom' and the right 'to acquire, hold and dispose of property' is guaranteed. Art. 31 describes itself as dealing with 'right to property' and cl. (1) guarantees the right not to be 'deprived of' one's property 'save by the authority of law'. Cl. (2) of Art. 31, on the other hand, guarantees that private property cannot be 'acquired' or 'requisitioned' by the State except for a 'public purpose' and after providing for the payment of 'compensation'.

The question arises whether there is any overlapping between the two Articles.

In *Gopalan's case*,⁷ the Supreme Court made a distinction between Arts. 19 (1) (d) and 21 on the basis of the distinction between 'restriction' and 'deprivation'. Das J. explained the *rationale* as follows:

"The protection of Art. 19 is co-terminous with the legal capacity of a citizen to exercise the rights protected thereby, for sub-clauses (a)-(e) and (g) of Art. 19 (1) postulate the freedom of the person which alone can ensure the capacity to exercise the rights protected by those sub-clauses."

In the same strain, his Lordship observed that the capacity to exercise the right guaranteed by Art. 19 (1) (f) was gone when the property was compulsorily acquired under Art. 31 (2):

"If his capacity to exercise is gone, by reason of a lawful compulsory acquisition with respect to the right in sub-cl. (f), he ceases to have those rights while his incapacity lasts."⁸

In *Chiranjit Lal's case*,⁹ Das J. pursued the above line of reasoning to Art. 31 (1) to hold that—

"Art. 19 (1) (f) would continue until the owner was, under Art. 31, deprived of such property by authority of law."

The above view was for some time clouded by the extended meaning attributed to the words 'deprivation' and 'taking' (Art. 31) by the majority in the later cases of *Subodh Gopal*¹⁰ and *Dwarkanadas*.¹¹ According to those decisions, the test for the application of Art. 19 (1) (f) or Art. 31 in a given case was only one of *degree*.¹²

(7) *Gopalan v. State of Madras*, (1950) S.C.R. 88 (304-5); (1950-51) C.C. 74 (110-1), Das J.

(8) Also Bose J. in *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777 (780).

(9) *Chiranjit Lal v. Union of India*, (1950)

S.C.R. 869 (919); (1950-51) C.C. 10 (24), Das J.

(10) *State of W. B. v. Subodh Gopal*, (1954) S.C.A. 65 (90), Sastri C.J.

(11) *Dwarkanadas v. Sholapur Spinning & Weaving Co.*, (1954) S.C.R. 132 (143).

(12) Cf. C3, Vol. I, pp. 227-8.

If the restriction of the right of property proceeded beyond a certain degree, it amounted to a 'deprivation' or 'taking possession of' within the meaning of Art. 31 (1) or (2).

The above extended interpretation of Art. 31 was sought to be superseded by the amendment of the Article by the Constitution (Fourth Amendment) Act, 1955, by substituting the word 'taking' in cl. (2) by the word 'requisitioned', and by explaining what was meant by 'acquisition' and 'requisitioning' by the insertion of cl. (2A). As explained in *Kochuni v. State of Madras*,¹³ the amendment accepted the majority view of Das J. in *Subodh Gopal's case*,¹⁰ and made the following points clear:

(i) Cl. (1) and cl. (2) are mutually exclusive, that is to say, cl. (1) deals with all cases of deprivation of property by law, *other than* by way of acquisition or 'requisitioning' which is included in cl. (2).

(ii) Cl. (2) is not attracted unless there is a transfer of ownership or right of possession to the State or its nominee. Hence, even if there is a substantial impairment of the rights of enjoyment of a property by the operation of any law other than that of acquisition or requisitioning (i.e., by any law made in exercise of the 'police power'), it is cl. (1) and not cl. (2) of Art. 31 that is attracted.¹⁴

On the basis of the above propositions, the Court reverted to its original view⁹ as to the relationship between Art. 19 (1) (f) and Art. 31. Instantly, it seemed to be settled that two Articles cover different fields without any overlapping¹⁵ and that Art. 19 (1) (f) applies only so long as a person is not 'deprived' of his property by a law enacted by a competent Legislature under Art. 31 (1)¹⁶ or 31 (2).¹⁷

"If the property itself is taken lawfully under Art. 31, the right to hold or dispose of it perishes with it and Art. 19 (1) (f) cannot be invoked".¹⁸

The net result was that whenever a competent Legislature enacted a law, in the exercise of any of its legislative powers, destroying, or otherwise depriving a man of his property, the latter was precluded from questioning its reasonableness by invoking Art. 19 (1) (f), however arbitrary the law might palpably be.^{19, 18}

I. The unwholesomeness of this position moved the majority (Subba Rao¹⁹ Shah J.J., and Sinha C.J.) in *Kochuni's case*¹³ to introduce a proposition unheard of so far,—that even though the law enacted by a Legislature, 'depriving' a person of his property under Art. 31 (1), was *intra vires*, the person aggrieved could question its reasonableness under Art. 19 (5). The inequity of the case before their Lordships was, of course, patent, namely, that the State Legislature had sought to transfer A's property to B, without any 'public purpose' being involved, so as to attract cl. (2) of Art. 31. The majority applied Art. 19 (1) (f) and held that the law sought to impose an unreasonable restriction upon the right of A, guaranteed by Art. 19 (1) (f).¹³

The majority, with respect, resorted to a quibble in applying Art. 19 (1) (f) even though the law was one under Art. 31 (1). Their Lordships held that the 'law' referred to in Art. 31 (1) must be a *valid* law. So far the majority was in company with the majority in *Gopalan's case*.²⁰ But in *Kochuni's case*,¹³ the majority went further than the majority in *Gopalan's case*²⁰ in holding that *validity* meant not only that the law was *intra vires* the Legislature concerned, but also that it did

(13) Cf. *Kochuni v. State of Madras*, A. 1960 S.C. 1080 (1091).

(14) Cf. *Bombay Dyeing Co. v. State of Bombay*, (1958) S.C.R. 1122 (1131).

(15) *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777 (779-80).

(16) *Collector of Malabar v. Ebrahim*, A. 1957 S.C. 688 (690).

(17) *Kamkhyia v. Collector*, (1956) S.C.A. 494 (499); *Lilavati v. State of Bombay*, (1957) S.C.R. 721 (730); *Barkya v. State of Bombay*, A. 1960 S.C. 1203 (1208).

(18) Thus it was understood by the High Courts [*Union of India v. Mohan*, A. 1952 Assam 159; *Aurora v. State of U. P.*, A. 1958 All. 126; *Mahindra v. State of Assam*, A. 1953 Assam 84].

(19) The minority (Sarkar & Imam J.J.) avoided the question of relationship between Arts. 19 (1) (f) and 31 by holding that the law in question was saved by Art. 31A (p. 1103) of A.I.R.

(20) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

not contravene any of the fundamental rights included in Part III of the Constitution, as required by Art. 13 (2).

The majority decision in *Kochuni v. State of Madras*,²¹ thus, lays down that Art. 19 (1) (f) is applicable to test the validity of a law which comes under cl. (1) of Art. 31.

II. It is not quite clear if Subba Rao J. in *Kochuni's case*²¹ intended to extend Art. 19 (1) (f) to cases coming under Cl. (2) of Art. 31 as well. But in the facts of the case,²¹ what was needed was a pronouncement regarding Cl. (1) and not Cl. (2) of Art. 31. Since the decision holds that Cl. (2) is independent of Cl. (1), the conclusion arrived at with respect to Cl. (1) cannot, therefore, extend *ipso facto* to Cl. (2).

We have therefore, to examine the question independently. The principle on which the decision in *Kochuni's case*²¹ rests is that the 'law' required by Cl. (1) of Art. 31 must be a valid law and, hence, in conformity with the other fundamental rights contained in Part III. But, as has been stated above (p. 192, *ante*), the requirement of 'law' exists also in Art. 31 (2) and there is no reason why a law coming under Cl. (2) shall not also be a valid law in the same sense as a law under Cl. (1).

As regards Art. 14, the Patna High Court²² had clearly decided that a law of acquisition was not outside the purview of Art. 14. By the time the case came on appeal to the Supreme Court,²³ the Constitution had been amended, inserting Arts. 31A-31B. These Articles applied to the legislation in question and hence, the Supreme Court²³ held that the question whether the impugned legislation contravened any of the fundamental rights in Part III was precluded by Arts. 31A-31B. It was not, and could not be, suggested that Art. 14 was not applicable to a law of acquisition, under Cl. (2).

Indeed, the very fact that the 'rights conferred by Arts. 14, 19 or 31' were sought to be excluded by inserting Art. 31A demonstrates that the Legislature had acknowledged the position that Arts. 14 and 19 would be attracted to a law coming under Art. 31 (2), but for the shield raised in Art. 31A.

Supposing a law of acquisition or requisition empowers the Government to assess compensation without a hearing, is not the person affected entitled to urge that the law lacks in *procedural* reasonableness as required by Art. 19 (1) (f)?

In *State of Bombay v. Bhanji*,²⁴ the challenge was on the ground of *substantive* reasonableness. In that case, the impugned law of requisition provided that the requisitioned premises would be allotted in favour of the first informant of the vacancy of the premises. It was urged that this constituted an unreasonable restriction on the owners' rights inasmuch as he was deprived of his possession for the benefit of a particular individual. The Supreme Court held that the contention under Art. 19 (1) (f) was not available inasmuch as the impugned law was a law depriving the owner of his property and after he is so deprived there is no right left in respect of which he is capable of exercising his rights under Art. 19 (1) (f). Of course, the Court also held that though a particular individual was primarily benefited, the law was for a public purpose, namely, providing accommodation to homeless persons during a period of scarcity of accommodation. From this it may be inferred that even on the merits, the Court might have upheld the restriction as a reasonable one.

But the question with which we are concerned is not one of merits but whether a law of acquisition or requisition can be challenged on the ground that its provisions constitute a substantively unreasonable restriction. On that point, the following observations of Subba Rao J., in *Kochuni's case*,²¹ holding that the decision in the *State of Bombay v. Bhanji*²⁴ no longer holds good after the amendment of 1955, are worth reproducing—

(21) *Kochuni v. State of Madras*, A. 1960 S.C. 1080 (1092).

(22) *Kameshwar v. State of Bihar*, A. 1951 Pat. 91.

(23) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (895).

(24) *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777 (780).

"Before the amendment, this Court held by a majority in (1954) SCR 587¹ that clauses (1) and (2) of Art. 31 were not mutually exclusive in its scope and content, but should be read together and understood as dealing with the same subject, namely, the acquisition or taking possession of property referred to in clause (2) of Art. 31. In that view, Art. 31, before the amendment, was self-contained Article providing for a subject different from that dealt with under Art. 19. On that basis, it was possible to hold, as this Court held in (1955) 1 SCR 777,²⁴ on the analogy drawn from Art. 21, that *when the property therein was requisitioned within the meaning of Art. 31, the operation of Art. 19 was excluded*. But there is no scope for drawing such an analogy after the Constitution (Fourth Amendment) Act, 1955, as thereafter they dealt with two different subjects: Art. 31 (2) and (2A) with acquisition and requisition and Art. 31 (1) with deprivation of property by authority of law. The decision of this Court in *Bhanji Munji's case* no longer holds the field after the Constitution (Fourth Amendment) Act, 1955."²⁵

Do the above observations suggest that in a case of requisition coming under clause (2) also the Court would be prepared to apply Art. 19 (1) (f)?

The answer to this question has, however, been given, in the negative, by a unanimous Bench in *Sitabati v. State of W. B.*² In this case, a law of requisition and acquisition was challenged on the ground of *procedural* unreasonableness. The Court, approving of its earlier decision in *Barkya v. State of Bombay*,³ held that Art. 19 (1) (f) had no application to a law coming under Art. 31 (2) and also observed that in *Kochuni's case*,²³ the Court was not concerned with a law relating to requisition or acquisition.

CLAUSE (1).

OTHER CONSTITUTIONS⁴⁻⁵

(A) U.S.A.—The Fifth Amendment (1791) says—

"Nor shall any person be deprived of property, without due process of law."

Sec. 1 of the 14th Amendment (1868) imposes a similar prohibition upon the State.

This provision is founded on the theory of individualism and private property and means that what a man acquires as his property, by inheritance, personal effort or other lawful means, shall not be taken away from him *arbitrarily* (the meaning of 'due process' has been explained at Vol. I, pp. 564, *et seq.*). We have already seen (Vol. I, p. 731) how the *use* of private property may be controlled by the State under its police powers, in the interests of public welfare. The present clauses (5th and 14th Amendments) provide how a person may be *deprived* of his property. Shortly speaking, private property may be taken by the State only in the exercise of its powers of taxation, eminent domain, penalty and under the law of escheat.

That the Executive has no power to take private property (even for a temporary period to avert a national emergency) without legislative sanction has been emphasised in *Youngstown Sheet Co. v. Sawyer*.⁶ In order to avert a nation wide strike of steel workers, the President issued an executive order authorising the government to seize and operate the steel mills. The Supreme Court declared the executive order to be unconstitutional on the ground that the power to take private property for public use was a *legislative* power and the President could not assume it under any of the powers given to him by the Constitution, including his military power as Commander-in-Chief of the Armed Forces, even though such power was necessary to prevent a labour dispute which would jeopardise the national defence.⁶

(25) *Kochuni v. State of Madras*, A. 1960 S.C. 1080.

(1) *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587.

(2) *Sitabati v. State of W. B.*, (1962) S.C. [C.A. 322/61], affirming *Sitabati v. State of W. B.*, (1961) 66 C.W.N. 423.

(3) *Barkya v. State of Bombay*, (1961) 1 S.C.R. 128.

(4) See also Art. 153 of Weimar Germany; Art. 9 (2) of Czechoslovakia; Art. 110 of Danzig; Arts. 9-10 of U.S.S.R., Constitutions.

(5) Art. 17 (2) of the Universal Declaration of Human Rights says—

"No one shall be arbitrarily deprived of his property."

(6) *Youngstown Sheet Co. v. Sawyer*, (1952) 343 U.S. 579.

A person is *deprived* of his property when its *value* is taken in whole or in part.⁷ So, this may be done by some act done at a distance from the property in question, e.g., by flooding the land by placing a dam across a water-course⁸ or by cutting off access to his property by occupying the street in front of it,⁹ or by a second grant after the grant of an exclusive privilege.⁹ There can be no 'deprivation' when the law does not recognise any right of property in the thing in question, e.g., an individual has no vested right of property in any rule of law and hence, any change in any rule of law, so long as it does not disturb 'property rights' which are recognised by law, is not a deprivation of property.¹⁰

(B) *England*.—In *Entick v. Carrington*,¹¹ Lord Camden observed—

"By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him."

Apart from the right against *trespass* upon his property, every subject has a right against unlawful *deprivation* of his property in his lands and goods. English law, in short, recognizes private property and it can be taken by the State only (a) by consent of the owner,¹² or (b) under authority of Parliament which represents the consent of the nation.¹²

Parliament interferes with private property in the public interest—

(a) By way of *taxation* for raising the revenue for the State.

(b) By way of acquisition of land and other property for purposes of industry, development, etc., in time of peace; and for defence in time of war. This is technically called the power of '*eminent domain*'.

Parliament's interference with private rights is, however, subject to certain *safeguards* in favour of the subject:

(i) The Courts would not infer that Parliament intended to take away private property, unless such intention was expressed by Parliament by plain words, or it followed from the statute by necessary implication.¹³

(ii) Even where Parliament evinces its intention to encroach upon private rights, the courts insist on a strict and rigid adherence to the formalities laid down in the statute before the individual can be deprived of his rights.¹⁴

(iii) There is a further *presumption* that Parliament would not interfere with private property without payment of compensation for the loss.¹⁵ [This second principle is embodied in cl. (2) of our Art. 31]. "An intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in *unequivocal terms*".¹⁵ Again, any legislation which enables the Executive to take property without compensation must be strictly construed and all conditions laid down by the statute must be strictly complied with in order to give validity to the order.¹⁶

It is to be noted that during the World Wars, statutes authorising acquisition or requisition of property for defence purposes provided for payment of compensation and it was held that the Crown's prerogative to take possession of property, for the defence of the realm, without compensation, was to that extent, superseded by legislation.¹⁷

(7) *Pumpelly v. Green Bay Co.*, (1871) 13 Wall. 166.

(8) *Lackland v. R. R. Co.*, 31 Mo. 180.

(9) *Central Bridge v. Lowell*, 4 Grav. 474.

(10) *Munn v. Illinois*, (1876) 94 U.S. 113.

(11) *Entick v. Carrington*, (1765) 19 St. Tr. 1067.

(12) Stephen's Commentaries, Vol. I, p. 548; cf. S. 40 of the Town & Country Planning Act, 1947.

(13) *Inglewood Pulp Co. v. New Brunswick Commission*, A. 1928 P.C. 287 (290).

(14) Cf. *East Riding C. C. v. Park Estate*, (1956) 2 All E.R. 669 (672) H.L.

(15) *Central Control Board v. Cannon Brewery*, (119) A.C. 744 (752); *Colonial Sugar Refining Co. v. Melbourne Commrs.*, (1927) A.C. 343; *Commissioner v. Logan*, (1903) A.C. 355.

(16) *Minister of Health v. Rex*, (1930) 2 K.B. 98 (145).

(17) *Att. Gen. v. De Keyser's Royal Hotel*, (1920) A.C. 508 (542, 576).

(C) *Eire*.—Art. 43 of the Constitution of 1937 provides:

"1. (1) The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. (2) The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

2. (1) The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. (2) The State, accordingly, may as occasion requires, delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

A unique feature of the Irish Constitution is the guarantee it gives to the right of property as a *natural right*, antecedent to positive law.¹⁸ It cannot be abolished or curtailed,^{18a} except for the purposes of 'social justice' and the 'common good'.

As to 'social justice', it has been held that it would cover a price-fixing legislation for the purpose of restricting the abuses of free competition.^{18b}

On the other hand, where some party funds were deposited with the Court pending determination as to who was entitled thereto, and the Legislature, pending the litigation, enacted a statute directing the Court to deliver the money to a statutory Board, held, the Act contravened the guarantee of private property and that there was no conflict between the right of property and the common good involved in the case so as to justify the legislation.¹⁸

But where a question of 'social justice' is involved, the determination of what would constitute social justice is regarded as a question of policy, on which the Courts do not interfere.^{18a-18b}

(D) *Fourth French Republic*.—The Preamble of the Constitution of the Fourth French Republic (1946) affirms and adopts the Declaration of Rights of 1789. Cl. (17) of that Declaration is—

"Property being a sacred and inviolable right, no one can be deprived of it unless a legally established public necessity demands it, and on condition of just and prior indemnity."

(E) *Japan*.—Art. 29 of the Japanese Constitution, 1946, says—

"The right to own or to hold property is inviolable, but property rights shall be defined by law, in conformity with the public welfare."

Art. 30 says—

"The people are liable to taxation as fixed by law."

(F) *West Germany*.—Art. 14 (1)-(2) of the West German Constitution (1948) provide—

"1. Property and the right of inheritance shall be guaranteed. Contents and limitations shall be determined by legislation.

2. Property shall involve obligations. Its use shall simultaneously serve the general welfare."

(G) *Government of India Act, 1935*.—Cl. (1) of s. 299 was exactly similar to cl. (1) of Art. 31 of the Constitution.

INDIA

CLAUSE (1).

Scope of Cl. (1) : No deprivation except under law.

The effects of cls. (1) and (2) are that any deprivation of a man's property, not sanctioned by law, constitutes a wrong. No action in any form will lie for any deprivation which is authorised by law; but when the law professes to acquire or requisition property 'for public purposes', there is a right to compensation. A

(18) *Buckley v. Att. General*, (1950) Ir. R. 67.

(18a) *Toley v. Irish Land Commission*, (1952) Ir. R. 118 (149).

(18b) *Pigs Marketing Board v. Donnelly*, (1939) Ir. R. 413 (418); *National Union v. Sullivan*, (1947) Ir. R. 86.

law which comes within the scope of cl. (2) but does not provide for payment of compensation, would be void, subject to cls. (4-6) of Art. 31 and Arts. 31A-31B.

Apart from cl. (2) there is no constitutional right to compensation.

Clause (1) contains a declaration of the fundamental right in a negative form, namely, that no person shall be deprived of his property save by authority of law. In other words, this clause implies that a person may be deprived of his property, provided he is so deprived by authority of law.¹⁹ This clause thus affords protection against executive but not against legislative expropriation of property. The law referred to in this clause must, of course, be a valid law,¹⁹ which means a law enacted by a competent Legislature and not inconsistent with any of the fundamental rights guaranteed by Part II of the Constitution.²⁰

As against its own subjects, a sovereign cannot exercise an 'Act of State', and the private property of a subject cannot be taken away by an executive order. Thus, it has been held that an executive order revoking pre-Constitution grants by Rulers of Indian States contravenes Art. 31 (1) and is, accordingly, void.²¹

The usual purposes for which a State may deprive a person of his private property, by law, are—(i) taxation; (ii) eminent domain; (iii) penalty—as we have already seen.

But so far as *taxation* is concerned, we have a separate Article, viz., Art. 265, which enjoins that 'no tax shall be levied or collected except by authority of law'. From this, *our* Supreme Court has held²¹ that in *our* Constitution, taxation is wholly outside the purview of Art. 31 and that cl. (1) of Art. 31, therefore, must be regarded as concerned with deprivation of property *otherwise than* by the imposition or collection of a tax. This is also clear from cl. (5) (b) (i) of Art. 31.

The power of 'eminent domain' is exclusively contained in cl. (2) of Art. 31.²⁰

Hence, the scope of cl. (1) is limited to cases of deprivation *other than* in exercise of the powers of 'eminent domain' and 'taxation'.

The right of non-citizens.

Article 31 is not confined to citizens.²²

But Cl. (1) of this Article can be of no avail to a non-citizen where his contention is that the law by which he has been deprived of his property is invalid owing to contravention of Art. 19, which is confined to citizens.²²

'Deprived'.

The meaning to be attributed to this word in Cl. (1) has varied with the fluctuation in the views of the Supreme Court as to the relationship between Cls. (1) and (2). As matters stand (p. 191, *ante*), Cl. (1) must be construed as referring to deprivation of property by modes other than 'acquisition' or 'requisition' [coming under Cl. (2)] as well as by taxation [Art. 265], e.g., destruction¹⁹ or confiscation,²³ or revocation of a proprietary right granted by a private proprietor,²⁴ seizure of goods²⁵ or immovable property²⁴ from the possession of an individual²⁵ or assumption of control of a business,¹⁻² in exercise of the 'police power' of a State.

'Deprivation' is to be distinguished from 'restriction' (see Vol. I, p. 511) of the rights following from ownership, which ordinarily falls short of dispossession of the owner from those rights.²⁻³ There would, however, be a 'deprivation' within the meaning of Art. 31 (1) if a *substantial bulk* of the rights constituting property is taken away.^{23,2} On the other hand, since restriction may sometimes require a

(19) *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (925), Das J.

(20) *Kochuni v. State of Madras* (II), A. 1960 S.C. 1080 (1091).

(21) *Virendra v. State of U. P.*, (1955) 1 S.C.R. 415.

(22) *Indo-China Navigation Co. v. Jasgit*, A. 1964 S.C. 1140 (1154).

(23) *Ananda v. State of Orissa*, (1955) 2 S.C.R. 919.

(24) *Virendra v. State of U. P.*, (1952-4) 2 C.C. 347 (348).

(25) *Wazir v. State of U. P.*, (1952-4) 2 C.C. 344.

(1) *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (925); (1950-51) C.C. 10 (27).

(2) *Dwarkadas v. Sholapur Co.*, A. 1951 Bom. 86.

(3) *State of Bombay v. Bhanji*, (1954) S.C.A. 1286 (1289).

prohibition or destruction,⁴⁻⁵ such cases of restriction would also come under Art. 31 (1).⁶

(A) The following have been held to be cases of 'deprivation' within the meaning of Art. 31 (1)—

(i) Where the trustees of a property for the purposes of a public school are sought dispossessed by a Managing Committee nominated by the Government.⁷

(ii) Where the right to occupy, transfer, assign or sublet is taken away from a leasehold interest.²³

(iii) Where a proprietary grant is revoked.²⁵

(B) But there is no deprivation—

(a) Where the State simply refuses to recognise a contract to which it is not a party.²⁴

(b) Where the property is taken by consent of or agreement with the owner.⁸

For the purposes of cl. (1), it is not necessary that the transfer of property must be in favour of the State as distinguished from private individuals.⁹

'Save by authority of law'.

This expression indicates that the Indian Constitution follows the English law on the point, rather than the American doctrine of 'due process'.

(A) *U.S.A.*—Under the *American* Constitution, vested rights cannot be taken away by the Legislature except under due process and it is for the Courts to say in each of case whether the action of the Legislature has been a 'due process'.¹⁰

"As an exercise of the right of the owners is a severe instance of governmental convenience displacing private ownership, the rule is general that the legislation which permits it must be strictly construed and strictly followed, and that every precedent, form or ceremony which by law is made a condition to a completed appropriation must be had or observed before the right of the government will be perfected, and the right of the citizen appropriated."¹¹

(B) *England*.—Under the *English* system, the Legislature is competent to take away any rights of property, without interference by the Courts. The only restriction imposed by judicial interpretation is that the statute taking away vested rights must say so either expressly or by necessary implication. And the Court acts upon the presumption that the Legislature did not intend to take away vested rights of property.

The principle was explained by the Privy Council as follows:

"... A retrospective operation ought not to be given to the statute unless the intention of the Legislature is expressed in plain and unambiguous language, because it manifestly shocks our sense of justice that an act, legal at the time of doing it, should be made unlawful by same new enactment. . . ."¹²

The presumption applies with a greater force when by the retrospective operation, rights and interests vested in a *limited* class of persons is sought to be taken away.¹²

(C) *India*.—Cl. (1) of Art. 31 of *our* Constitution, similarly, is intended as a limitation upon the Executive as in England,¹³ and not upon the Legislature.¹⁴

The Executive cannot deprive a person of his property (of any kind¹⁵) without legal authority¹⁶ which can be established in a court of law, however laudable the motive behind such deprivation may be.¹⁷

(4) *Narendra v. Union of India*, A. 1960 S.C. 430.

(5) *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873.

(6) *Kochuni v. State of Madras* (II), A. 1960 S.C. 1080 (1096).

(7) *Dwarka v. State of Bihar*, A. 1959 S.C. 249.

(8) Cf. *Nelungaloo v. Commonwealth*, (1948) 75 C.L.R. 495; *Hassanji v. State of M.P.*, A. 1965 S.C. 470.

(9) *Vajrapuri v. New Theatres*, (1959) 2 M.L.I. 469 (473).

(10) Cf. *Bailey v. Anderson*, (1945) 326 U.S. 203.

(11) Cooley, *Constitutional Law*, p. 409.

(12) *Young v. Adams*, (1898) A.C. 469.

(13) Blackstone's *Commentaries*, Vol. I. pp. 138-9.

(14) *State of W. B. v. Subodh Gopal*, (1954) S.C.A. 65 (82, 85; 103-4).

(15) *Wazir v. State of H. P.*, (1955) 1 S.C.R. 408: (1952-4) 2 C.C. 344 (346).

(16) *Virendra v. State of U. P.*, (1955) 1 S.C.R. 415: (1952-4) 2 C.C. 347 (352).

(17) Cf. *Vino C. & P. Works v. State of M. P.*, A. 1956 Nag 1 (5).

Again, as under Art. 21 [see p. 88, *ante*], an act may be said to be 'under the authority of law' only if there is a strict compliance with the terms and conditions laid down by the statute. Thus, where a law empowered the Executive to occupy vacant premises after 'due enquiry', an order under the law made without giving an opportunity to the landlord of being heard, was in contravention of Art. 31 (1), and, hence, void.^{17a}

But such 'law' must, under *our* Constitution, be a valid law, which means a law in conformity with the other rights embodied in Part III. Hence, the reasonableness of a restriction imposed by a law coming under Art. 31 (1) may be questioned under Art. 19 (1) (f) or 19 (1) (g) [see p. 193, *ante*].

Judicial review has thus entered into Art. 31 (1) through the flanks.

'Law'.

'Law' in this Article refers to statute law or rules and orders made under statutory authority,^{17b} as is shown by cls. (3)-(4).

Cl. (1) thus means that private property cannot be taken away by mere executive order,¹⁶ Government Code^{17b} or manual, made without legislative sanction, or by a rule or scheme^{17c} which is *ultra vires* the statute under which it is made.

On the other hand, if the deprivation takes place by an *intra vires* administrative order made under the very statute which created the right of property, it cannot be said to be without the authority of law, e.g., the cancellation of an allotment under the Administration of Evacuee Property Act.^{17d}

An act done under a contract cannot be said to be without the authority of law so long as the contract is not set aside.^{17e}

A right property created or recognised by existing law cannot be taken away without legislation.

The definition of 'existing law' in Art. 372 (1) being wide, whenever a right of property is recognised by an existing law, such as a custom^{17f} or an ordinance of an erstwhile Ruler of an Indian State,¹⁶ having the force of law, such right cannot be taken away, after the commencement of the Constitution, by an executive order, in contravention of Art. 31 (1).

Since the Rulers of the Indian States were fully sovereign, even their executive acts constituted law. Hence, grants made by them can be revoked, after the Constitution, only by law made by a competent Legislature.^{17f} But if the revocation took place, before the commencement of the Constitution, by the Ruler himself or a duly constituted authority, exercising the Ruler's powers, there is no remedy after the Constitution, under Art. 31 (1).¹⁸

'Person'.—This word, in the present Art., includes natural as well as artificial persons.¹⁹

The present clause also extends to aliens.

'Property'.—See Vol. I, p. 633, and also under cl. (2), *post*.

Arts. 31(1) and 265.

As there is a special provision in art. 265 of the Constitution that no tax shall be levied or collected except by authority of law, cl. (1) of art. 31 of the Constitu-

(17a) *Shankarlal v. Addl. Dy. Commissioner*, A. 1951 Nag. 22.

(17b) *Dwarka v. State of Bihar*, A. 1959 S.C. 249 (258).

(17c) Cf. *Nageswara v. A. P. State Road Transport Corp.*, A. 1959 S.C. 308.

(17d) *Amar Singh v. Custodian*, A. 1957 S.C. 599.

(17e) *Hassanji v. State of M.P.*, A. 1965 S.C. 470 (473).

(17f) *Madhorao v. State of M. P.*, A. 1961 S.C. 298.

(18) *Sarwarlal v. State of Hyderabad*, A. 1960 S.C. 862 (865).

(19) *Chiranjit Lal v. Union of India*, A. 1951 S.C. 41 (61).

tion must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax.²⁰

The net result of this is that where a tax is levied without the authority of law, the imposition cannot be challenged on the ground of contravention of Art. 31 (1). Consequently, an application under Art. 32 will not lie unless there is a violation of some other fundamental right, such as Art. 19 (1) (f)²⁰ or 19 (1) (g).²¹

CLAUSE (2).

OTHER CONSTITUTIONS

(A) U.S.A.—The Fifth Amendment to the Constitution of the U.S.A. included—

“ . . . Nor shall private property be taken for public use, without just compensation.”

I. Property is ‘taken’ when the title to it is transferred to Government or Government takes over or assumes to control its valuable uses, or when, in the case of land, it commits a deliberate and protracted *trespass*.²² The infringement of any right of property is a ‘taking’ even though the owner is not actually deprived of the subject-matter.²³ In other words, to constitute ‘taking’, it is not necessary that the property should be *appropriated* or formally *acquired*.²⁴

Thus, where land was permanently inundated²⁵ by backwater from a public dam, compensation was directed to be made under this provision.¹ The result is the same where the value of the land is affected by artificial obstruction of water, though there is no overflow.² But there is no ‘taking’ when the injury is merely ‘consequential’ or where the injury is due to the operation of natural causes.¹

The test of ‘taking’, according to the Supreme Court is—whether an inroad has been made upon the owner’s use of the property to such an extent that it constitutes, as between private parties, a servitude which could be acquired only by agreement or prescription.³ It is the character of the invasion, not the amount of damage resulting from it, that determines the question of ‘taking’.⁴

Thus, the flight of airplanes, which skim the surface so as to substantially affect the user of the land by the frequency and altitude of the flights;²⁴ the erection of a fort on nearby land and firing of guns from there over the petitioner’s land;⁵ may constitute ‘taking’.

There is also ‘taking’ when Government assumes control over a private business for some national purpose, say, for public safety or protection of the public welfare, to the extent of directing the operation and management of the business or industry, though the owners may continue to conduct its affairs ‘as government officials’.⁶ ‘Taking’ may be either *permanent* or *temporary*.⁶ In either case, compensation must be paid.⁶⁻⁷

Even *regulation* of proprietary rights may constitute taking if it substantially⁸ affects the owner’s rights and severely diminishes the value of the property.² But the mere fact that regulation deprives the owner of the most profitable use of his property is not necessarily enough to establish the owner’s right to compensation.⁹ In particular, a lenient view has been taken by the Supreme Court with

(20) *Ramjilal v. I. T. O.*, A. 1951 S.C. 97.

(21) *Yasin v. Town Area Committee*, (1952)

S.C.R. 572; *Himmattal v. State of M. P.*, (1954) S.C.R. 1122.

(22) *U. S. v. Great Falls Mfg. Co.*, (1884) 112 U.S. 645.

(23) *Pumpelley v. Green Bay Co.*, (1871) 13 Wall. 166.

(24) *U. S. v. Causby*, (1946) 328 U.S. 256.

(25) *U. S. v. Cress*, (1917) 243 U.S. 316.

(1) *Bedford v. United States*, (1904) 192 U.S. 217.

(2) *U. S. v. Kansas City L. I. Co.*, (1950) 339 U.S. 799

(3) *U. S. v. Dickinson*, (1946) 331 U.S. 745 (748).

(4) *U. S. v. Cress*, (1917) 243 U.S. 316 (328).

(5) *Portsmouth Harbour Co. v. U. S.*, (1922) 260 U.S. 327.

(6) *U. S. v. Pewee Coal Co.*, (1951) 341 U.S. 114 (120).

(7) *U. S. v. General Motors Corp.*, (1945) 323 U.S. 373.

(8) *Pennsylvania Coal Co. v. Mahon*, (1922) 260 U.S. 393.

(9) *Mugler v. Kansas*, (1887) 123 U.S. 623 (664).

respect to wartime regulation¹⁰ or destruction.¹⁰ Thus, it has been held that no compensation was payable where the War Production Board issued an order requiring non-essential gold mines to *cease operating*, even though the mine owners incurred heavy loss as a result of the order.¹¹

The general rule is that regulation may be reasonable and constitutional even though it significantly reduces the value of private property.¹² But the Court has refused to lay down any rigid rule as to whether compensation must be paid in every case of diminution of value from regulatory State action. "Each case must be judged on its own facts".¹³ The test of substantial interference with use or enjoyment as constituting a 'taking' is whether

"inroads are made upon as owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."¹⁴

It has however, been held that there is no 'taking' and no compensation is payable under the Fifth Amendment in the following cases—

(a) When destruction of a property is necessary to save the public against imminent peril, such as conflagration¹⁵ or spreading of a contagious disease,¹³ where a bridge is removed as an obstruction to navigation.¹⁴

(b) When destruction of property is necessary to prevent the enemy from getting strategic advantage¹⁴ or for successful prosecution of war.¹⁰ In such cases, the safety of the State overrides all considerations of private loss.¹³

Compensation is, however, payable where the Army requisitions private property for its use.¹⁶

(c) When the taking is *incidental* or the injury is consequential to the exercise of any lawful power of the State, other than that of 'Eminent Domain'.

In *Knox v. Lee*,¹⁷ rejecting a contention that the declaration of treasury notes as legal tender, with retrospective effect, applying to debts contracted prior to the Act, constituted a 'taking', the Court observed—

"A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses . . . But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared?"¹⁷

Thus,—

(i) Though taxation also amounts to taking of private property for public purposes, the taxing power is *distinct* from that of eminent domain.¹⁸ For when property is taken under the latter power, Government shall make compensation; but no question of direct compensation arises in the case of taxation inasmuch as the person taxed may be said to be compensated by the general benefits which they receive from the existence and operation of the Government.¹⁹

(ii) Again, property is not 'taken' simply because its *value declines in consequence of the exercise of some lawful power by government*, e.g., lowering the tariff¹⁷ or declaring war,¹⁷ or public regulation of navigation on navigable public waters.²⁰ Neither the Fifth nor the Fourteenth Amendment requires compensation to be made for the consequential damages resulting from the exercise of the lawful powers of government.²¹ In such cases, there is no obligation to compensate those who suffer such loss.¹⁷

(iii) On the same principle, wartime allocations, priorities and price controls do not constitute a 'taking' of property even though they reduce or even destroy

(10) *U. S. v. Caltex*, (1952) 344 U.S. 149.

(11) *U. S. v. Central Eureka Mining Co.*, (1958) 357 U.S. 155 (166).

(12) *Bowles v. Willingham*, (1944) 321 U.S. 503.

(12a) *U. S. v. Dickinson*, (1947) 331 U.S. 745.

(13) *Juragua v. U. S.*, (1909) 212 U.S. 297.

(14) *Hannibal Bridge Co. v. U. S.*, (1911) 221 U.S. 194.

(15) *U. S. v. Pacific R. Co.*, (1887) 120 U.S. 227 (234).

(16) *U. S. v. Russel*, (1871) 13 Wall. 623.

(17) *Knox v. Lee*, (1871) 12 Wall. 457 (Legal Tender Cases).

(18) *Nichols, Eminent Domain*, 1950, Vol. I, pp. 60-65.

(19) Willoughby, *Constitutional Law*, II, p. 667.

(20) *Lewis Co. v. Briggs*, (1913) 229 U.S. 82.

(21) *Manigault v. Springs*, (1905) 199 U.S. 473; *Peabody v. U. S.*, (1913) 231 U.S. 530.

the value of property, and so, no question of compensation arises.²² Similarly, taxation of excess profits²³ or refund of excessive earnings by carriers²⁴ or refixation of contract prices and recovery of excessive profits²⁵ during war, are valid exercise of the 'war power' and do not constitute 'taking' within the meaning of the Fifth Amendment. On the same ground, no compensation was held payable where gold mine was directed to be closed by the War Production Board,²⁶ or they were prevented from acquiring new machinery, being a non-essential industry.^{27a}

But compensation would be payable where property is occupied by the military for use for war purposes as distinguished from destruction² for strategic purposes or for safety of the State.

(iv) Again, no compensation is payable for loss or reduction in value resulting from valid exercise of the *police power*,³ e.g., regulation of prices,³ building regulation.³ While eminent domain involves the 'taking' of private property for public use, police power involves the 'regulation' of such property for the purpose of preventing such use of the property as is detrimental to the public welfare.⁴ In the exercise of the police power, the property may sometimes be destroyed and the owner deprived of his property altogether, but eminent domain involves the *transference* of the property to the State, which never takes place when police power is exercised.⁴

But excessive regulation may sometimes amount to a 'taking' of the property and then compensation must be paid as in the case of exercise of the power of eminent domain.⁵

(d) There is no 'taking' where the owner suffers incidental damages resulting from a *legalised* nuisance, e.g., from noise, vibrations, etc., caused by a railway operating under statutory authority.⁶

(e) When private property is held *subject* to some public right, the exercise of the public right would not constitute a 'taking'.⁷

(f) There cannot be a taking or 'deprivation' of property unless the law recognizes that which is taken as 'property'.⁸ Thus, in the U.S.A., it has been held that there is no private right of property in the flow of a navigable stream, so as to give rise to a claim for compensation when the flow is diverted for the purpose of improving navigation;⁸ but the case is otherwise if the stream be non-navigable.⁸

Certain kinds of property have also been considered to be outside the ambit of the power of 'Eminent Domain' to which the Fifth Amendment relates, e.g., money;⁹ choses in action.⁹ (See p. 207, *post*).

II. The question whether the taking is for a 'public use' is a justiciable question,¹⁰⁻¹¹ but "the decision of the Legislature is entitled to deference until it is shown to be an impossibility."¹²

The expression '*public use*' has been widely interpreted to include purposes relating to the functions of Government. Apart from the use by the State or local

(22) *Morrisdale Co. v. U. S.*, (1922) 259 U.S. 188; *Foreign Trade Co. v. U. S.*, (1948) 334 U.S. 832; *Bowles v. Willingham*, (1944) 321 U.S. 503.

(23) *Lichter v. U. S.*, (1947) 334 U.S. 742 (787-8).

(24) *Dayton-Goose Co. v. U. S.*, (1923) 263 U.S. 456.

(25) *Oro Mines v. U. S.*, (1951) 341 U.S. 948.

(25a) *U. S. v. Central Eureka Mining Co.*, (1948) 357 U.S. 155.

(1) *U. S. v. Russell*, (1871) 13 Wall. 623.

(2) *U. S. v. Caltex (Phillipines)*, (1952) 344 U.S. 149.

(3) *Fed. Power Commn. v. Hope Natural Co.*, (1944) 320 U.S. 591.

(4) Nicholas, *Eminent Domain*, 1950. Vol. I, pp. 66, 70.

(5) *Pennsylvania Coal Co. v. Mahon*, (1922) 266 U.S. 393.

(6) *Richards v. Washington Co.*, (1914) 233 U.S. 546.

(7) *U. S. v. Chandler-Dunbar*, (1913) 229 U.S. 53 (62).

(8) *U. S. v. Powelson*, (1943) 319 U.S. 266; *U. S. v. Chandler-Dunbar Power Co.*, (1913) 229 U.S. 53.

(9) Willis, *Constitutional Law*, 816; Cooley, *Constitutional Limitations*, Vol. II, 1117.

(10) *Block v. Hirsch*, (1921) 256 U.S. 135.

(11) *Cincinnati v. Vester*, (1930) 281 U.S. 439 (446).

(12) *Old Dominion Co. v. U. S.*, (1925) 269 U.S. 55; *U. S. v. Welch*, (1946) 327 U.S. 546.

authorities, there is a public use when the property is put directly to the use of the people of the community in general, for purposes relating to public welfare or convenience. Thus, property is taken for public use when it is taken for the construction of public buildings, schools and the like; for establishing public parks, cemeteries, markets, etc., highways, bridges, ferries and canals used as highways, railways, telegraph and other means of communication; for irrigation of arid tracts,¹³ drainage of land; fortresses, lighthouses, piers, docks; preservation of places of historical value,¹³ supply of water to a city.¹⁴ Even projects material for the 'prosperity'¹⁵ or 'beautification' of the community have been held to be for 'public use'.

In interpreting the word 'public use', the earlier view of enjoyment by the public has given way to the more liberal meaning of 'public advantage' or 'public benefit',¹⁶ and—

"the more liberal application has been rendered necessary by complete conditions due to recent development of civilization and the increasing density of population. In the very nature of the case, modern conditions and the increasing interdependence of the different human factors in the progressive complexity of a community make it necessary for the Government to touch upon and limit individual activities at more points than formerly."¹⁶

Prof. Willis¹⁷ puts it thus—

"According to the newer viewpoint there is a 'public use' if the thing taken is useful to the public. This makes public use for eminent domain *practically synonymous* with public purpose or *taxation* and somewhat like social interest for *police power*. Under this rule it is *not necessary for the benefit to be for the whole community*^{18,19} but it must be for a considerable number."

The concept of 'public use' has been so liberally interpreted that according to one critic²⁰ it has ceased to be "a judicially enforceable limitation on the power of condemnation".

It is not necessary for the use to be 'public'—

(i) that *every* resident in the district should have the right to use or enjoy the improvement in question;²¹

(ii) that the requisite use is *present*;²² it is present when the general public may avail itself of the services;²³

(iii) that the use is by a public agency;²³ even the use by a private person²⁴ or corporation²⁵ may involve widespread public benefit.²⁴

But there is no public use where property is transferred from one private person to another, without any public benefit or advantage accruing from such transfer.¹

"As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighbourly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate."²⁶

Once the existence of a public purpose is established, the need for taking a particular tract or the amount and character of land to be taken are for the sole determination of the Legislature.²

(13) *Clark v. Nash*, (1905) 198 U.S. 361; *Cherokee v. Kansas Ry.*, (1890) 135 U.S. 656; *Shoemaker v. U. S.*, (1893) 147 U.S. 282; *Kohl v. U. S.*, (1875) 91 U.S. 367 (372); *U. S. v. Jones*, (1883) 109 U.S. 513.

(14) *Long Island Water Supply Co. v. Brooklyn*, (1897) 166 U.S. 685.

(15) *Falbrook Irigation Dt. v. Bradley*, (1896) 164 U.S. 112.

(16) Cooley, *Constitutional Limitations*, Vol. II, pp. 1139-40.

(17) Willis, *Constitutional Law*, 1st Ed., pp. 817-8.

(19) *Vernon-Woodbery Cotton Co. v. Alabama I. P. Co.*, (1916) 240 U.S. 30.

(20) Kauper, *Frontiers of Constitutional Liberty*, 1956, p. 37.

(21) *Clark v. Nash*, (1905) 198 U.S. 361; *Rindge Co. v. Los Angeles*, (1923) 262 U.S. 700.

(22) In re opinion of the Justices, (1910) 204 Mass. 607.

(23) *Cherokee Nation v. S. Kansas R. Co.*, (1890) 135 U.S. 641.

(24) *Strickley v. Highland Gold Mining Co.*, (1906) 200 U.S. 527.

(25) *Union Lime Co. v. Chicago R. Co.*, (1914) 233 U.S. 211.

(1) *Puerto Rico v. Eastern Sugar Associates*, (1946) 156 F (2d) 316.

(1a) Willoughby, *Constitutional Law of the U.S.*, (1929) p. 795.

(2) *Berman v. Parker*, (1954) 348 U.S. 26 (35).

III. It has been held that the ascertainment of 'just compensation' is a judicial function and cannot be taken away by statute, nor is the executive or legislative assessment final.³⁻⁴ It means that the owner should be put in as good a position pecuniarily as he would have been if his property had not been taken.⁵ He is, therefore, entitled to the full and perfect equivalent of the property taken, damages inflicted by the taking as well as interest on the value where the payment of it would be necessary to restore the owner to his former position.⁶ It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken,⁵ and the owner's loss is to be measured by the fair market value on the date of the taking.⁵ Where, for any reason, the property has no market, resort must be had to other data to ascertain its value, including a guess by informed persons.⁵

Again, where the market price is disturbed by a war emergency, the ceiling price fixed by the Government will be 'just' compensation.^{6a}

But the State is not bound to compensate for loss of opportunities that may result from speculative projects that may be taken by the State in future.^{6b}

The constitutional guarantee of just compensation is, however, not a limitation upon the power to take, but only a condition for its exercise. All private property is subject to the demands of a public use, and whenever public uses require, the government may appropriate any private property on payment of just compensation.⁷ Nor does the Constitution require that the law must provide for payment of compensation as a condition precedent to the taking; it is enough if it directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives the owner the right to recover that amount by judicial process.⁸

(B) *England*.—The principle as to why compensation must be paid for acquisition of private property for public use can hardly be better explained than in the inimitable words of *Blackstone*:

"So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extremely beneficial to the public: but the law permits no man, or set of men, to do this, without the consent of the owner of the land. Besides, the public good is nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.

In this and similar cases the Legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the Legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the Legislature indulges with caution, and which nothing but the Legislature can perform."⁹

While there is no constitutional limitation upon the power of Parliament to take private property without payment of compensation, and there is no judicial review of the validity of a law which seeks to do so, the rights of the individual are substantially secured by the Judiciary by applying a rule of statutory construction. The court presumes against confiscation of property and would not deny compensation to an expropriated owner unless the intention of Parliament to take away the property of a subject without giving him compensation is not to be imputed unless the intention is "expressed in unequivocal terms".¹⁰ Since 'com-

(3) *Seaboard Air Line Co. v. U. S.*, (1923) U.S. 299.

(4) *Monongahela Navigation Co. v. U. S.*, (1893) 148 U.S. 312 (327).

(5) *U. S. v. Miller*, (1943) 317 U.S. 369.

(6) *United States v. New River Collieries*, (1923) 262 U.S. 341.

(6a) *U. S. v. Commodities Trading Corp.*, (1950) 339 U.S. 121.

(6b) *U. S. v. Powelson*, (1943) 319 U.S. 266.

(7) *Long Island Water Supply Co. v. Brooklyn*, (1897) 166 U.S. 685.

(8) *Sweet v. Reachel*, (1895) 159 U.S. 380.

(9) *Blackstone's Commentaries*, Bk. I, p. 139.

(10) *Central Control Board v. Cannon Brewery Co.*, (1919) A.C. 744 (752); *A. G. v. De Keyser's Hotel*, (1920) A.C. 508.

pensation' means the cash value of the property taken at the time of deprivation of the owner, the presumption would apply in any case where it is urged that a sum less than that cash value has been provided for by the Legislature.²¹ The presumption is no less applicable in relation to emergency legislation.¹¹

Where a statute, on its proper construction, cannot be held to have provided for confiscation, any subordinate legislation made thereunder which seeks to deprive the subject of his property without payment of the full compensation must be held to be *ultra vires*.¹¹

(C) *Australia*.—Sec. 51 (31) of the Commonwealth of Australia Constitution Act, 1900, gives the Commonwealth Parliament the power of—

"acquisition of property on just terms from any State or person for any purpose in respect of which Parliament has power to make laws".

The *time, manner, occasion and necessity* for the exercise of the power of acquisition are matters exclusively for the Legislature. The only two justiciable questions are—(i) whether the acquisition is on just terms (but not the measure of justice) and (ii) whether the acquisition is in respect of some purpose as regards which Parliament has the power to make laws.¹¹ As to 'just terms', it has been held that the Court will not invalidate a law unless the terms provided by it are such that *reasonable* men could not regard them as just; thus, a low rate of interest on compensation is not unjust.¹² But the Legislature cannot, by any device, withdraw from the determination by a Court whether any terms which it has provided are just.¹³ If the compensation is not just, the whole Act fails, including the acquisition.¹²

As to what constitutes 'acquisition', the American view of 'substantial abridgement' has been generally followed. Thus, it has been held that a regulation which makes it 'difficult', if not impossible, for a wool owner to dispose of his wool except under the direction of the Government and on terms offered by it, amounts to 'requisition'.¹⁴

(D) *West Germany*.—Art. 14 (3) of the West German Constitution (1948) provides—

"3. Expropriation shall be admissible only for the well-being of the general public. It may be effected only by legislation or on a basis of law which shall regulate the nature or extent of compensation. Compensation shall be determined after just consideration of the interests of the general public and participants. Regarding the extent of compensation, an appeal may be made to ordinary courts in case of dispute."

Art. 15, next, provides—

"Land and landed property, natural resources, and means of production may for the purpose of socialization be transferred to public ownership or other forms of publicly controlled economy by law which shall regulate the nature and extent of compensation. For compensation, Article 14, Paragraph 3, Sentences 3 and 4 shall apply appropriately."

(E) *Eire*.—Art. 44 (2) 6 of the Constitution of 1937 says—

"The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation."

(11) *Newcastle Breweries v. R.*, (1920) 1 K.B. 854 (866).

(11) Wynes, *Legislative and Executive Powers*, p. 249; *Minister of State v. Dalziel*, (1944) 68 C.L.R. 261; *Bank of N. S. W. v. Commonwealth*, (1948) 76 C.L.R. 1.

(12) *Grace Bros. v. Commonwealth*, (1946) 72 C.L.R. 269; *Nelungaloo v. Commonwealth*, (1950) 81 C.L.R. 144 (157) P.C.

(13) *Australian Marketing Board v. Tonking*, (1942) 66 C.L.R. 77 (106-7). The Court will not readily deny the justice of terms fixed by the Legislature [*Andrews v. Howell*, (1941) 65 C.L.R. 255]. In considering whether the terms are just, the Court may have regard to the interests of the public as well as those of the person dispossessed

[*Johnston v. Commonwealth*, (1943) 67 C.L.R. 314]. Ordinarily, what the owner is entitled to is the value to him of the property taken (*Minister for Army v. Parbury*, (1945) 70 C.L.R. 459). "The value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired [*Fraser v. City of Fraserville*, (1917) A.C. 187. foll. in *Minister for Home v. Lazarus*, (1919) 26 C.L.R. 159].

(14) *John Cooke v. Commonwealth*, (1922) 31 C.L.R. 394; *McClinton v. Commonwealth*, (1948) 75 C.L.R. 1.

(F) *Japan*.—Art. 29 of the Japanese Constitution, 1946 says—

"Private property may be taken for public use upon just compensation therefor."

(G) *Government of India Act, 1935*.—Cl. (2) of Sec. 299 of the Act of 1935 was—

"Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined."

It will be seen that the above provision was similar to cl. (2) of Art. 31 of the Constitution, as it originally stood, except on the following points: (i) Movable property¹⁵ was not included within the scope of s. 299 (2). (ii) The words 'taken possession of' were not there. (iii) For the words 'provides for payment of compensation' in s. 299 (2), Art. 31 (2) uses the words 'provides for compensation', and for the words 'to be determined', Art. 31 (2) uses the words 'to be determined and given'.

Since the validity of a statute is to be determined with reference to the legislative competence existing at the time of its enactment,¹⁶ it is useful to examine the interpretation given to this provision inasmuch as pre-Constitution laws are not infrequently challenged as invalid on the ground that it is in contravention of Art. 299 (2) of the Government of India Act, 1935.

(I) The word 'acquisition' was interpreted to refer to 'confiscatory' legislation,¹⁷ i.e., where the ownership of or title to private property was transferred to the Government as owner.¹⁸⁻¹⁹ Hence, compensation was not payable under the section where the rights of the private owner were merely diminished and there was no question of a transfer of ownership to the Government, e.g.,—

(i) Where the impugned law merely regulated the relations of landlord and tenant;¹⁷

(ii) Where the impugned law provided for the re-instatement of tenants evicted by the landlord, except in specified circumstances;²⁰

(iii) Where the impugned law only took over the management of the private property, with a liability to account for the income;²¹

(iv) Where the land revenue payable by a grantee of land from the Government is increased,²² or the exemption from payment of revenue which was conferred at the time of the grant is subsequently withdrawn.²³

The word 'acquisition' was held not to comprise 'requisition'.²⁴

(II) Some controversy arose as to the interpretation of the word 'land' which was defined in sub-sec. (5) of s. 229 as including 'immovable' property of every kind and any rights in or over such property. It was held that the following kinds of interests were not comprehended within the definition of land as given above—

(a) Right to exemption from land revenue.²²

(b) Right to receive additional statutory compensation, in addition to the market value, under s. 23 (2) of the Land Acquisition Act, 1894.²⁵

(15) Power to acquire movable property was conferred by s. (2) (xxiv) of the Defence of India Act, 1939.

(16) Cf. *Asstt. Collector v. Jamnadas*, A. 1960 Bom. 35 (42), where it is stated that Art. 31 (5) (a) of the Constitution does not save inconsistency with s. 299 (2) of the Government of India Act, 1935; also *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

(17) *Jagannath v. United Provinces*, A. 1946 P.C. 127.

(18) *State of W. B. v. Subodh Gopal*, A. 1954 S.C. 92 (114).

(19) *Bhikaji v. State of M. P.*, A. 1955 S.C. 781 (786).

(20) *Khairunnissa v. Ganga Prasad*, A. 1961 All. 191 (194).

(21) *Gurudutt v. State of Bihar*, A. 1961 S.C. 1684; (1962) 2 S.C.R. 292.

(22) *Kunwar Lal v. C. P. & Berar*, A. 1944 F.C. 62.

(23) *State of M. P. v. Laxmi Prasad*, A. 1960 M.P. 372.

(24) *Tan Bug v. Collector of Bombay*, A. 1946 Bom. 216.

(25) *Asstt. Collector v. Jamnadas*, A. 1960 Bom. 35 (42).

(III) The word 'compensation' in Art. 31 (2) of the Constitution was interpreted by the Supreme Court, in *Bela Banerjee's case*,¹ to mean "a just equivalent of what the owner has been deprived of". Since then it has been understood that the word 'compensation' was used in s. 299 (2) of the Government of India Act, 1935, also, in the same sense.²⁻⁴ It has, accordingly, been held that there has been no compliance with s. 299 (2)—

(i) Where the compensation payable was not the market value of the property at the date of the acquisition, but the value prevailing at an anterior date, arbitrarily chosen, having no relation to the value of the land when it was acquired.¹⁻²

(ii) Where the amount provided to be paid is less than the market value on the date of the acquisition.³

INDIA

Amendment.—See p. 183, *ante*.

The doctrine of Eminent Domain.

It has been already stated that the present clause embodies the principle of what is called 'Eminent Domain', or the

"power of the sovereign to take property for public use without the owner's consent."⁵

The justification for acquisition of private property for public purposes is that the interests of the public are paramount and that in some cases, private interests have to be subordinated to public interests and the necessities of government.⁶

One of the characteristic features of a sovereign power is its legal right to deal as it thinks fit, with anything and everything within its territory, to enable it to perform its proper functions.⁷ This includes the right to take to itself any property within its territory,—eminent domain being thus the proprietary aspect of sovereignty, and is inseparable from it.⁷ From this standpoint, it has been held in the *United States*, that the State cannot contract away its right of eminent domain.⁸

As our Supreme Court puts it—

"It is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right, which is described as *eminent domain* in American law, is like the power of taxation, an offspring of political necessity, and it is supposed to be based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner."⁹

Conditions for the application of Cl. (2).

Cl. (2) of the present article prescribes certain conditions, subject to which only such superior right of the State can be exercised:

(i) One limitation is that such taking must be for a 'public' purpose.

(1) *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558 (563).

(2) *State of W. B. v. Bon Behari*, A. 1961 Cal. 112 (115).

(3) *Khandelwal v. State of U. P.*, A. 1955 All. 12.

(4) But in *Asstt. Collector v. Jamnadas*, A. 1960 Bom. 35 (40), the Bombay High Court has expressed the view that *Bela Banerjee's case* [(1954) S.C.R. 558] related to the interpretation of Art. 31 (5)-(6) and is not an authority for the interpretation of s. 299 (2). According to the Bombay High Court, 'compensation' in s. 299 (2) merely meant a compensation which was real and not illusory; it was intended to reasonably indemnify the owner for the loss of his prop-

erty and did not require the payment of the exact equivalent of the market value at the date of the acquisition. This view is no longer good in view of the Supreme Court decision in *Jeejeebhoy v. Asstt. Collector*, (1964) S.C. [C.A. 775/62], where it has been held that there is no difference between Art. 31 (2) and s. 299 (2) with respect to the meaning of the word 'compensation'.

(5) Nicholas, *Eminent Domain*, Vol. I, pp. 2, 20-21.

(6) Cooley, *Constitutional Law*, p. 480.

(7) *Kohl v. U. S.*, (1875) 9 U.S. 367; *U.S. v. Carmack*, (1947) 329 U.S. 230.

(8) *Chiranjit Lal v. Union of India*, A. 1951 S.C. 41 (54), Mukherjea J.

(A) In the *United States* it has been held that it is unconstitutional for the State to take private property for *private use*, i.e., to divest one citizen to benefit another, whether compensation is made or not.

"The right of eminent domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer."⁹

(B) In *India*, before the amendment of Art. 31 (2) by the Constitution (Fourth Amendment) Act, 1955, the Supreme Court held¹⁰ that though Art. 31 (2), as it then stood, did not expressly make the existence of 'public purpose' to be a condition for the acquisition or taking possession of property, it was an *implied* condition and that the clause proceeded on the assumption that the property is required for a public purpose. It is an 'essential ingredient' in the very concept of 'eminent domain'. Hence, the State cannot compulsorily take the property of one private person in order to give it to another private person.¹⁰

But the Amendment Act of 1955, by inserting the words 'save for a public purpose', has expressly made 'public purpose' a condition for acquiring or requisitioning private property.

As a result, it is now made clear that the State cannot, under cl. (2), acquire A's property to give it to B, without any public purpose being involved.¹¹

(ii) The power under cl. (2) can be exercised only by the authority of a law. If the State enters into a contract with a private owner to take his property, the State's title depends upon the terms and validity of the contract. A defective contract cannot be validated by payment of compensation, without legislation. Conversely, if the property is acquired not under a statute, but under a contract (cf. Art. 299, *post*), the owner or occupier of the property will get merely the price payable under the contract and no question of compensation under the present clause would arise.¹² Property is compulsorily 'acquired' when it is taken without the agreement of the owner.¹³

The requirement of legislation as a condition has been made clear by the redrafting of the clause by the Amendment Act of 1955. The process of compulsory acquisition by law, in fact, takes place when it is not possible to acquire the property by agreement with the private owners, individually.¹⁴

(iii) The subject-matter must be 'property'.

(iv) It must be either 'acquired' or 'requisitioned' and the ownership or the right to possession, as the case may be, must be transferred either to the State itself or to a corporation owned or controlled by the State.

(v) The other condition is that the law which authorises the appropriation must provide for payment of compensation to the owner in the manner laid down in the clause;¹⁵ for, otherwise it would be a mere spoliation on the part of the State,—contrary to principles of justice and liberty.

Once it is held that it is an 'acquisition' or 'requisitioning' of property within the meaning of cl. (2), compensation must be paid, notwithstanding any degree of public interest to the contrary.

"A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹⁶

The adequacy of the quantum of compensation is, however, not justiciable.

I. What is 'property.'

(A) *U.S.A.*—All kinds of private property¹⁶ and 'every character of right, title or interest therein which a citizen may possess'¹⁴ is subject to the power of

(9) Cooley, *Constitutional Limitations*, Vol. II, p. 1124.

(10) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (935, 937, 902).

(11) *Kochuni v. State of Madras*, A. 1960 S.C. 1080.

(12) Cf. *Commonwealth v. Huon Transport*, (1945) 70 C.L.R. 293 (304, 329).

(13) Halsbury, 3rd Ed., Vol. 10, p. 3.

(14) *Chappel v. U. S.*, (1895) 160 U.S. 409.

(15) *Pennsylvania Coal Co. v. Mahon*, (1922) 260 U.S. 393.

(16) *Long Island Water Supply Co. v. Brooklyn*, (1897) 166 U.S. 685.

Eminent Domain. 'Property' indicates not only the physical thing itself but also the legal rights inhering in the citizen in relation to the thing, such as the right to possess, to use and to dispose of it.¹⁷

Apart from immovable property, the following are instances of property coming under the power of Eminent Domain:

- (i) A patent owner's royalty rights under the licence with the manufacturer.¹⁸
- (ii) Right of user of a riparian owner in a river.¹⁹
- (iii) Easements.²⁰
- (iv) Intangible property, including benefits of contracts.²¹⁻²²
- (v) The future products of an industrial concern.²³
- (vi) Charitable and religious institutions.²⁴

(B) India.

(I) Property, in this Article, means only that which can by itself be acquired, disposed of or taken possession of.²⁴⁻²⁵ Subject to this limitation,¹ it is designed, to include private property in all its forms² and "must be understood both in a corporal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as in its judicial or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others".³

'Property' thus includes—

(a) Any proprietary interest, including a temporary or precarious interest, such as that of a mortgagee or lessee.⁴

It thus includes mere possessory interest, provided it is accompanied by a claim of ownership, such as the interest of a person who is holding by adverse possession which has not yet ripened into ownership by lapse of the required statutory period.⁵⁻⁶

On the other hand, actual possession is not an essential ingredient to constitute property, and the interests of remaindermen and reversionary interests of landlords are property⁵ for the purposes of compensation when the land is taken under the power of eminent domain.⁶

Nor is beneficial interest necessary. Hence, persons holding property in trust for a public school cannot be dispossessed without authority of law.⁷

(b) Any interest in a commercial or industrial undertaking,⁸ or business;⁹ e.g., occupations connected with the transport of goods,¹⁰ the business of an hotel;¹¹ a managing agency.⁹

The materials of a business as well as its goodwill are 'property'.¹⁰

(c) The hereditary interest in and right of management of the head of a Hindu religious endowment;² hereditary 'cash grants' in Hyderabad, enjoyed without rendering any services.¹¹

(17) *U. S. v. General Motors Corp.*, (1945) 323 U.S. 373.

(18) *Almo-Motor Co. v. Timken-Detroit Co.*, (1944) 144 F. 2d. 714.

(19) *U. S. v. Powelson*, (1943) 319 U.S. 266.

(20) Nichols, *Eminent Domain*, Vol. I, p. 97; 855.

(21) *Cincinnati v. Louisville R. Co.*, (1911) 223 U.S. 390.

(22) *Brooks-Scanlon Corp. v. U. S.*, (1924) 265 U.S. 106.

(23) *Liggett v. Myers Co.*, (1927) 274 U.S. 215.

(24) *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (923), Das J.

(25) *Amar Singh v. Custodian*, A. 1957 S.C. 599.

(1) *Dwarkadas v. Sholapur Co.*, A. 1951 Bombay 86.

(2) *Commr. H. R. E. v. Lakshmindra*, (1952-4) 2 C.C. 191 (196).

(3) *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587 (Sastri C.J.).

(4) *Suryapal v. State of U. P.* (1952) S.C.R. 1059.

(5) *Perry v. Clissold*, (1907) A.C. 73.

(6) Nichols, *Eminent Domain*, 1950, Vol. II, pp. 13, 31.

(7) *Dwarka v. State of Bihar*, A. 1959 S.C. 249.

(8) *Saghir Ahmed v. State of U. P.*, (1955) 1 S.C.R. 707.

(9) *J. K. Trust v. Commr. of I. T.*, (1958) S.C.R. 65 (71, 74).

(10) *Mackeritch v. Gupta*, (1945) 49 C.W.N. 322 (326); also 49 C.W.N. 583 (587); *Lahore Electric Supply Co. v. Punjab*, (1943) 24 Lah. 617.

(11) *Veernath v. State of Hyderabad*, A. 1957 A.P. 1034.

(d) A right of pre-emption conferred by Mahomedan law or by custom (as distinguished from a personal right when created by contract).¹²

(e) Benefits of a contract which are transferable *per se*.¹³

(f) Shares in a company.¹³

(g) The property may be in existence or may come into existence in future. Thus, in exercise of its war power, the State can acquire the future products of an industrial concern.¹⁴

(h) Property includes both movable and immovable property tangible and intangible property, e.g., the rights of patentee,¹⁵ easement.¹⁵

But an incorporeal right which cannot be alienated or acquired by itself cannot be regarded as a 'property' within the meaning of this Article, e.g.—

(i) The right to hold a land revenue-free.¹⁶

(ii) The rights of share-holders of a company, e.g., to elect directors, to apply for winding up, which are not transferable apart from the shares.¹³

(iii) The interest of an allottee under the Evacuees Act, 1947, which arises from a statutory grant.¹⁷

(II) On the other hand, no right or interest constitutes 'property' unless the law recognises it as a proprietary right.¹³

Hence, the following interests have been held *not* to constitute 'property' within the meaning of this Article—

(a) A public office. A public officer has no vested or proprietary interest in his appointment.¹⁸ A public officer is not in the nature of a property but of a fiduciary relationship between the State and the public officer who is charged with certain duties and obligations.¹⁹

Even where the office is hereditary, it does not create a right of property if the appointing authority has the power to *abolish* the office. Again, the fact that the holder of the office is entitled to property as remuneration for his office does not create a right of property if the Government has the right to *resume* the grant.^{19a} In such a case, no compensation is payable under Art. 31 (2) for abolition of the office or resumption of the grant.^{19a}

(b) A mere chance or prospect of having particular customers.²⁰

(c) The right to use a public highway.²¹

(d) The right to manufacture liquor.²²

(e) A bare contractual right,²³ or the right of a bare licensee,²⁵ unattended with any interest in property.

(f) A grant-in-aid, until it is actually paid.²⁴

(g) The interest of an *allottee* of evacuee property under the Evacuee Property Administration Acts¹⁷ (which is in the nature of a statutory licence).

(h) A right of superintendence of property, without any beneficial enjoyment.¹

(III) Since Art. 31, *per se*, did not create any right of property but only protected rights which otherwise existed, a pre-Constitution right which was not

(12) *Audh Behari v. Gajadhar*, (1955) 1 S.C.R. 70 (84).

(13) *Dwarkanadas v. Sholapur Co.*, (1954) S.C.R. 674 (725-6).

(14) *Liggett & Myers Co. v. U. S.*, (1927) 274. U.S. 215.

(15) *James v. Campbell*, (1882) 104 U.S. 356; *Nicholas, Eminent Domain*, 1950, Vol. I, p. 97.

(16) *Girijananda v. State of Assam*, A. 1956 Assam 33 (48).

(17) *Amar Singh v. Custodian*, A. 1957 S.C. 599.

(18) *Sukhanandan v. State of Bihar*, A. 1957 Pat. 617 (631).

(19) *Reading v. Att. Gen.*, (1951) 1 All E.R. 617 (621) H.L.

(19a) *Collector v. Deshpande*, A. 1964 S.C. 326 (329).

(20) *Ram Jayawa v. State of Punjab*, (1955) 2 S.C.R. 225 (242).

(21) *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707.

(22) *Manohar v. State of Rajasthan*, A. 1954 Raj. 85.

(23) *Shantabai v. State of Bombay*, A. 1958 S.C. 532 (536); (1959) S.C.R. 265.

(24) *Joseph v. State of Kerala*, A. 1958 Ker. 290.

(25) *Rameshwar v. Commrs.*, A. 1959 S.C. 498 (503).

(1) *Bira Kishore v. State of Orissa*, A. 1964 S.C. 1501.

recognised as a right of property under s. 299 (1) of the Government of India Act, 1935, cannot be deemed to be a property under Art. 31 of the Constitution.^{1a}

Whether any kind of 'property' is exempt from the power of compulsory acquisition.

No kind of 'property' is exempt from the power of 'eminent domain' belonging to the State. Thus, it has been held that the following kinds of property may be acquired or 'requisitioned' in compliance with the conditions laid down in Art. 31:

(i) Property already dedicated to a public use, including religious endowments.

That the property is already dedicated for a public purpose is no objection against its being acquired for another purpose.² In *Suryapal v. State of U. P.*,² Mahajan J. observed—

"A charity created by a private individual is not immune from the sovereign power to compulsorily acquire that property for public purposes. It is incorrect to say that the vesting of these properties in the State under the provisions of the Act in any way affects the charity adversely because the net income that the institutions are deriving from the properties has been made the basis of compensation awarded to them."

Das J.² similarly observed—

"The property belonging to the religious institution will only change its form, namely, from immovable property into money."

This is also the position in the U.S.A.:³

"There is no question that the Legislature, in the absence of constitutional prohibition, has the power to authorize the taking of land devoted to one public use for a different public use."⁴

The following kinds of property are not, therefore, exempt from the sovereign power of 'acquisition'—

(i) The personal property of ex-Rulers of Indian States.⁵

(ii) Lands held under Ghatwali tenure.⁶

(iii) Crown grants.⁷⁻⁸

Whether money and choses in action can be compulsorily acquired.

Both in the U.S.A. and in India, a controversy has arisen as to whether 'money' and 'choses in action' can be the subject of acquisition by the State in exercise of its power of Eminent Domain.

(a) U.S.A.—In the U.S.A., though it is established that any kind of property is subject to the exercise of the power of eminent domain, the opinion has been expressed by some text-book writers⁹⁻¹⁰ that money and choses in action cannot be acquired in exercise of the power of eminent domain. The reason offered for this exception, as explained by Nichols,¹¹ is not based on an implied inherent limitation of the power of eminent domain, "but upon the difficulty of effecting a taking of money that would be of any service to the public without violating the Constitution." The argument is thus put by Nichols¹¹—

"As compensation must be paid in money and if not in advance, at least with such expedition as conveniently may be had, the seizure of money without compensation or with an offer of payment in notes, bonds or merchandise,—in other words, a forced sale or loan,—

(1a) *State of Gujarat v. Vora Fiddali, A.* 1964 S.C. 1043 (1058).

(2) *Suryapal v. State of U. P.*, (1953) S.C.A. 932 (953, 963).

(3) *West River Co. v. Dix*, (1848) 6 How. 507 (U.S.).

(4) Nichols, *Eminent Domain*, 1950, Vol. I, p. 150.

(5) *Visheshwar v. State of M. P.*, (1952) S.C.R. 1020 (1055).

(6) *Manmohan v. State of Bihar, A.* 1955 N.U.C. (Pat.) 3984.

(7) *Venkat v. State of Hyderabad, A.* 1955 Hyder. 44.

(8) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (943).

(9) Willis, *Constitutional Law*, 1936, p. 816.

(10) Cooley, *Constitutional Limitations*, Vol. II, p. 117.

(11) Nichols, *Eminent Domain*, Vol. I, p. 100.

however, it may be justified by dire necessity would not be a constitutional exercise of the power of eminent domain."

The view of Cooley¹⁰ seems to be in that it is not excluded from the purview of eminent domain, but that it would not be *proper* to exercise the power of eminent domain to seize money as that would be amounting to a forced loan to which the Government should not resort in *normal times*—

"From this statement, however, must be excepted money or that which in ordinary use passes as such, and which the Government may reach by taxation and also rights in action which can only be available when made to produce money; neither of which can be needful to take under this power Taking money under the right of eminent domain when it must be compensated in money afterwards could be nothing more or less than a forced loan, only to be justified as a last resort in a time of extreme peril where neither the credit of Government nor the power of taxation could be made available."

Cooley further observed¹²—

"The principle of compulsory acquisition of property is founded on the superior claims of the whole community over an individual citizen but is applicable only in those cases where private property is wanted for public use or demanded for the public welfare and that no instance is known in which it has been taken for the mere purpose of raising revenue by a sale or otherwise and the exercise of such power is utterly destructive of individual right."

The argument of forced loan is thus repudiated by Nichols¹¹—

"Circumstances might occur under which a solvent State required a large sum of money in a certain place at once for an unquestioned public use and an individual whose coin was seized with the certainty of repayment as soon as funds could be brought to the scene of the trouble from the State treasury would hardly complain that he was deprived of his constitutional rights."¹³

In other words, the seizure of money with provision for compensation *afterwards* may not in all situations be a forced loan. Moreover, even in the United States such a forced loan may be deemed constitutionally proper in a state of emergency.¹⁴ So far as the Federal Government is concerned it has already been held that the Federal Government has, under its power of eminent domain together with its power over finance and currency, the power to take gold and gold certificates.¹⁵

So, according to Nichols, the Federal Government has the *power* to acquire in exercise of its powers of eminent domain even money as well as choses in action. Though *Cincinnati v. Louisville R. Co.*¹⁶ is not a direct authority, still it shows that intangible property such as contractual rights can be the subject of acquisition in exercise of the power of eminent domain.

On general principles, thus, the view of Nichols that both money and choses in action can be acquired by the Federal Government in the U.S.A. cannot be brushed aside.

(b) India.

I. In *State of Bihar v. Kameshwar*,¹⁷ the Court was sharply divided on the present question.

While Mahajan,¹⁸ Mukherjea¹⁹ and Chandrasekhara Aiyar,²⁰ JJ. held that under Art. 31 (2) of our Constitution, money and choses in action could not be acquired or taken possession of, Sastri, C.J. and Das, J. held the view that there was nothing in Art. 31 (2) to exclude these items which were property under the ordinary law and were transferable *inter partes*.²²

Mahajan, J.²² relied on Cooley, but held that the power of compulsory acqui-

(12) Cooley, Constitutional Limitations, Vol. II, p. 113.

(13) *Mitchell v. Harmony*, 13 How. 128.

(14) *People v. Brooklyn*, 4 N.Y. 419.

(15) *Nortz v. U. S.*, 294 U.S. 317.

(16) *Cincinnati v. Louisville R. Co.*, (1911) 223 U.S. 390.

(17) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(18) *Ibid.*, pp. 943-4.

(19) *Ibid.*, p. 961.

(20) *Ibid.*, pp. 1015-8.

(21) *Bombay Dyeing Co. v. State of Bombay*, (1958) S.C.R. 1122.

(22) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

sition could not be used for the mere purpose for adding to the revenues of the State.

Mukherjea, J.²² observed—

“.....Taking money under the right of eminent domain when it must be compensated by money afterwards, could be nothing more or less than a forced loan and it is difficult to say that it comes under the head of acquisition or requisitioning of property.....and is embraced within its ordinary connotation.”

Aiyar, J.²² held that though money and choses in action are movable property and would *prima facie* come under the power of compulsory acquisition the power under Art. 31 (2) could not be used to support such acquisition “on the ground that generally speaking there would be no public purpose in their acquisition.” In other words, Aiyar, J. was of the view that mere raising of revenue was not a public purpose sufficient to support the power of eminent domain.

Both Sastri, C.J. and Das, J. confined their attention to choses in action because the point at issue was whether zamindars' right to recover the arrears of rent from the tenants could be acquired by the State under the Bihar Land Reforms Act, 1950. Both of them held that the arrears of rent constituted property and where the Government acquired such right on payment of compensation in bond or on payment of compensation at an amount less than the face-value of the arrears due, there might at best be a question of inadequacy of compensation which in the present case could not be questioned in view of clause (4) of Art. 31 and Art. 31A.

II. The question was next raised in *Bombay Dyeing Co. v. State of Bombay*.²¹ The judgment of the Court was delivered by Venkatarama Aiyar, J. Even though the Court held that Art. 31 (2), as it then stood, was attracted to the impugned legislation, the Court did not propose to decide the question whether money could be taken under Art. 31 (2), but nullified the impugned provision under Art. 19 (5) as being an unreasonable restriction upon the right of property of the employees under Art. 19 (1) (f). Nevertheless, his Lordship was inclined to follow the majority view in *Kameshwar's case*,²² and observed that all that was property within the meaning of Art. 19 (1) (f), may not be 'property' within the purview of Art. 31 (2).

Art. 31 (2) has undergone significant changes since *Kameshwar's case*²² was decided, and it is really interesting to guess what the judgment of the Supreme Court might be if the case were presented to-day. Not only Art. 31A, but also clause (2) itself precludes any inquiry as to the adequacy of compensation. If, therefore, the State 'acquires' a claim to money belonging to a private individual and gives bonds in lieu thereof, no Court can question the adequacy of compensation so that it may be struck down as a forced loan. It may simply be pointed out that there is no prohibition against a forced loan under our Constitution and the only prohibition (under Art. 265) is against taxation without legislation. When, therefore, instead of taxing the subject, the State acquires the property by legislation and on payment of some compensation, however inadequate, there cannot be any violation of any express provision of our Constitution. The question raised is, at most, one of propriety, not of constitutional validity. It is, again, a different question to urge that the power of eminent domain cannot be exercised for the mere purpose of raising revenue.

Property of an alien.

Alien friends would be entitled to the protection of cl. (2) as of cl. (1) of this Article.²³ But the power of confiscating the property of an alien enemy is a necessary incident of sovereignty.²⁴⁻²⁵

(23) Cf. *Silesian-American Corpn. v. Clark*, (1947) 332 U.S. 469.

(24) *Stoehr v. Wallace*, (1921) 255 U.S. 239

(245): *U. S. v. Chemical Foundation*, (1926) 272 U.S. 1 (11).

(25) Stephen's Commentaries, 20th Ed., Vol. I. p. 538.

Whether Art. 31 (2) extends to Government property.

(A) *U.S.A.*—Even though the Fifth Amendment to the American Constitution expressly refers to 'private' property (p. 200, *ante*), the federal power of Eminent Domain has been extended to the public property of a State¹ or of an instrumentality of a State,² without the consent or concurrence of the State. Though there is no express provision in the Constitution enabling Congress to make any law for the acquisition of property, it has been held by the Supreme Court that this can be done in so far as it is necessary to effectively exercise the powers conferred upon it by the Constitution,³ and that the fact that a property is situated in a State is no barrier to the exercise of this implied power.⁴ On this theory, it has been held that if the construction of a reservoir is necessary for the purposes of flood control, in the exercise of the 'commerce power' to do so, Congress may authorise the acquisition of lands in State where the reservoir is to be constructed.⁵ The power of eminent domain has, thus, been considered to be a power ancillary to the powers granted to Congress.⁵⁻⁶ Such power may be exercised in respect of lands in the States, without the consent of the States concerned, because otherwise the powers granted to the Congress would be nugatory:⁶

"The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals.....and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State.....This cannot be".⁸

But though the power of eminent domain has been said to be an attribute of sovereignty in the case of the Federal Government, and it has been held that the powers granted by the Constitution to the Federal Government may be rendered nugatory unless the Federal Government is allowed to exercise this power even against property belonging to the State Government, no such view has been taken in the case of a State Government. The Supreme Court has held that the States have no corresponding power of acquiring federal property without consent of the federal Government,⁷ owing to the *supremacy* of the federal government which is entrusted with a 'national' purpose,⁸—excepting federal land situate in a State, which is not reserved for any of the purposes of the federal government.⁹

Land belonging to a local authority is not regarded as governmental property and may be acquired by the Federal or a State Government in the exercise of its sovereign powers.¹⁰ When property to be acquired is already devoted to public use the usual rule is that it cannot be acquired for another public use unless the intention of the Legislature is express. But the case of acquisition of municipal lands by the Federal or State Government is not subject to this rule, and the 'public' character of the property does not limit the sovereign power of Eminent Domain.

(B) *England*.—Briefly speaking, 'Crown land', that is, land belonging to the Crown in her political capacity (as distinguished from her personal rights in a Duchy) or belonging to a Government department, is exempt from the statutes providing for compulsory acquisition, e.g., S. 83, Town and Country Planning Act, 1947; S. 61, Town and Country Planning Act, 1954.

But land held by local authorities or any other statutory authority is not exempted from such acquisition. The only difference from private lands is that

(1) *Oklahoma v. Atkinson Co.*, (1941) 313 U.S. 508 (534).

(2) *U. S. v. Gettysburg Ry.*, (1896) 160 U.S. 668.

(3) *U. S. v. Darby*, (1940) 312 U.S. 100 (124).

(4) *U. S. v. Wayne County*, (1919) 252 U.S. 574.

(5) *Cherokee v. South Kansas Ry.*, (1889) 135 U.S. 641.

(6) *Kohl v. U.S.*, (1875) 91 U.S. 367.

(7) *Utah Power Co. v. U. S.*, (1917) 243 U.S. 389.

(8) *New Orleans v. U. S.*, (1836) 10 Pet. 662; *U. S. v. Carmack*, (1947) 329 U.S. 230 (242).

(9) *Texas R. Co. v. Kirk*, (1885) 115 U.S. 1.

(10) *U. S. v. Jotham Bixby Co.*, 55F. 2d. 317.

a special Parliamentary procedure is required in the case of compulsory acquisition of such lands, e.g., s. 1 (2) Acquisition of Land (Authorisation) Procedure Act, 1946.

(C) *Australia*.—S. 51 (xxxi) of the Constitution Act specifically empowers the Commonwealth Parliament to make laws for the acquisition of State property in the same way as that of a private person (see p. 202, *ante*). Since there is express provision to this effect, no problem arises there as regards the power of the Commonwealth to acquire State property, but, in the absence of any such provision in favour of a State Government, it is not possible for a State Legislature to make a similar provision for the acquisition of property vested in the Commonwealth.

(D) *Canada*.—The decisions in Canada seem to suggest the powers vested in the Dominion, e.g., with respect to a railway or telephone, would extend to property situate in the Provinces.¹¹⁻¹² But the Dominion Parliament has no power "to transfer to itself property which has, by the British North America Act, been left to the Provinces and not vested in it".¹³

(E) *India*.—The comments of the Author, under the present head, at p. 210 of Vol. II of the previous Edition, was as follows—

"The existing law of land acquisition,—the Land Acquisition Act, 1894, has been held to be inapplicable to land belonging to Government,¹⁴ and s. 2 of the Land Acquisition (Mines) Act, 1952 expressly saves the rights of the Government to any mines or minerals from the operation of the Act.

Cl. (2A) to Art. 31 now makes it clear that Cl. (2) of the Article refers only to cases where the property of a private person is transferred to the State or a public corporation. Hence, no question of governmental property being 'acquired' under Art. 31 (2) arises. When the property vested in one Government is required for the purposes of another, that can be transferred only by agreement as between the two Governments.

A local authority is a statutory body in India and is regarded as an artificial person rather than an authority exercising sovereign power. Hence, the property of a local authority is capable of being compulsorily acquired or requisitioned by the Union or a State Government."

This question has since come up before the Supreme Court in *State of West Bengal v. Union of India*.¹⁵ The Author's view that the property of one Government cannot be acquired by another Government under Art. 31 (2) was accepted by Subba Rao J. in the minority, but the majority took the view that though a State Government cannot acquire the property of the Union, it was competent for Parliament to make a law empowering the Union to acquire property belonging to a State Government.

The majority judgment in the instant case¹⁵ deserves careful consideration by the Court on an appropriate future occasion inasmuch as, having emphasised in other cases¹⁶ that the Constitution must be interpreted according to its expressed intentions and not according to *a priori* notions as to the supposed intentions of its makers, the majority has, it is submitted with respect, exposed itself to the question whether it has adhered to that golden rule of interpretation, in asserting that a 'concept of superiority of the Union over the States'¹⁷ pervades the manifold aspects of the Constitution, including Art. 31 (2), notwithstanding the language used in this latter provision. As Subba Rao J. holds,¹⁸ there is no such implied concept of Union superiority underlying our Constitution,^{18a} as has been evolved

(11) *Canadian Pacific Ry. v. Corporation*, (1899) A.C. 367.

(12) *A. G. for Br. Columbia v. Canadian Pacific Ry.*, (1906) A.C. 204.

(13) *A. G. for Canada v. A. G. for Ontario*, (1898) A.C. 700.

(14) *Deputy Collector v. Aiyavu*, (1911) 9 I.C. 341 (Mad.); *Bhandi v. Ramadhin*, 10

C.W.N. 991; *Moos v. Govt. of Bombay*, A.I.R. 1926 Bom. 47.

(15) *State of W. B. v. Union of India*, A. 1963 S.C. 1241.

(16) Cf. *Gopalan v. State of Madras*, A. 1950 S.C. 27 (42).

(17) *Ibid.*, P. 1259.

(18) *Ibid.*, P. 1278.

(18a) See, further, f.n. 23 at p. 28 if Vol. I.

by the Courts while interpreting the laconic provisions of the American Constitution:

"The Indian Constitution accepts the federal concept and distributes the sovereign powers between the co-ordinate constitutional entities, namely, the Union and the States".

There is no apprehension of projects of national importance being defeated by reason of absence of power in the Union to compulsorily acquire property belonging to a State, for, as Subba Rao J. holds,¹⁸ the object may be achieved by agreement between the two governments. The Union is not lacking in coercive powers conferred by the Constitution itself against a recalcitrant State which would not agree to part with a property which may be needed for the implementation of a national scheme. On the other hand, where the matter is left to agreement between the two units of government set up by the federal Constitution, the difficulties and interests of both parties are likely to be properly analysed and considered than where direct power of compulsory acquisition is placed unilaterally in the hands of one of the units. Some compensation has to be given to a State even if acquisition were possible under Art. 31 (2). Is it not proper and dignified that the quantum of compensation be fixed on a governmental level by negotiation than by the provisions of a statute made by the Union itself?

Apart from these general considerations, the Author still ventures to submit respectfully that the language of Art. 31 (2) would not warrant the conclusion that it authorises the Union to compulsorily acquire the property of a State though a corresponding power is not, apparently, conceded by the majority to the State, on the ground of the supposed 'superiority of the Union'. The majority strongly relies upon the fact that Entry 42 of List III, which relates to the legislative power for acquisition—"Acquisition and requisitioning of property",—uses the word 'property' generally, without making any exception in respect of the property vested in a State. But if that be so, the same argument is available in favour of a State Legislature acquiring property vested in the Union, because of the undeniable fact that Entry 42 belongs to the Concurrent List. Again, it would not be legitimate to interpret Entry 42 as including governmental property if the language of Art. 31 does not warrant such an interpretation. For, as the Supreme Court has repeatedly held,¹⁹ and that even in connection with Art. 31, in particular,²⁰ the Entries in the Legislative lists do not confer legislative power but merely distribute the fields of legislation, the power to legislate being conferred by the substantive provisions of the Constitution laid down in the Articles; at any rate the Entries cannot in any way override or circumscribe the powers conferred by the relevant Articles. In determining the ambit of the legislative power relating to acquisition, therefore, we are to proceed from Art. 31 to Entry 42 and not conversely.

It is patent that while cl. (1) of Art. 31 deals with deprivation of property otherwise than by the process of acquisition, cl. (2), read with cl. (2A), deals with one species of deprivation, namely, deprivation by means of acquisition, and this is clear from the concluding words of cl. (2A),—"notwithstanding that it deprives a person of his property." Now, so far as cl. (1) is concerned, it is beyond question that it aims at the property of an individual or a 'subject' and not the State itself. The words 'save by authority of law' recall the celebrated decision in *Entick v. Carrington*²¹ and fix the object of this clause, namely, that it is intended to protect private property from being invaded by the Executive without the authority of law, which represents the consent of the nation. The object of the provision, in short, is to ensure the Rule of law, with regard to the proprietary rights of an individual and has no relevance to a property owned by a unit of the State itself.

The majority in the West Bengal case²² assumed that the word 'person', which is used in cl. (1), to define the scope of that clause, is absent from cl. (2) and (2A).

(19) *E.G., Calcutta Gas Co. v. State of W. B.*, A. 1962 S.C. 1044 (1049).

(20) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252.

(21) *Entick v. Carrington*, (1765) 19 St. Tr. 1067 (see p. 195, ante).

(22) *State of West Bengal v. Union of India*, A. 1963 S.C. 1241 (1264).

This assumption is, however, incorrect as would appear from the concluding words of cl. (2A), which have been referred to by me earlier. These words, read with cl. (2) to which it is in the nature of an Explanation, make it clear that in order to constitute a valid acquisition within the purview of cl. (2), there must be not only the 'authority of a law', just as in the case falling under cl. (1), but further that the deprivation of the property of the person must be made in one specific mode, namely, by way of *transfer* of the property to the State. Obviously, the other party to the transfer must be the 'person' who is going to be deprived of his property by the law. The word 'person' cannot, in the present context, include a Government, unless we can make the same conclusion with regard to the word 'person' in cl. (1). Whatever be the wider meaning imputable to the word 'person' when used generically, in the context of the word 'State' in cl. (2A), it cannot, again, be understood to include the State itself, in which case, there would be no two parties which are essentially required for a 'transfer'. There is, of course, an apparently stronger argument in the majority judgment,²³ namely, that if the scope of cls. (2) and (2A) be confined to private property and the word 'person' be restricted to a natural person, it would mean that the property of non-sovereign authorities like municipal and local bodies cannot be acquired by legislation at all, for, the definition of a 'State' in Art. 12 of the Constitution includes local and other authorities. That definition, however, may be excluded "if the context otherwise requires". The power of legislating for acquiring property under Art. 31 (2) may be exercised only by the Union or a State Legislature, and the 'transfer' contemplated by cl. (2A) means a transfer to the Governmental unit to which the Legislature is the legislative organ. A local body, itself set up by a statute, cannot make a law providing for acquisition of property. It is, therefore, not illogical to hold that cl. (2A) and the word 'person' used therein, includes the acquisition of the property of a natural person as well as artificial persons such as statutory authorities but not any unit of the State itself which is capable of exercising the legislative power of acquiring property. Above all, if the power of the Union Legislature to acquire property belonging to a State is to be derived from an interpretation of cls. (2) and (2A), there is no reason whatever why the corresponding power to acquire Union property cannot be similarly derived by a State Legislature by interpreting the same provisions.

II. 'Public purpose'.

(1) The expression 'public purpose' is not capable of a precise definition and has no rigid meaning. The definition of the expression is elastic and takes its colour from the *statute* in which it occurs, the concept *varying* with the *time and state of society and its needs*. The point to be determined in each case is whether the acquisition is in the *general interest of the community* as distinguished from the private interest of an individual.²⁴⁻²⁵

No hard and fast definition of a 'public purpose' can, therefore, be laid down. Whatever furthers the general interests of the community¹ as opposed to the particular interests of the individual must be regarded as a public purpose and the expression has to be construed according to the spirit of the times in which the particular legislation is enacted.²⁴ Thus,

"With the onward march of civilisation our notions as to the scope of the general interest of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interest of the community."²⁴

(23) P. 1264.

(24) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (274, 290, 292, 311).

(25) *Somawanti v. State of Punjab*, A. 1963 S.C. 151 (161; 163).

(1) E.g., things conducive to the safety, health or comfort of the public, such as works relating to transportation, education,

recreation, communication, irrigation, drainage, reclamation of waste lands, supply of essential commodities such as water, electricity, housing (where provision for public accommodation is necessary), slum clearance, flood-control embankment, and the like constitute public purposes [Nichols, *Eminent Domain*, 1950, Vol. II, pp. 499-594].

Again, in determining whether a purpose is a public purpose, not only the *present* demands of the public but also the *future* demands as may be fairly anticipated, should be taken into consideration.²

(II) A purpose which is for the benefit of individuals may still be a 'public' purpose, provided such persons are benefited not as individuals but in furtherance of a scheme of public utility.³⁻⁴

"If the use for which land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will ensure to private individuals."⁵

Thus, the acquisition of lands for a society formed for construction of houses for clearing slum areas and housing poor people or in areas where there is an acute shortage of dwelling accommodation,⁶ is a 'public purpose', even though the direct and immediate beneficiaries were the members of the society.⁷ Even the allotment of requisitioned premises to informers of vacancies does not take away from the public purpose behind the requisition if the informers are homeless and are in need of accommodation.⁸ Similarly, the excavation of an irrigation channel is a public purpose even though an adjoining private owner is immediately benefited by it.⁹

(III) The test of a public purpose is whether it is *useful to the public* rather than its *use by the public*.¹⁰ If the purpose for which the acquisition is made results in benefit or advantage to the public, it is a 'public' purpose, though the acquisition may be in favour of a private corporation or of individuals. It is not essential that the entire community or even any considerable portion thereof¹¹ should directly enjoy or participate in the improvement,¹² provided the object of acquisition advances a public purpose.

(IV) If the object be a 'public purpose', it does not cease to be so merely because the compensation payable for the acquisition is to be paid not from the public funds but from the funds of a private society.¹³

(V) Implementation of a Directive principle of State policy is a public purpose,¹⁴ but not that of a mere policy of the party in power.¹⁵

(VI) A public purpose is either a purpose of the Union or of a State or any other public purpose.¹⁶ Cases where the State acquires or requisitions property for utilitarian institutions or welfare schemes, fall within the third category. An undertaking may possibly have all the three aspects and may serve the purpose of a State, the purpose of the Union and a general public purpose.¹⁶

A. The following are some purposes which have been held to be public purposes—

(i) The housing of a Minister;¹⁷ public officer;¹⁸ an employee of the State Transport Corporation¹⁹ or even of an industrial company;²⁰ a member of a foreign Consulate;²¹ poor people living in a slum area;²² or the general public in a con-

(2) *Rindge Co. v. Los Angeles*, (1923) 262 U.S. 700.

(3) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (290, 311); (1952) S.C.R. 880.

(4) The position in the U.S.A. is similar. Thus, the development of the national resources of the State or irrigation through private agencies, has been held to be a public purpose: *Clark v. Nash*, (1905) 198 U.S. 361; *Strickley v. Highland Mining Co.*, 200 U.S. 527; *Union Lime Co. v. Chicago Ry.*, (1914) 233 U.S. 211.

(5) Nichols, *Eminent Domain*, 1950, Vol. II. p. 447.

(6) *Bhagwat v. Union of India*, A. 1959 Punj. 544 (551).

(7) Cf. *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777; (1952-4) 2 C.C. 436 (438).

(8) *State of Bombay v. Nanji*, (1956) S.C.R. 18.

(9) *Gundachar v. State of Madras*, A. 1953 Mad. 537.

(10) *Khandewal v. State of U. P.*, A. 1955 All. 12.

(11) *Barkaya v. State of Bombay*, A. 1960 S.C. 1203 (1206).

(12) *Thambiran v. State of Madras*, A. 1952 Mad. 756.

(13) *State of Bombay v. Nanji*, (1956) S.C.R. 18 (27).

(14) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889; (1952-54) 2 C.C. 353 (361, 362, 379).

(15) *Namazi v. Dy. Commr.*, A. 1951 Mad. 930.

(16) *State of Bombay v. Gulsan*, A. 1955 S.C. 810.

(17) *Sudhindra v. Sailendra*, (1950) 87 C.L.J. 140 (142).

(18) *Manohar v. Desai*, A. 1951 Nag. 33 (36); *Abdul Hamid v. State of W. B.*, (1952) 89 C.L.J. 268.

dition of acute shortage of accommodation, e.g., owing to the influx of refugees ;^{18a} or the members of a co-operative society.¹⁹

(ii) Doing away with unemployment amongst a section of the community.²⁰

(iii) A scheme of land reforms, even though it may ultimately benefit a class of tenants.²¹⁻²²

(iv) Land reform by nationalising the means of production and elimination of the concentration of the means of production in the hands of a few individuals ;² elimination of intermediaries between the Government and the tillers of the soil and vesting the management of cultivation in a village body.²²

(v) Where a company is engaged in an industry or work which is for a public purpose (e.g., the building of a textile machinery part,²³ the construction of a building which serves that public purpose in which the company is engaged²⁴ or works like a hospital, a public reading room or an educational institution open to the public. ²⁴

B. On the other hand, it has been held that the following purposes are not 'public purposes':

(a) The mere purpose of raising revenue.²¹

"The principle of compulsory acquisition of property is founded on the superior claims of the whole community over an individual citizen but is applicable only in those cases where private property is wanted for public use, or demanded by the *public welfare* and no instance is known in which it has been taken for the mere purpose of raising a revenue by sale or otherwise and the exercise of such a power is utterly destructive of individual right."²⁵

Illustration.

S. 4 (b) of the Bihar Land Reforms Act, 1950 was invalidated on this ground. It provided that all outstanding arrears of rent, which were due to the proprietors and tenure-holders at the date of acquisition of the estate, should also vest in the estate, though the liability of the zemindars for payment of arrears of revenue and cases should remain. *Held*, it had no connection with land reform. Its only object was to raise revenue to pay compensation to the zemindars for acquisition of their estate. It was obviously a colourable legislation.¹

(b) Where no benefit to the public is involved, the State cannot acquire private property (even on payment of compensation) for the private interests of some individual or individuals. There is no power in the Sovereign to acquire private property *in order to give it to private persons*.²⁵

"As between individuals, no necessity, however great; no exigency, however imminent; no improvement, however valuable; no refusal, however unneighbourly; no obstinacy, however unreasonable; no offers of compensation, however extravagant; can compel or require any man to part with an inch of his estate."²

Thus, the requisitioning of the property of one refugee for the benefit of another is not, *prima facie*, a public purpose.³

But there is nothing to debar the Government from transferring the land acquired to a company or other party, after it has been acquired for a public purpose and vested in the Government,⁴ except where the exercise of the power of acquisition by the State can be shown to have been colourable.⁵

(c) Nothing can be a public purpose which is unlawful or unconstitutional, e.g., a purpose which offends against Art. 15 (1).⁶

(18a) *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777; (1952-54) 2 C.C. 436 (438).

(19) *Tej Ram v. Union of India*, A. 1959 Punj. 478.

(20) *Dwarkanadas v. Sholapur Spinning Co.*, I.L.R. (1951) Bom. 473 (490).

(21) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (311-2).

(22) *Visheshwar v. State of M. P.*, (1952) S.C.R. 1020, Mahajan J.

(23) *Arora v. State of U. P.*, (II), A. 1964 S.C. 1231 (1238).

(24) *Arora v. State of U. P.*, A. 1962 S.C. 764.

(25) Cooley, *Constitutional Limitations*, Vol. II, p. 113.

(1) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(2) Willoughby, *Constitutional Law*, Vol. II, p. 795.

(3) *Prov. of Bombay v. Khusaldas*, (1950) S.C.R. 621.

(4) *Mangalbai v. State of Gujarat*, A. 1964 Guj. 82 (83).

(5) *Somawanti v. State of Punjab*, A. 1963 S.C. 151.

(6) *Jagwant v. State of Bombay*, (1952) 54 Bom. L.R. 678.

Jurisdiction of Courts to determine whether a purpose is a 'public purpose'.

(A) *U.S.A.*—What is a 'public use' is a justiciable question.⁷ But the rule followed by the Court is that when the Legislature has declared a purpose to be public, its judgment will be upheld by the Court unless it is palpably without foundation.⁸

In *Block v. Hirsch*,⁹ the Supreme Court observed—

"No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. But a declaration by a Legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect."

The principle is thus stated by *Weaver*.¹⁰

"What constitutes a public use is largely a question for the Legislature and the Courts will not interfere except to inquire whether the Legislature could reasonably have considered the use a public one. Generally, the phrase is not limited to business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. It may include not only the present demands of the public, but also those which may be fairly anticipated in the future. The Courts, however, require that the use shall be fixed and definite. It must be one in which the public actually has an interest, and the terms and manners of enjoyment must be within the control of the State."

As the Supreme Court observed in *Berman v. Parker*¹¹—

"The concept of public welfare is broad and inconclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the Legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled".¹²

The decision of the Legislature "is entitled to deference until it is shown to involve an impossibility,"¹² or to be 'capricious or arbitrary'.¹³

(B) India.

I. *Prior to 27-4-55.*—Prior to the amendment of Cl. (2) by the **Constitution (Fourth Amendment) Act, 1955**, the language of the Clause was not quite clear, and the Court had to infer by implication, from the principles of 'Eminent Domain', that the existence of a 'public purpose' was a condition precedent to compulsory acquisition of private property, and that, accordingly, the question was justiciable.¹⁴

II. *After 27-4-55.*—The words 'save for a public purpose', inserted by the Amendment Act, makes public purpose an express condition of compulsory acquisition or requisition and no doubt is left that when it is found that there was no public purpose to support a law of compulsory acquisition, the Court is bound to declare the law unconstitutional.¹⁴⁻¹⁵

Any law to which Art. 31 (2) is attracted, would be unconstitutional if it seeks to make the Executive determination of the existence of a public purpose 'final' and non-justiciable.¹⁵⁻¹⁶

Of course, when the Legislature declares that there is a public purpose, the Courts should respect its words,^{16a} and in examining whether there is a public purpose behind a scheme for acquisition, the scheme should be examined as a whole instead of picking out particular items to say that they are not supported by any public purpose.¹⁷

(7) *Kohl v. U. S.*, (1875) 91 U.S. 367.

(8) *U. S. v. Gettysburg Ry.*, (1896) 160 U.S. 668.

(9) *Block v. Hirsch*, (1921) 256 U.S. 135.

(10) *Weaver*, Constitutional Law, p. 546.

(11) *Berman v. Parker*, (1952) 348 U.S. 26.

(12) *City of Cincinnati v. Vester*, (1930) 281 U.S. 439; *Old Dominion Co. v. U. S.*, (1925) 269 U.S. 55.

(13) *Vide* C3, Vol. I, pp. 353-4.

(14) *State of Bihar v. Kameshwar*, A. 1952

S.C. 252 (273, 275, 279, 288, 295); *State of Bombay v. Nanji*, (1956) S.C.R. 18 (25).

(15) *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

(16) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252, p. 291, *Das J.*

(16a) *Somwanti v. State of Punjab*, A. 1963 S.C. 151 (160).

(17) *Cf. Arora v. State of U. P.*, A. 1962 S.C. 764 (774).

It is unnecessary to state in express terms in the statute¹⁸ itself or even in the notification for acquisition¹⁹ the precise purpose for which property is being taken, provided from the whole tenor and intendment of the Act it could be gathered that the property was being acquired either for purposes of the State or for the purposes of the public and that the intention was to benefit the community at large.²⁰ It may be established from the proved facts.¹⁹

Once it is held that public purpose exists, it is not competent for the Court to go into the further question, namely, whether that public purpose could be secured by a compulsory acquisition or requisition or otherwise. In other words, the necessity for the acquisition or requisition is not a justiciable question.²¹

Put otherwise, Government is the best judge of the need for the land;²² whether that need is a public purpose or not remains justiciable.²³

Since 'public purpose' is a condition precedent to the exercise of the power of compulsory acquisition by the State, it is clear that the State has no power to compulsorily acquire or requisition private property for private purposes, that is to say, to take the property of A to be given to B, where there is no scheme of public utility involved.²⁴ It may, however, be valid where a public purpose is involved, such as agrarian reform.²⁴

Whether property acquired for one purpose may be used for another purpose.

Since it has been held in India that it is not necessary to state in the statute itself the specific purpose for which land is being acquired, land may be acquired for any public purpose generally, and in such cases the problem arising from the diversion of the land to use for some other purpose would not obviously arise.

If, however, the statute specifies a particular purpose and a land is acquired for that purpose (e.g., to make sewage works), the property cannot, after acquisition, be used for an entirely different purpose which is inconsistent with the authorised purpose (e.g., for the establishment of a hospital),²⁵⁻⁴ because that would amount to an abuse of statutory power,² if not *ultra vires* action.³ In *Galloway v. London Corpn.*,⁴ the House of Lords observed—

"When persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise those powers for any collateral object; that is, for purposes except those for which the Legislature has invested them with extraordinary powers".⁴

In such cases, in order to determine whether the power has been used for the purpose for which it had been granted, the Court inquires into the real state of affairs as distinguished from the ostensible or colourable purpose.⁵

There is an exception to this general rule, namely, that where after acquisition, the property is not immediately required for the purpose for which it was acquired, it can be temporarily used for another purpose, provided—(a) such other purpose is not inconsistent with the purpose for which the property was acquired; (b) the property is so kept that it may be ultimately used for the purpose for which it was acquired.⁶

(18) *Ibid.*, p. 274, Mahajan J.

(19) *Barkya v. State of Bombay*, A. 1960 S.C. 1203 (1208).

(20) *State of Bombay v. Bhanji*, (1955) 1 S.C.R. 777.

(21) *Prov. of Bombay v. Khusaldas*, A. 1950 S.C. 222 (229).

(22) *Aurora v. State of U. P.*, A. 1958 All. 872 (877-8).

(23) *Sachindra v. State of W. B.*, A. 1958 Cal. 510.

(24) *Kochunni v. State of Madras (II)*, A. 1960 S.C. 1080.

(25) *A. G. v. Hanwell Urban Council* (1900) 2 Ch. 377.

(1) *Luchmeshwar v. Darbhanga Municipality*, (1891) 18 Cal. 99 (P.C.).

(2) *London Properties v. Minister of Housing*, (1961) 1 All E.R. 610 (617).

(3) *Fosler v. London, Chatham & Dover R. Co.*, (1895) 1 Q.B. 711 (C.A.).

(4) *Galloway v. London Corpn.*, (1866) L.R. 1 H.L. 34 (43).

(5) *Grice v. Dudley Corpn.*, (1957) 2 All E.R. 673 (681).

(6) *A. G. v. Teddington Urban Council*, (1898) 1 Ch. 66.

In short, except where the power of acquisition has been exercised for a collateral purpose,⁷ a diversion of the property to a different use, after acquisition would not, *per se*, be unconstitutional.

The question of necessity.

The question as to the existence of a public purpose must, however, be distinguished from the question as to the *necessity* or *expediency* of resorting to the power of eminent domain in a particular case or class of cases. This latter question lies within the discretion of the Legislature or its delegates and is not a proper subject for judicial review.⁸ As held in the U.S.A.,⁹ provided there is a public purpose, the *necessity* for the taking in a particular case is for the Legislature, not the Courts.

The position in India is similar, for, the constitutional requirement in Art. 31 (2) relates only to 'public purpose' and 'compensation'.

Not only is the question as to the necessity for the taking of any particular property,¹⁰ but also that of the proper time for doing it or the extent of property to be acquired,¹¹ or whether private property should at all be acquired for a particular public purpose¹¹ in the contemplation of the Legislature, are questions for legislative determination.

III. Obligation to give compensation for acquisition or requisitioning.

1. The obligation for payment of just compensation is a necessary incident of the power of compulsory acquisition of property both under the doctrine of the English Common Law as well as under the Continental doctrine of *Eminent Domain* subsequently adopted in America. The Constitution of India has raised this obligation to pay compensation for the compulsory acquisition of property to the status of a fundamental right and declared that a law that does not make provision for payment of any compensation shall be void.^{11a}

Illustration.

A law which leaves it entirely to the discretion of the Government to requisition the stocks (say, of foodgrains) at *any rate* fixed by it at its discretion, offends against Art. 31 (2) as it fails to specify the principles on which compensation is to be paid.¹²

2. But by subsequent amendments, the above fundamental right has been hemmed in by certain limitations:

Firstly, while 'compensation' literally means a 'full and fair equivalent of the property taken',¹³ cl. (2), as amended by the Constitution (Fourth Amendment) Act, provides that inadequacy of the compensation provided for by the Legislature shall not be called into question in a Court of law. Hence, an individual shall have no legal remedy even though he is not paid the full monetary equivalent of the property taken from him.¹⁴ He can obtain relief from the Courts, only if no compensation is provided for at all, either literally or in effect^{11a, 15a} (see below).

Secondly, the application of cl. (2) is altogether excluded in the cases coming under Arts. 31 (4)-(6); 31A, 31B, so that in these cases, the Courts shall not be entitled to interfere even though no compensation at all has been provided for (see *post*).

(7) *Somawanti v. State of Punjab*, A. 1963 S.C. 151.

(8) Cf. *Backus v. St. Union Depot Co.*, (1898) 169 U.S. 557; *Bragg v. Weaver*, (1919) 251 U.S. (59).

(9) *Alma Motor Co. v. Tinken-Detroit Co.*, (1944) 144 F. 2d. 714.

(10) *Aurora v. State of U. P.*, A. 1958 All. 872 (877-8).

(11) *Nichols, Eminent Domain*, 1950, Vol. I, pp. 374. 380.

(11a) *Vajravelu v. Special Dy. Collector*,

(1964) S.C. [W. P. 144/63]; *Jeejeebhoy v. Asstt. Collector*, (1964) S.C. [C.A. 775/62].

(12) *State of Rajasthan v. Nathmal*, (1954) S.C.R. 982.

(13) Cf. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

(14) *Asst. Collector v. Jamnadas*, A. 1960 Bom. 35 (40).

(15) *Burakur Coal Co. v. Union of India*, A. 1961 S.C. 954.

(15a) *State of M. P. v. Champalal*, A. 1965 S.C. 124 (131).

'Provides for compensation'.

(A) In the U.S.A., it has been held that 'compensation' must be paid in money and that the owner cannot be asked to take either bonds or other lands in exchange,^{15b} unless, of course, he himself agrees.

(B) In India, it seems to be settled¹⁶ that compensation, under Art. 31 (2), may be paid in bonds or in kind; and that, if in money, it may be paid in instalments.¹⁷

The reason was thus explained by the Patna High Court:¹⁸

Since the present clause of the Constitution has omitted the words 'the payment of' which occurred in the Government of India Act, 1935 and also added the word 'given' at the end of the clause, compensation may now be given not only in money but also in bonds or in kind, say, in land.¹⁹ For instance, when large numbers of individuals are to be expropriated under a scheme of land reform, it may not be possible to compensate them in money. Similarly, when large numbers of cultivators are to be expropriated in order that land may be taken for such a public purpose as the construction of a dam, it may be in their own interest to receive land elsewhere than money.²⁰ Without discussing the reasons, the Supreme Court,¹⁶ on appeal, upheld the validity of the provision in the impugned statute¹⁹ which authorised payment in bonds.

But to exempt the owner from payment of Government revenue while he is deprived of the possession of his property, offers him no compensation for the deprivation.^{13a}

'Or specifies the principle'.

This expression enables the Legislature either to make the acquisition by specific legislation for a specific purpose, itself fixing the amount of compensation to be paid, or to make a general legislation conferring power on local or other subordinate bodies,—itself providing only the principles according to which compensation is to be determined and given by such subordinate bodies.

The task of determining the principles cannot be delegated to subordinate authorities.²⁰

Illustration.

A law which leaves it entirely to the discretion of the Government to requisition the stocks (say, of foodgrains) at any rate fixed by it at its discretion, offends against Art. 31 (2) as it fails to specify the principles on which compensation is to be paid.²⁰

But, where the Legislature had laid down the principles for assessment of compensation and provided that compensation was payable in forty equal instalments, partly in cash and partly in bonds and then authorised the State Government to determine the 'proportion in which compensation shall be payable in cash and in bonds', the Supreme Court upheld the legislation,²¹ on the ground that the Legislature had applied its mind to the form and manner in which compensation was to be paid but simply left the proportion between cash and bonds to be determined by the Government according to its financial resources in regard to which the Government alone could have special means of knowledge.²¹

'Manner in which compensation is to be determined and given'.—A law coming within the purview of Art. 31 (2) should not only fix the amount of compensation or specify the principles relating thereto but must also specify the manner in which the compensation is to be determined and given.

Unless there is a fraud on this power, the legislative provision on this matter is not liable to be challenged.²¹ Thus, the Legislature may validly provide that—

(15b) Nichols, Eminent Domain, 1950, Vol. III, pp. 11-12; Corpus Juris Secundum, Vol. 29, pp. 1089-1090.

(16) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (912, 954, 1006).

(17) *Gujapati v. State of Orissa*, (1954) S.C.R. 1.

(18) *Kameshwar v. State of Bihar*, A. 1951 Pat. 91 (95).

(19) S. 32 (2) of the Bihar Land Reforms Act (XXX of 1950).

(20) *State of Rajasthan v. Nathmal*, (1954) S.C.R. (982).

(21) *Jagaveera v. State of Madras*, A. 1954 S.C. 257 (258).

The compensation shall be payable in instalments, together with interest,²² or partly in cash and partly in bonds.²³

'Compensation'.

The Dictionary meaning of compensation is 'equivalent' [Murray's Oxford Dictionary]. Compensation, thus, means the value in money of the property to the owner at the time when he is called upon to relinquish it, so that by such compensation, the owner may be put in as good a position pecuniarily as he would have been if his property had not been taken.²⁴ It is the price which must be paid to the owner to compensate him for his loss of the property.

"The owner receives for the lands he gives up their equivalent, that is that which they were worth to him in money. His property is, therefore, not diminished in amount but to that extent it is compulsorily changed in form."²⁵

Compensation is meant to alleviate the loss of the property. Exemption from payment of the Government revenue during the period the owner is kept out of possession is, accordingly, no compensation.¹

Justiciability of the amount of compensation fixed by the Legislature.

(A) U.S.A.—(I) *Federal field*.—It has already been noticed (pp. 196-200) that the Fifth Amendment to the American Constitution requires 'just compensation' to be paid whenever private property is taken for public use, and that the determination of just compensation by the Legislature or the Executive is not final but is justiciable.² It has, further, been held that the word 'compensation' means 'equivalent of the property' and it would have been the duty of the Court to see that the expropriated owner got the equivalent of his property even if the adjective 'just' were omitted from the constitutional provision:

"The noun 'compensation', standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'.³

*Nichols*²⁴ on Eminent Domain is also to the same effect—

"The adjective 'just' only emphasises what would be true if omitted,—namely, that the compensation should be the equivalent of the property. It has been said in this regard that it is difficult to imagine an 'unjust compensation' . . ."²⁴

No question arises where the parties are able to come to an agreement as to the amount of compensation payable. In such a case, whatever is agreed upon will be payable, if the agreement is otherwise valid, and no constitutional question as to the fairness or adequacy of the compensation would arise.⁴⁻⁵

In the absence of agreement, it is for the Court to determine whether the compensation offered by the statute is just or fair, according to the circumstances of each case.

The following general propositions may, however, be formulated:

(i) Market value⁶ is the ordinary measure of compensation for acquisition or permanent taking⁷ (where the property has a determinable market value)⁸ while rental value is the measure for requisition or temporary taking.⁹

(22) *Gajapati v. State of Orissa*, (1954) S.C.R. 1.

(23) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(24) *Nichols*, Eminent Domain, Vol. III, p. 29.

(25) *In re Arbitration*, (1909) 1 K.B. 16 (29).

(1) *State of M.P. v. Champalal*, A. 1965 S.C. 124 (131).

(2) *Hurley v. Kincaid*, (1932) 285 U.S. 95.

(3) *Monongahela v. U. S.*, (1893) 148 U.S. 312.

(4) *Danforth v. U. S.*, (1939) 308 U.S. 271.

(5) *Albrecht v. U. S.*, (1947) 329 U.S. 599 (603).

(6) As to the meaning of 'market value', see *below*.

(7) *U. S. v. Commodities Trading Corp.*, (1950) 339 U.S. 121 (123).

(8) *U. S. v. Powelson*, (1943) 319 U.S. 266 (275).

(9) *Kimball Laundry Co. v. U. S.*, (1949) 338 U.S. 1 (7).

(ii) It is the owner's loss, not the taker's gain, which should be the measure of compensation.¹⁰

(iii) When part only of a parcel of land is taken, compensation must also be paid for any incidental injury to the part not taken,¹¹⁻¹² but not for injury to separate tracts.¹³

"When part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account."¹¹⁻¹²

On the other hand, if the taking of a part has in fact benefited the owner in respect of the rest of his property, such benefit may be set off against the value of the land condemned,¹⁴ but no account should be taken of the benefits which the owner may receive, along with other members of the public, from the public use to which the acquired property is appropriated.¹⁴

(iv) When the property which is taken possession of was being used for a profession or business, loss of occupation or profits must be taken into account in assessing compensation.¹⁵⁻¹⁶

Again, in determining the value of a business, "the goodwill and earning power due to effective organisation are often more important than tangible property". Compensation must, accordingly, be paid for these, "at least under some circumstances".¹⁶⁻¹⁷

(v) When Government assumes control over the management of a business or enterprise, Government must pay for the extra losses which are occasioned by Government operations,¹⁸ or supervision.

In the ordinary case of temporary possession of a business enterprise by the Government and diversion of the property to new uses, the reasonable value of the use of the property represents fair compensation.¹⁶ But when Government also takes upon the operation and management of a business or factory, there is no reason why the owner who has lost control over the business should bear the losses which are due to operation by the Government.¹⁸ If, however, the losses are such that the owner would have in any case suffered, without Government taking, he cannot recover compensation from the State for such losses.¹⁹

(vi) Since compensation denotes the full value of the property at the time of 'taking', where the payment takes place subsequent to the taking, reasonable interest must be paid on the amount from the date of 'taking' to that payment in order "to produce the full equivalent of that value paid contemporaneously with the taking".²⁰

(vii) The right to compensation must also be unconditional.²¹

(II) *State field*.—The Fifth Amendment, which requires 'just compensation', does not apply to the States and there is no corresponding limitation in the federal Constitution applicable to the States. In the case of the States, therefore, the only condition upon the power of 'Eminent Domain' is that of 'Due Process' in the Fourteenth Amendment.

(10) *U. S. v. Powelson*, (1943) 319 U.S. 266 (281).

(11) *Bauman v. Ross*, (1897) 167 U.S. 548 (574).

(12) *U. S. v. Dickinson*, (1946) 331 U.S. 745 (750).

(13) *Sharp v. U. S.*, (1903) 191 U.S. 341.

(14) *Monongahela Co. v. U. S.*, (1893) 148

(15) *Minister of State v. Dalziel*, (1944) 68 C.L.R. 261.

(16) *Kimball Laundry Co. v. U. S.*, (1949) 338 U.S. 1.

(17) *Galveston Electric Co. v. Galveston*, (1923) 258 U.S. 388 (396).

(18) *U. S. v. Pewee Coal Co.*, (1951) 341 U.S. 114.

(19) *Marion & Rye Co. v. U. S.*, (1925) 270 U.S. 280.

(20) *U. S. v. Klamath Indians*, (1938) 304 U.S. 119 (123). [But, where the parties settle compensation by agreement even though payment of the contract price is delayed, there is no obligation upon Government to pay 'interest' unless expressly stipulated in the contract (*Albrecht v. U. S.*, (1947) 329 U.S. (599)).]

(21) *Nichols on Eminent Domain*, 1950, Vol. III, pp. 11-12,

While, therefore, in the case of a federal taking the Court insists on a full market value, in the case of a State acquisition the standard applied is one of *substantial* compensation, determined by a proper tribunal:

"All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution".²²

(B) *Australia*.—In the Australian Constitution, the expression 'just compensation' which occurs in the American Constitution, is absent, but s. 51 (xxxix) [see p. 202, *ante*] provides that Parliament has the power of 'acquisition . . . on just terms'. Hence, any law which provides for acquisition on terms which are not 'just' must be held to be void by the Courts.²³

But a distinction has been sought to be drawn in some cases on the ground that S. 51 (xxxix) is a provision conferring legislative power and not a constitutional prohibition like the Fifth Amendment to the American Constitution. Thus, it has been said that—

"Under the Australian Constitution the terms of acquisition are, *within reason*, matters for legislative judgment and discretion."²⁴

The test for the validity of a law passed under s. 51 (xxxix), therefore is—

"whether the provisions made might *reasonably* be regarded as just."²⁵

The Courts do not, accordingly, readily interfere with the terms fixed by the Legislature.¹

(C) *India*.

(I) *Prior to 27-4-55*.

Prior to the amendment of cl. (2) by the Constitution (Fourth Amendment) Act, 1955, the adequacy of compensation was justiciable.²

Though in Art. 31 (2) or Entry 42 of List III of *our* Constitution the word 'compensation' was not qualified by the word 'just', it was nevertheless held by the Supreme Court that the very word 'compensation', according to its Dictionary meaning (p. 217, *ante*, signifies a '*full and fair money equivalent*' of the property taken and any law which denies this must be held to be void.³

"While it is true that the Legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be *compensation*, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what *principles* should guide the determination of the amount payable [Entry 42, List III]. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court."⁴

(i) The normal measure of compensation is the price which the property would have fetched at the time of the taking in the 'free, open market'.

'Market value' is "the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired".⁴

(a) *Value to the seller*: This does not refer to any sentimental value that the land may have for the vendor, but the value which the vendor, willing to sell at

(22) *Backus v. Fort Street Union Co.*, (1898) 169 U.S. 557.

(23) *Johnston Co. v. Commonwealth*, (1946) 72 C.L.R. 269; *Australian Marketing Board v. Tonking*, (1942) 66 C.L.R. 77.

(24) *Minister of State v. Dalziel*, (1944) 68 C.L.R. 261 (291).

(25) *Grace Bros. v. Commonwealth*, (1946) 72 C.L.R. 269 (291).

(1) *Andrews v. Howell*, (1942) 65 C.L.R. 255.

(2) *State of M. P. v. Champalal*, A. 1965 S.C. 124 (131).

(3) *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558 (563).

(4) *Fraser v. City of Fraserville*, (1917) A.C. 187 (194).

the market price, might reasonably obtain from a willing purchaser.⁵ In the words of the *American Supreme Court*, market value is—

“what a willing buyer would pay in cash to a willing seller.”⁶

There is no market for land as there is a market for goods, but the market price of land can be measured by a consideration of the prices that have been obtained in the past for land of *similar quality* and in *similar positions*.

(b) *With all its possibilities*: The value is to be determined not merely by reference to the use to which it is being put at the time at which its value has to be determined but also by reference to the uses to which it is *reasonably capable* of being put in the future.⁷ Thus in the case of land which is lying waste or is being used for agricultural purposes, if it is capable of being used for building purposes in the immediate or reasonably near future, the possibility of its being used for building purposes would also have to be taken into account, by having the evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes.⁸

Even where the land acquired is worthless in itself at the time of the acquisition, but it has a *potentiality* of being used⁹ (e.g., for the establishment of salt works, owing to vicinity to the sea),¹⁰ the market value of such ‘potentiality’ must be paid to the owner as compensation.¹⁰

But mere ‘possible or imaginary uses, or the speculative schemes of the proprietor’, are to be excluded.¹¹ No compensation is payable for the unique need of the owner for the property or his idiosyncratic attachment to it.¹²

Similarly, where the Government lays out a project involving the taking of lands, no increment of value arising by virtue of the fact that a particular tract is clearly or probably within the project, is to be added to the compensation.¹³ In other words, though the ‘future possibilities’ of the land acquired are to be taken into consideration, the advantages due to the carrying out of the very scheme for the purposes of which the property was acquired, are to be excluded.¹⁴ Again, in determining compensation, no account is to be taken of the enhancement of value due to the special or extraordinary demand of the Government for the property in question.¹⁵

(c) The value of the land shall be taken to be the amount which the land, if sold in the *open market* by a *willing seller*, might be expected to realise.

Though this proposition is taken from s. 2 of the English Acquisition of Land (Assessment of Compensation) Act, 1919, it embodies a principle of general application.

Value in the open market¹⁶ means ‘such amount as the land might be expected to realise if offered under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale’.

A willing seller is one who is a free agent and cannot be required by virtue of compulsory powers, to sell. ‘A sale by a willing seller is distinguished from a sale which is made by reason of compulsory powers, where the vendor frequently obtains an addition to the price by reason of being under compulsion to sell.’

‘Expected’ refers to the expectations ‘of properly qualified persons who have taken pains to inform themselves of all the particulars ascertainable about the property, and its capabilities, the demand for it, and the likely buyers’.

(5) *Vyricherla v. Revenue Officer*, (1939) 66 L.A. 104.

(6) *U. S. v. Miller*, (1943) 317 U.S. 369 (374).

(7) *McCandless v. U. S.*, (1936) 298 U.S. 342.

(8) *Atmaram v. Collector, Nagpur*, (1928) 33 C.W.N. 458 P.C.

(9) *Cedars Rapids Manufacturing Co. v. Lacoste*, (1914) A.C. 569.

(10) *Vallabhdas v. Collector*, (1928) 33 C.W.N. 549 P.C.

(11) *Chicago R. Co. v. Chicago*, (1897) 166 U.S. 226 (250).

(12) *Omnia Commercial Co. v. U. S.*, (1923) 261 U.S. 508 (509).

(13) *U. S. v. Miller*, (1943) 317 U.S. 375 (376-9).

(14) *Atmaram v. Collector, Nagpur*, (1928) 33 C.W.N. 458 (460) P.C.

(15) *U. S. v. Cors*, (1948) 337 U.S. 325 (333).

(16) *Olson v. U. S.*, (1934) 292 U.S. 246 (255).

(ii) But there must be a market to make the criterion available. The problem arises when the market does not exist or is not 'free', e.g., during a regime of price control during war or other abnormal conditions.

In several cases, the American Supreme Court has held that in such cases, the *ceiling price*, fixed by the Government, should be accepted as the measure of compensation, if *generally* fair and equitable.¹⁷ It has, however, been acknowledged that there would be room for special exceptions if a particular dealer could establish that the ceiling price would inflict unfair hardship on him,¹⁸ but no tests for determining such hardship were laid down. Perhaps a ceiling price imposed for the sole purpose of measuring compensation in a particular requisition would be subject to attack.¹⁹ The Supreme Court has, in another case²⁰ upheld the validity of a statute which provided that just compensation for requisitioned ships should exclude "any enhancement of value resulting from the Government's special or extraordinary demand for the property". These cases thus tend to assert that the market value, arrived at by unfettered bargaining, is not the measure of just compensation, when the market itself is abnormal, owing to extraordinary circumstances.

In the words of Black J.—

"Courts have never attempted to prescribe a rigid rule for determining what is just compensation *under all circumstances and in all cases*. Fair market rate has normally been accepted as the just standard. But when market value has been too difficult to find or when its application would result in manifest injustice to the owner or public, Courts have fashioned and applied *other standards*."²¹

The foregoing American view was followed by Bose J. (as he then was) of the Calcutta High Court, in *Govinda v. Dinesh*,²¹ a case of acquisition of paddy at a controlled rate, in these words—

"There can be no doubt that the economic conditions prevailing in the country and the food situation of the country require that ceiling prices fixed by the Government should be treated or accepted as the measure of just compensation. Just compensation cannot mean that the Government must compensate the owner of the paddy for *potential* profits lost because of economic distress in the country and consequent price control."²¹

(iii) The compensation that is payable is the money equivalent of the property *at the time when the property is acquired*²² so as to restore to the owner the actual value of the property in its actual condition at the time of expropriation.²³ It is not material whether he had purchased the property at a price higher or lower than the market value on the date of taking.²⁴

In certain circumstances, the fixing of an *anterior date* for the ascertainment of value may not be unconstitutional, e.g., when the proposed scheme of acquisition *becomes known* before it is launched and prices rise sharply in anticipation of the benefits to be derived under it.²⁵⁻¹ The reason is that the owner is entitled to the value of the property with all its possibilities, but he cannot claim the advantages which are due to the carrying out of the scheme itself for which the property is compulsorily acquired.²²

But to provide, that whenever any land is acquired under the Act, the expropriated owner will get the market value of the land as it stood in a particular year (e.g., 1946) is arbitrary and is not a compliance with the constitutional requirement to provide the principles on which 'compensation' is to be given. Any principle for determining compensation which denies to the owner the increment

(17) *U. S. v. Felin*, (1948) 334 U.S. 624 (629, 631, 641).

(18) *U. S. v. Commodities Trading Corp.*, (1950) 339 U.S. 121; (1950) *Harvard Law Review*, 139.

(19) Cf. (1951) *Harvard Law Review*, 1103 (1110).

(20) *U. S. v. Cors*, (1949) 337 U.S. 325 (333).

(21) *Govinda v. Dinesh*, A. 1952 Cal. 100.

(22) *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

(23) *Fraser v. City of Fraserville*, (1917) A.C. 187 (194).

(24) *U. S. v. Commodities Corp.*, (1950) 339 U.S. 121 (130).

(25) *Nichols on Eminent Domain*, 1950, Vol. III, pp. 11-12.

(1) Re arbitration between Lucas and Chesterfield Board, (1909) 1 K.B. 16 (28).

in value that may take place between 1946 and the subsequent date of acquisition cannot result in the ascertainment of the true equivalent of the land appropriated.²

On the same principle, a law which denies compensation to the owner of the land for improvements effected after a specified date, has been held to violate Art. 31 (2), as it stood before the Constitution (Fourth Amendment) Act, 1955.³

(II) After 27-4-55.

It followed from the view taken by the Supreme Court in *Bela Banerjee's case*,² that in all cases where Art. 31 (2) was attracted, the law would fail "unless the law provides for compensation" in the sense of full market value of the property at the time of acquisition or requisition. As has been already explained, Government considered that it would not be possible to execute its socialistic schemes if this full value were payable, and it were open to the Courts to examine every law and to invalidate it if anything short of the full value was payable under the provisions of the law. This led to the amendment of Cl. (2) by the Constitution (Fourth Amendment) Act, 1955. By this amendment, the question of 'adequacy' of compensation is made non-justiciable, leaving it to the final judgment of the Legislature, while it was reiterated several times during the debate that it was not the intention of Government to expropriate property without paying any compensation at all.

A law coming under Art. 31 (2) will no longer be open to attack in a Court of law on the ground that the compensation provided by the Legislature is not adequate, e.g., being less than the market value of the property⁴ or being less than the equivalent of what the owner had been deprived of⁵ or that compensation has been provided at the same rate for different classes of property without having regard to the difference in their nature and quality.⁴ This last case was taken as one of inadequacy of compensation in *Amar Singh v. State of Rajasthan*.⁴ It was not discussed if such a provision would also offend against Art. 14, because the Legislature made no attempt to classify where the properties were admittedly of different classes.

But Cl. (2) still requires that *some* compensation must be 'given'. It is not open to the Legislature to lay down principles which may result in non-payment of compensation or which may result in not paying any compensation whatsoever.⁶ In such a case, the law will now be invalid for contravention of Art. 31 (2) itself.⁷

Illustration.

It is on this principle that the Supreme Court annulled s. 23 (f) of the Bihar Land Reforms Act, 1950, which provided that the net income of the proprietor for the purpose of determining compensation, shall be computed by deducting from the gross asset of the proprietor, the cost of works for the benefit to the raiyats of such estates at the rates varying from 4 to 12½%, according to the amount of the gross asset,— for, the calculation of the cost of such works at a flat rate without reference to the actual expenses, which reduces the net income which is the basis of the assessment of compensation, is of a confiscatory character, and partially negates the provision for payment of compensation.⁸

It must be some pecuniary benefit to the individual in lieu of the property taken from him and not some benefit which may be conferred upon him along with other members of the public.⁷ Thus, where land is taken away from an individual without providing for any payment of compensation to him, it cannot be said that Art. 31 (2) has been complied with because the land so taken or some portion of it has been set apart for the use of the public.⁷

(2) Cf. *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

(3) *State of Madras v. Namasivaya*, A. 1965 S.C. 190 (194).

(4) Cf. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (363).

(5) Cf. *Burrakur Coal Co. v. Union of India*, A. 1961 S.C. 954 (963).

(6) Cf. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (270, 275-6).

(7) *Mukhtar Singh v. State of U. P.*, A. 1957 All. 297.

There is a contravention of Art. 31 (2) if the Legislature neither fixes the amount of compensation itself nor specifies the principles for its determination ;⁸ or lays down irrelevant principles.⁹

The task of determining the principles must be performed by the Legislature itself. But there is no unconstitutional delegation of legislative power where the Legislature lays down the principle according to which compensation is to be paid but leaves it to the Executive to apply those principles according to particular circumstances.⁶

Thus, the Legislature may provide for payment of compensation in instalments but leave it to the Executive to specify the instalments.⁹

Effects of the 1955 Amendment on Compensation.

It is evident that the 1955 Amendment of Cl. (2) eats into the vitals of the constitutional mandate to pay compensation and demonstrates a drift from the mooring of the American concept of private property and judicial review to which our Constitution was hitherto tied to that of Socialism.

As soon as the Legislature fixes the amount of compensation or specifies the principles on which the compensation is to be determined, it has done its duty and the aggrieved owner is not entitled to challenge the constitutionality of the law on the ground that the compensation provided for is not 'adequate', or, in other words, that it does not give him the full monetary equivalent of the property taken by him.¹⁰

Naturally, this has evoked serious apprehensions in the minds of people initiated in the American school of social philosophy and jurisprudence. Justice Douglas of the American Supreme Court thus observed in his review of the Indian Constitution :¹¹

"Whatever the cause, the 1955 amendment casts a shadow over every private factory, plant, or other individual enterprise in India. The Legislature may now appropriate it at any price it desires, substantial or nominal. There is no review of the reasonableness of the amount of compensation. The result can be just compensation or confiscation—dependent wholly on the mood of the Parliament

If the Parliament appropriates private property for only *nominal* compensation, the spectre of confiscation would have entered India contrary to the teachings of her outstanding jurists".

There is no doubt that the step is retrograde inasmuch as it precludes judicial review of a law on the ground of adequacy of compensation which was so long open, as held by the Supreme Court in *Bela Banerjee's case*¹² (see p. 226, *ante*). But the picture does not appear to be so gloomy as to suppose that all property owners in India are, since 1955, under a constant threat of confiscation. A proper perspective is possible only if we consider the following:

Firstly, the Amendment does nothing more than to return from the American doctrine of judicial review to the English doctrine of Parliamentary sovereignty. Nobody can suggest that a shadow of confiscation hangs over every capitalist or landowner in the United Kingdom. No doubt, judicial review secures the individual from confiscatory legislation. But though the Courts in England are powerless to interfere with a law made by Parliament which expressly provides for some compensation short of the full money equivalent or even for a nominal or illusory compensation, history does not offer instances of such confiscatory legislation. The reason is that the people of England trust in their Parliament that it will not go mad.

On the other hand, the English Parliament has, of late, been passing statute after statute curtailing the measure of compensation for lands taken for development purposes, in contravention of the traditional principles so long established

(8) *State of Rajasthan v. Nathmal*, (1952-54) 2 C. C. 239 (241).

(8a) *Vajravelu v. Special Dy. Collector*, (1964) S.C. [W.P. 144/63].

(9) *Visheshwar v. State of M. P.*, (1952-54) 2 C.C. 387 (392); (1952) S.C.R. 1020.

(10) Cf. *Burrakar Coal Co. v. Union of India*, A. 1961 S.C. 954 (963).

(11) Douglas, *From Marshall to Mukherjee*, 1956, pp. 224-5.

(12) *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

by common law to ensure full compensation. Thus, the Acquisition of Land (Assessment of Compensation) Act, 1919 did away with the additional allowance to be made for the fact that the acquisition was compulsory. The Town and Country Planning Act, 1944, provided for assessment of compensation on the basis of valuation not on the date of taking but on an anterior date, namely, March 31, 1939. The Town and Country Planning Act, 1947, further excluded the 'potential development value'. There has been no agitation in the United Kingdom on the ground that these encroachments on full compensation were confiscatory in nature.

The resentment in India is, in fact, due to the fact that the Amendment shifts to the English precedent after *Bela Banerjee's case*¹³ had laid down that the quantum of compensation was justiciable. It is obviously anomalous that after introducing judicial review as regards each of the individual rights, a vital question relating to property right has been withdrawn from judicial review. But, as has been pointed out (p. 187, *ante*), when the Constitution was drafted, a section of the members responsible for it assumed that they were adhering to the English precedent in adopting the words 'either fixes the amount of compensation or specifies the principles . . . determined' from the Government of India Act, 1935, and while moving the Amendment Bill, the Home Minister explained that this was the intention of the framers of the Constitution *ab initio*:

"So it was thought from the outset that Parliament alone could have all the necessary material and data for determining the compensation in such cases. Large projects meant for the uplift of the community in general in the fulfilment of the objectives which form part of the process of reconstruction of the new order in the country cannot come within the limited purview of courts and tribunals. That was the intention, but the language did not fully convey the intentions that were behind it. The courts were in the circumstances unable to carry out the intentions of the authors. It became necessary therefore to amend the language so that the courts might be relieved of the embarrassing necessity of having to interpret the clause in a manner which did not quite conform to the wishes, intentions or objects of the authors of the Constitution."¹⁴

Without suggesting for a moment that the withdrawal of judicial review has been for the better from the juristic standpoint, what is meant is that, but for the decision in *Bela Banerjee's case*,¹³ nobody could have suggested that by making it clear that the quantum of compensation is a matter for legislative determination, as in England, the Amendment Act has cast a 'shadow of confiscation' over every property owner in India.

Secondly, the existing law of land acquisition, as embodied in the Land Acquisition Act, 1894, which is an all-India enactment, embodies the principle of 'full compensation', comprising 'market value' plus something more. So long as this statute remains on the statute book, there is no fear of confiscation or nominal compensation in the field to which it applies.

Thirdly, as regards new legislation, it was suggested by Pandit Nehru and Pandit Pant (the Home Minister) during the debates on the Amendment Bill that it was not the intention of the Government to enact confiscatory legislation; the object of the Amendment was to withdraw the question of quantum of compensation from legal controversy.

Fourthly, as will be seen presently, if the compensation provided for is illusory, the Courts will be still free to interfere.^{14a}

Matters still remaining justiciable in cases coming under amended cl. (2).

Though the Constitution (Fourth Amendment) Act, 1955 has made various changes in Art. 31 (2), it would not be correct to suppose that all questions relating to the exercise of the power of eminent domain have been taken away from the jurisdiction of the Courts.

(13) *State of W. B. v. Bela Banerjee*, (1954) S.C.R. 558.

(14) R. S. Deb., 19-4-55.

(14a) *Vajravelu v. Special Dy. Collector*, (1964) S.C. [W.P. 144/63].

The questions which were justiciable under cl. (2) prior to the amendment have been enumerated earlier. Even after the amendment, the following questions remain justiciable:

- (i) Whether the law provides for 'acquisition' or 'requisition' (p. 240, *post*).
- (ii) Whether the compulsory acquisition or requisition has taken place by the authority of law. Accordingly, the Executive cannot compulsorily acquire or requisition any property without clear and specific authority of law, and the Courts would be entitled to interfere where the Executive acts without the authority of law made by the competent Legislature¹⁵ or in excess of that authority or without complying with the formalities or obligations¹⁶ laid down in the law or in *mala fide* exercise of the power conferred by the statute.
- (iii) Whether the Legislature in question has the legislative competence to enact the law.

Though, as has been pointed out, it is no longer open to question the competence of the Legislature on the ground that the *purpose* of the legislation is beyond its jurisdiction, the territorial limitation in the case of a State Legislature still subsists, so that a State Legislature cannot provide for the acquisition or requisitioning of property situate outside its territorial limits.

- (iv) Whether the legislation is for a 'public purpose' (see p. 217, *ante*).

(v) What is made non-justiciable is the 'adequacy of the compensation provided by that law', i.e., the law made by the legislature which provides for acquisition or requisition. Hence, where that law does not itself fix the amount of compensation but merely lays down the principles on which and the manner in which the compensation is to be determined and in working those principles the Executive commits any deviation from the principles laid down by the Legislature, the order of the Executive will be open to question on the ground of being *ultra vires*.

(vi) Whether the Legislature has failed to lay down any principles on which compensation is to be determined and given. Where, for instance, the Legislature authorises the Executive to acquire or requisition property on payment of *any* compensation it chose to fix, at its discretion,¹⁷ the Court would still be entitled to interfere.

(vii) Whether the law under which the acquisition or requisition has been made does not provide for 'compensation' at all or lays down principles which, in effect, provide for payment of no compensation or only illusory^{17a} compensation.

(viii) It is not open to the Legislature to provide that no compensation is to be paid for a *part* of the property acquired,^{17b} provided it is a *separate* tenement.^{17b} Where it is not a separate tenement, the question of non-payment for any of the elements of the property becomes a question as to *inadequacy* of the compensation provided for, which is precluded by the concluding words of Art. 31 (2), e.g., the contention that minerals have not been separately valued where mining land is acquired.^{17b}

(ix) Whether the impugned law offends against any Article of Part III of the Constitution, other than Art. 31 (2).

Of course, the amended cl. (2) says that the 'adequacy of compensation' shall not be justiciable, but, according to canons of legal construction, this provision cannot be used to control independent provisions outside Art. 31 (2), particularly when the Legislature has found it necessary to except the other provisions of Part III from the operation of Arts. 31A-31B.

Thus—

(a) A law providing for 'acquisition' or 'requisition' shall still be open to be challenged on the ground that it offends against Art. 14.¹⁸

(15) *Virendra v. State of U. P.*, (1955) 1 S.C.R. 415.

(16) *Cf. Zamindar v. State of Madras*, (1955) 1 M.L.J. 264.

(17) *State of Rajasthan v. Nathmal*, A. 1954 S.C. 307 (308).

(17a) *Vajravelu v. Special Dy. Collector*, (1964) S.C. [W.P. 144/63].

(17b) *Burrakur Coal Co. v. Union of India*, A. 1961 S.C. 954 (963).

(18) *Than Singh v. Union of India*, A. 1955 Punj. 55.

Thus, in *Than Singh v. Union of India*,¹⁸ it was contended that the impugned law contravened Art. 14 in so far as it provided for a lesser amount as compensation than that provided by the Land Acquisition Act, 1894, which was the general law of the land relating to acquisition. Of course, the Court negated this contention on the ground that the impugned law was made for a specific and distinct object and that there was a reasonable classification. But the case illustrates the possibility of such contention and legal niceties which are sought to be avoided by the Amendment may not altogether be avoided if proceedings for acquisition or requisition are liable to be delayed by taking them to the Court on such grounds as aforesaid, excepting, of course, those cases which are specifically covered by Arts. 31A—31B, where the scope for interference is narrower.

Similarly, if the Legislature makes a discrimination between the rich and the poor by adopting different rates of compensation for different slabs of property¹⁹ or by adopting different rates for different areas without a reasonable basis for the classification, the law would be open to challenge on the contravention of Art. 14. So far as the cases coming under Arts. 31A-31B are concerned this attack is now precluded. But in the case of acquisition or requisition of other kinds of property the ground of attack remains.

(b) As regards the applicability of Arts. 19 (1) (f) and 19 (1) (g), see p. 194, *ante*.

What constitutes a colourable legislation for confiscation.

It has been already stated, that though the amendment of Cl. (2) precludes the Court from invalidating a law where the compensation provided for is merely inadequate, it does not debar the Court from annulling the law if the law provides for the payment of *no* compensation at all or where what is provided amounts to illusory compensation or non-payment of consideration. This may happen as follows—

(a) Where the provision for compensation is merely a cloak for confiscatory legislation.

Illustration.

It is on this principle that the Supreme Court annulled s. 23 (f) of the Bihar Land Reforms Act, 1950, which provided that the net income of the proprietor for the purpose of determining compensation, shall be computed by deducting from the gross asset of the proprietor, the cost of works for the benefit of the raiyats of such estates at the rates varying from 4 to 12½% according to the amount of the gross asset,—for, the calculation of the cost of such works at a flat rate without reference to the actual expenses, which reduces the net income which is the basis of the assessment of compensation, is of a confiscatory character, and partially negates the provision for payment of compensation.^{19a}

(b) Though the form and manner in which the compensation is payable are matters for legislative determination, the Court may interfere if such determination constitutes a fraud on the Constitution by providing illusory compensation.²⁰

(c) Where the compensation is based on something which is unrelated to facts.²⁰

The Supreme Court summed up the position in these words—

“Entry 42 (of List III) is undoubtedly the description of a legislative head and in deciding the competency of a legislation under this Entry, the Court is *not* concerned with the *justice* and *propriety* of the principles upon which the determination of the compensation was to be made or the *form* and *manner* in which it was to be given.

But even then, the legislation must rest upon some principle of giving compensation and not of *denying* or *withholding* it, and a legislation could not be supported which was based upon something which was *non-existent* or was *unrelated to facts* and consequently could not have a conceivable bearing on any principle of *compensation*.²¹

Even though Entry 42 of List III has since been amended, in the opinion of the Author, the requirement of providing for ‘compensation’ has been made a

(19) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(19a) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (270, 275, 276). Mahajan J.

(20) *Gajapati v. State of Orissa*, A. 1953 S.C. 375 (381); *Vajravelu v. Special Dy. Collector*, (1964) S.C. [W.P. 144/63].

(21) *Jagveera v. State of Madras*, A. 1954 S.C. 257 (259).

condition for the exercise of the power of acquisition and requisitioning by the terms of Art. 31 (2) itself²² and the only change is that the question of 'adequacy' is taken out of the province of judicial review. 'Unreality' of compensation may, in particular circumstances, result in more than mere 'inadequacy' of compensation.

But, save the solitary example of the *State of Bihar v. Kameshwar*^{19a} where the Supreme Court annulled section 23 (f) of the Bihar Land Reforms Act, 1950 on the ground of illusory compensation, there has not been any other Supreme Court decision until 1964 where any legislation has been struck down as a colourable legislation on the ground that it provides for illusory compensation, because in most of the cases where this ground was raised the impugned legislation was shielded from the operation of clause 2 of Art. 31 altogether by reason of the operation of any of the exception clauses of Art. 31 or of Arts. 31-31B. Thus—

(i) In *Zamindar of Ettayapuram v. State of Madras*²³ (also cited as *Jagveera v. State of Madras*²¹) the impugned Act for acquisition of an estate provided that in computing "basic annual income" for the purposes of providing compensation, what was to be taken into account under section 30 was not the average of net annual income which the proprietors themselves derived from the sources mentioned in the Act when they were in possession of the estates, but which the Government might derive from them in future years after the date of notification. As a result of this, if on account of mismanagement or for other reasons the Government does not derive any income from these sources the proprietors would not have any compensation under this head at all.

From the tenor of the judgment of Mukherjee J. it seems that the Court was prepared to consider this item as an item of no compensation or compensation based upon something which was non-existent within the meaning of *Kameshwar's case*²⁴ but was obliged to hold that the question was precluded by clause (6) of Art. 31, as the impugned legislation has been certified by the President under that clause.

(ii) The effects of sections 4 (1) and 5 (b) of the Coal bearing Areas (Acquisition and Development) Act, 1952 was that after the Government had issued a notice of its intention of prospecting coal in an area the owner or lessee of the mine would be prevented from working his mine for a certain period of time and no provision was made for compensating him for this loss. It was held that the law was one for acquisition and would have come under clause (2) but for the shield in Art. 31A (1) (e).²⁵ It is clear that here was a case²⁵ of non-payment of compensation which might have been struck down by the Court if the legislation was not shielded by Art. 31A.

But if the Legislature has a specified principle on which and the manner in which the compensation should be determined and given and, as a result, some compensation is payable which is real, there cannot be any challenge to the provision for compensation in that enactment either under clause (2) or under the general doctrine of colourable legislation.

Thus, the Coal-bearing Areas (Acquisition and Development) Act, 1957 which provided for prospecting on land for mining of coal and for eventual acquisition of that land provided for compensation being paid for the surface rights of the land but omitted to take into account the value of the minerals underlying the surface and it was urged that the non-payment of compensation for the value of the minerals was a contravention of clause (2). The Supreme Court rejected this contention on the ground that the minerals underlying the surface were not a separate tenement and did not, therefore, raise a separate claim for compensation under clause (2). The result of omission to value the minerals was nothing more than providing an *inadequate* compensation for the land which was the subject

(22) This view finds support from the observations in *Burrakur Coal Co. v. Union of India*, A. 1961 S.C. 954, which is a decision subsequent to the Amendment of Entry 42 of List III.

(23) *Zamindar of Ettayapuram v. State of Madras*, (1954) 2 S.C.R. 761.

(24) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(25) *Burrakur Coal Company v. Union of India*, A. 1961 S.C. 954.

of acquisition and the amendment of clause (2) precluded the Court from nullifying the Act on the ground of such inadequacy of compensation.²⁵

In the *Burrakur Coal Co.* case,²⁶ the Legislature had expressly laid down that one of the elements of property acquired, namely, the underground rights, should not be valued for the purposes of compensation and yet the Supreme Court observed that the Legislature's duty of laying down the principles of compensation had been discharged and the only result of legislation was inadequacy of the compensation to be paid to the owner whose land was acquired.

In the case of *Amar Singh v. State of Rajasthan*,¹ similarly, instead of providing for compensation on the basis of the market value of the estate acquired, the impugned Act provided for compensation equal to seven years' net income and some miscellaneous items of compensation in kind, such as, a rehabilitation grant, an allotment of a portion of *khudkhasht* land. The Court rejected the contention that the compensation awarded on such a hybrid basis was illusory and held that it only amounted to the payment of an inadequate compensation.

In *State of Madras v. Namasivaya*,² the question of judicial review of a provision fixing compensation on the basis of market value prevailing on a date anterior to the date of acquisition was raised with respect to a pre-1955 enactment, and the Supreme Court refrained from expressing any opinion on the question—

"whether it is possible by enacting legislation after the amendment of Art. 31 (2) by the Constitution (Fourth Amendment) Act, 1955 . . . to provide that compensation for compulsory acquisition of land may be fixed on the basis of market value prevailing on a date anterior to the date of the issue of the notification under s. 4 (1)."

That question has been answered in the negative in the later case of *Vajravelu v. Special Dy. Collector*, (1964) S.C. [W.P. 144/63], which has made it clear that nothing in the Fourth Amendment of the Constitution has enabled a Legislature to provide for illusory compensation under Art. 31 (2). This, with respect, is one of the boldest pronouncements of the Supreme Court.

Limitations upon the rule of Compensation.

Cl. (2) of Art. 31, as it stood originally, made compensation payable whenever property was compulsorily acquired or taken possession of for public purposes, except in the cases coming under cls. (4)-(6). By subsequent amendments, this obligation has been fettered by several other conditions and exceptions:

The Constitution (Fourth Amendment) Act, 1955, has made it clear that there is no obligation to pay compensation under this clause except where property has been 'acquired' or 'requisitioned', in the manner explained in the new cl. (2A).

Arts. 31A-31B, inserted by the Constitution (First Amendment) Act, 1951 and enlarged by the Fourth Amendment Act, 1955,³ have taken out a large number of cases and specific enactments out of the general rule of obligation to pay compensation embodied in Art. 31 (2). (See *post*).

CLAUSE (2A).

'Acquisition' or 'requisitioning'.

1. Cl. (2A), introduced by the Constitution (Fourth Amendment) Act, 1955, makes clear what is meant by acquisition or requisitioning within the meaning of cl. (2). Unless the taking of the property takes place in either of these two ways, there is no obligation to pay compensation under cl. (2).

2. The doctrine of taking by substantial abridgement of the rights of the owner, which was enunciated in the cases of *Subodh Gopal*⁴ and *Dwarkadas*,⁵ has been superseded by this amendment.

(1) Cf. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (363).

(2) *State of Madras v. Namasivaya*, A. 1965 S.C. 190 (192).

(3) With the enlargement of the protected

list by the Constitution (Seventeenth Amendment) Act, 1964.

(4) *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587: (1952-4) 2 C.C. 403: A. 1954 S.C. 92.

(5) *Dwarkadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674, A. 1954 S.C. 119.

3. Since cl. (2A) is *not* retrospective,⁶ the interpretation given by the Supreme Court upon the original cl. (2) will be applicable to orders of acquisition or taking possession, which were made prior to 27-4-55. It is, accordingly, necessary to notice the law before and after amendment.

(A) *Under the Government of India Act, 1935.*

As stated at the outset, in the corresponding provision [s. 299 (2)] of the Government of India Act, 1935, only the word 'acquisition' was used (see p. 206, *ante*).

It was held by the 'Federal Court' as well as the Privy Council⁸ that 'acquisition' implies that there must be an actual *transference* of property, and it must be possible to indicate some person or body to whom it is transferred. There was, accordingly, no 'requisition' of property in the following cases—

- (i) Where merely the relations between landlord and tenant were *regulated*, though thereby the rights hitherto exercised by the landlord were diminished.⁷
- (ii) Where an owner of land remains in possession as before, and merely the land revenue payable by him is increased.⁸

It has been pointed out earlier that in s. 299 (2), there was nothing to refer to 'requisitioning' and it was held⁹ that the word 'acquisition' did not include 'requisition'.

(B) *Under Art. 31 (2), before 27-4-55.*

Cl. (2) of Art. 31 of the Constitution, as it originally stood, introduced the expression 'taken possession of', besides the word 'acquired'.

In *State of West Bengal v. Subodh Gopal*,⁴ Sastri C.J. took a wider view of the word 'acquired' than was attributed to the word under the pre-Constitution provision. This view was followed in a number of subsequent decisions¹⁰⁻¹¹ and may be taken to give the settled meaning of the word under the original cl. (2). This view, in short, is that the two expressions 'acquisition' and 'taking possession of' are not used in contradiction with each other but are used to convey similar sense, the expression 'taking possession of' being used to amplify the meaning of 'acquisition'. In this sense, in order to constitute 'acquisition' by the State, no formal transfer or vesting of the property is required. It includes any appropriation of the property of a subject by the State, without the owner's consent. It would thus include the taking of a thing for the purpose of destruction and other cases where there is no continued existence of the property after it is acquired.⁹

The expression 'taking possession' was similarly interpreted in a wide sense,⁴ to cover the following propositions:⁵

(a) 'Taking possession of' did not imply any formal transfer of possession but included seizure.

(b) 'Taking possession of' did not require taking of actual physical possession but meant the taking of such possession as the property is susceptible of. Thus, taking possession of a commercial or industrial undertaking [which is expressly included in cl. (2)], is not susceptible of any actual physical occupancy or seizure.

(c) It was not correct to say that cl. (2) was confined to the exercise of the power of 'eminent domain' while cl. (1) related to the exercise of the 'police power'. The true view was that both clauses dealt with the same thing, *viz*, limitations upon the power of the State to take private property,—the two clauses providing different limitations upon that power. Thus, taking possession of' also included those kinds of 'deprivation' which do not involve the continued existence of the property after it is taken. In other words, it would include 'destruction'

(6) *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 328 (333).

(7) *Lal Singh v. C. P. and Berar*, A. 1944 F.C. 61.

(8) *Jagannath v. United Provinces*, (1946) 50 C.W.N. 674 (678) (P.C.).

(9) *Tan Bug v. Collector of Bombay*, A. 1946 Bom. 216.

(10) *Saghir Ahmad v. State of U. P.*, (1955) 1 S.C.R. 707.

(11) *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 328 (333).

which implies the 'reducing into possession of the thing sought to be destroyed as a necessary step to that end'.

(d) The expression 'taking possession of' was *not* identical with requisitioning. This expression was not used in contradistinction with 'acquisition', but by way of amplification of that term, so as to make it clear that the two expressions 'acquisition' and 'taking possession of' in cl. (2) included also those kinds of deprivation which do not involve the continued existence of the thing after it is taken.

(e) On the other hand, the expression 'taking possession of' was not as wide as the word 'taking' in the 5th Amendment to the American Constitution so as to include any injury or damage to property (see p. 202, *ante*) but includes only such taking as constitutes 'deprivation' within the meaning of cl. (1). 'Taking possession of' thus refers to—

"such substantial abridgement of the rights of ownership as would amount to deprivation of the owner of his property. No cut and dried test can be formulated as to whether in a given case the owner is 'deprived' of his property within the meaning of Art. 31; each case must be decided as it arises on its own facts. Broadly speaking it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of Art. 31, if, in effect, it withheld the property from the *possession and enjoyment* of the owner, or seriously *impaired its use and enjoyment* by him, or *materially reduced its value*".¹²

(f) With respect to a commercial or industrial undertaking, the power of 'superintendence' should be distinguished from that of 'taking possession of' it. 'Superintendence' is merely regulative in nature and comes within the scope of Art. 19 (6). But such social control, when it oversteps its legitimate limits, may constitute the 'taking possession of' the affairs of the concern and thus bring the case under Art. 31 (2). This happens when 'under the guise of superintendence the State is carrying on the business or trade for which the company was incorporated with the capital of the company but through its own agents who take orders from it and are appointed by it'.¹³ The difference between superintendence or regulation and 'taking possession of' is thus one of *degree*. In this view, our Supreme Court adopted the reasoning of Holmes C. J. in *Pennsylvania Coal Co. v. Mahon*¹⁴:

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognised, some values are enjoyed under an implied limitation and must yield to the *police power*. But obviously the implied limitation must have its limits. . . . One fact for consideration in determining such limits is the *extent* of the diminution. When it reaches a certain magnitude, in most, if not in all cases, there must be an exercise of *eminent domain* and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power. . . .

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a *taking*. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . . . This is a question of degree and therefore cannot be disposed of by general propositions."¹⁴

Any *substantial* interference with rights of property thus came within the protection of Art. 31 (2).¹⁵

Illustration.

A law empowered the Central Government to appoint as many persons as it thought fit to be directors of a company for the purpose of taking over its management and administration in view of its mismanagement in the production of an essential commodity. The directors so appointed took over possession of the property and effects of the company. *Held*, that these statutory directors who worked under the control of the Government could not be said to be the agents of the company and their possession could not be said to be the possession of the company. Such legislation, therefore, provided for taking possession of the property of the company by the State through directors appointed by it.¹³

(12) *State of W. B. v. Subodh Gopal*, (1954) S.C.A. 65 (84-5, 90), Sastri C. J., Mahajan & Ghulam Hasan JJ.

(13) *Dwarkadas v. Sholapur Spinning & Weaving Co.*, (1954) S.C.A. 132 (143-4), Mahajan J.

(14) *Pennsylvania Coal Co. v. Mahon*, (1922) 260 U.S. 393.

(15) *Bombay Dyeing Co. v. State of Bombay*, A. 1958 S.C. 328 (333).

(C) Under Cl. (2)-(2A), after 27-4-55.

I. It has already been pointed out that the word 'requisition' has been substituted in cl. (2) for the expression 'taken possession of', in order to override the extended meaning given to the latter expression in the cases of *Subodh Gopal*¹² and *Dwarkadas*.¹³

It is interesting to note that in the 2nd Edition of this Commentary (p. 211), the Author observed—

"Taking 'possession of' obviously refers to the power of 'requisition' referred to in Entry 33 of List I and 36 of List III."

This view was approved by Das J. (in the minority) in *Subodh Gopal's case*,¹² as follows:

"The legislative power being confined only to 'acquisition or requisitioning', it will not be unreasonable to hold that "taking of possession" referred to in Art. 31 (2) in the nature of 'requisitioning' . . . Therefore, 'taken possession of or acquired' should be read as indicative of the concept of 'requisition or acquisition'."¹²

It is evident, therefore, that the Constitution (Fourth Amendment) Bill adopts the Author's view, referred to above, and replaces the dubious expression 'taken possession of' by the technical word 'requisitioned', which has a settled meaning, viz., the taking of "a domain or control over property, without acquiring rights of ownership".¹⁶ In other words, in requisition, while the title to the property remains with the private owner, he is excluded by the State from the right to possession or enjoyment of the property.¹⁷ The words "right to possession of" in cl. (2A) reiterates this meaning of "requisition" in order to prevent any further elaboration of that term by judicial interpretation.

It would seem, however, that in order to constitute a 'requisition' within the meaning of cl. (2A), it is not essential that there should be any formal order of 'requisition' under a special statute. It is enough if Government has taken exclusive possession of the property, ousting the owner. In a pre-1955 case,¹⁸ it was held that where the possession of the property passed to the Reclamation Officer under a statute for the purposes of tractorisation, it amounted to a 'taking possession of' the property within the meaning of the pre-1955 Art. 31 (2). On principle, it should also be construed as a 'requisition' under Cl. (2A).

II. As regards 'acquisition',—even in the First Edition of this Commentary (p. 154), it was stated—

"Acquisition implies that there must be an actual *transference* of . . . the land or rights referred to."

In *Chiranjit Lal's case*,¹⁷ Mukherjea J. further elaborated this view by observing that—

"Acquisition means the acquiring of the *entire* title of the expropriated owner, whatever the nature or extent of that title may be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing to the former."

And this view was followed by Das J. (in the minority) in *Subodh Gopal's case*.¹⁹

This view is made effectively clear by the Amendment Act by introducing words 'transfer of ownership' in cl. (2A).

The word 'transfer' makes it clear that there is no acquisition unless the ownership of the private owner (including all the rights which follow from title) are conveyed to the State or its nominee (i.e., a corporation owned or controlled by the State) by operation of the law referred to in cl. (2) of Art. 31. Compensation would be payable under cl. (2) only if the private owner is thus divested of his ownership and it is vested in the State or its nominee by the law in question.

(16) *Tan Bug v. Collector*, A. 1946 Bom. 216 (247); *Khetsidas v. Pratapmull*, A. 1946 Cal. 197 (201).

(17) Cf. *Mukherjea J. in Chiranjit Lal's case*, (1950) S.C.R. 869 (902).

(18) *State of M. P. v. Champalal*, A. 1965 S.C. 124 (130).

(19) *State of W. Bengal v. Subodh Gopal*, (1954) S.C.R. 587 (658-9).

Similarly, in requisition, there must be a 'transfer' of the right to possession. The following observations of Das J. in *Subodh Gopal's case*¹⁹ will elucidate the meaning of the expression 'transfer of the right to possession':

"... they required compensation to be paid only where there was an actual taking of the property out of the possession of the owner or possessor into the possession of the State or its nominee. Of course, the manner of taking possession must depend on the nature of the property itself."

The right to possession of some kinds of property can be transferred even without an actual transfer of the physical possession of the property itself. These cases were also included by the use of the words 'right to possession'. It is now made clear that no question of payment of compensation under Art. 31 can possibly arise when a property is injured as a result of the exercise of 'police powers' by the State or even where objectionable property is *seized* in the exercise of such powers, for, in neither case is the property 'requisitioned' in the sense of effecting a 'transfer' of the right to possession to the State.

In fact, it is possible for the State to render useless the property of an individual even in the exercise of its powers *other than the 'police' or regulatory powers*. In such cases, compensation is payable in the U.S.A., where it has been held that any injury to the property of an individual by State action which deprives the owner of its ordinary use amounts to 'taking' by the State (see p. 202, *ante*).

The case of *Saghir Ahmad v. State of U.P.*²⁰ furnishes an instance of such action. The U. P. Road Transport Act, 1951 empowered the State Government to operate the road transport services of the State as a Government monopoly, by cancelling the existing permits in favour of private operators and prohibiting them to run their vehicles on the routes taken up by Government. As a result of the exercise of this power by the Government, the buses of the private owners who were so long carrying on the business of road transport became practically useless.

The High Court²¹ held that no compensation was payable by Government to these private operators by reason of the fact that their buses had been rendered useless, because no compensation was payable under Art. 31 (2) unless property was 'acquired'. The High Court observed—

"The vehicles which were being operated by the private operators have not been acquired by the State nor has any other tangible property which was used by the petitioners for their business been acquired. What has been done is that the petitioners have been prohibited from operating their buses on certain routes."²¹

On appeal, the Supreme Court applied the decisions in the cases of *Subodh Gopal*²³ and *Dwarkadas*²² which had followed the American doctrine of 'taking' and held—

"The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads."²⁰

Hence, the result of this decision was that even though the State did not 'acquire' any property having it transferred to itself, the constitutional obligation to pay compensation under Art. 31 (2) would arise if the owner of a property was substantially deprived of the lawful enjoyment of the property in the manner it was capable of being enjoyed, by reason of State action.

The Amendment of 1955 sought to supersede the view taken by Shastri C.J. (for the majority) in *Subodh Gopal's case*.²³

Cl. (2A) explicitly lays down that in order to constitute 'acquisition', there must be a *transfer of the ownership* in the property to the State or to a corporation owned or controlled by the State. Since the Amendment adopts the minority

(20) *Saghir Ahmad v. State of U.P.*, (1954) S.C.R. 1218.

(21) *Saghir Ahmad v. State of U. P.*, A. 1954 All. 257 (273).

(22) *Dwarkadas v. Sholapur Spinning Co.*, A. 1954 S.C. 119.

(23) *State of West Bengal v. Subodh Gopal*, (1954) S.C.R. 587.

view of Das J. in *State of W.B. v. Subodh Gopal*,²³ it would be profitable to reproduce his observations in this context—

"It connotes the idea of transfer of title, voluntary or involuntary. When the acquisition by the State is effected by agreement after negotiation there is a regular conveyance transferring the title from the vendor to the State. Even when the acquisition by the State is effected by the coercive process of exercising its sovereign power the idea of purchase is nevertheless present, for there is a vesting of the property in the State by operation of law. Acquisition of private property by the State under the English law, therefore, connotes the concept of a purchase, voluntary or involuntary, and involves a transfer of the entire title from the owner to the State or a third party for whom the State acquires the property."²⁴

Hence, there is no longer any question of Art. 31 (2) being attracted where there is no provision for transference to the State and the legislation merely enables the tenants to purchase the landlord's share without intervention of the State.²⁴

This does not, however, mean that Government cannot acquire part of the rights of the owner. Thus, leasehold and other similar rights can always be 'acquired' and if a person owns the totality of rights, it is not necessary to acquire the whole interest of that person if it is not needed for public purposes.²⁵ The Legislature may, thus, acquire proprietary rights of zemindars, leaving the bhumidari right with them.²⁵

While in 'acquisition', the ownership or title of the owner is transferred to the State or a corporation owned or controlled by the State, 'requisition' takes place when the right to possession is transferred similarly, without transferring the title. In short, it must involve the "actual taking of the property out of the possession of the owner or possessor into the possession of the State or its nominee".¹⁻¹⁸ While acquisition is permanent, requisition is for a temporary period¹⁹ and during the period when the requisitioning authority remains in possession, the rights of all other persons to enjoy the property are suspended.²⁰

Cl. (2A) now completely excludes the possibility of importing the American doctrine of 'taking' (see pp. 237, *ante*) in the matter of interpreting Art. 31 of our Constitution.

To determine whether an obligation to pay compensation arises under Art. 31 (2), it will no longer be relevant to enquire whether the individual has been 'sustantially dispossessed' (cf. p. 237, *ante*) or whether his right to use and enjoy the property has been 'seriously impaired' or the value of the property has been 'materially reduced' by the impugned State action.

The new cl. (2A) not only explains cl. (2) but also differentiates the scope of cl. (1). It will no longer be possible to contend that cls. (1) and (2) relate to the same subject and that they are co-extensive. The cases of *acquisition* and *requisition*, involving transference of ownership or right to possession to the State, are specifically dealt with in cl. (2) and no other mode of deprivation can, accordingly, be held to attract the operation of cl. (2).

No liability for compensation can, accordingly, arise not only in cases of regulation or restriction of the rights of ownership, however substantial it may be, or in cases of harm or injury caused to the proprietary rights of an individual owing to the exercise by the State of its legitimate powers, but also in cases of total destruction of property without involving any transfer of dominion to the State.

It is now placed beyond doubt that the *only* cases where compensation is payable under Art. 31 are—where any property is physically or constructively transferred to the State or to a corporation owned or controlled by the State.

In the *United States*, there has been controversy over the question whether compensation is payable where property has to be taken or merely destroyed in exercise of independent powers, such as the 'police' power or 'war' power.²¹ But

(24) *Pirithi Singh v. State*, A. 1953 Pepsu 161.

(25) *Survapal v. State of U. P.*, (1952) S.C.R. 1056: (1952-4) 2 C.C. 396 (402).

(1-18) Cf. Das J. in *State of W. B. v. Subodh Gopal*, (1954) S.C.R. 587: (1952-4) 2 C.C. 403 (416).

(19) *Shyam Krishan v. State of Punjab*, A. 1953 Punj. 70.

(20) *Shanti v. State of W. B.*, A. 1954 Cal. 212.

(21) Cf. *U. S. v. Russel*, (1871) 13 Wall. 623 (627-8); *U. S. v. Caltex*, (1952) 344 U.S. 149.

in India, there is no scope for speculating whether the police power or war power is an independent power. Compensation will be payable where clauses (2) and (2A) of Art. 31 are attracted,—whatever be the purpose of the transfer of ownership or right to possession. On the other hand, no compensation will be payable where the value of property is *depreciated* or the property itself is *destroyed*, owing to the exercise of any power belonging to the Government. Whether the destruction is constitutionally justiciable or not will have to be determined with reference to other provisions of the Constitution, such as Art. 19 (1) (f).²²

Cases where Cls. (2)-(2A) have been held to be not applicable.

The Amendment makes it clear that mere 'deprivation of property', short of 'acquisition' or 'requisitioning'²³ within the meaning of cl. (2A), i.e., without transfer of title or right to possession will not attract cl. (2). Hence, there is no obligation to pay compensation in cases like the following—

(i) Where the relations between landlord and tenant are merely regulated, even though the rights of the landlord are diminished thereby.²³⁻²⁴

(ii) Where a private owner is affected (e.g., by the lowering of its value)²⁵ or deprived of his property by reason of the exercise of the 'police' or 'regulatory' powers of the State, e.g., where private road transport operators lose their business and their stock-in-trade is rendered useless because the State enters into the business as a monopolist and cancels the permits in favour of the existing traders;¹⁻² or adulterated foodstuffs are seized and destroyed or dilapidated structures are pulled down by municipal authorities or a fire brigade;³ or restrictions are imposed on transfer of property by evacuees;⁴ or such property is administered by the State;⁵ or goods are seized under the Sea Customs Act,⁶ 1878, or the Foreign Exchange Regulation Act, 1947; or the rights of a joint family manager are terminated or restrictions imposed upon the right of partition of coparceners;⁷ or where the State merely exercises powers of superintendence over endowed property;⁸ or over the affairs of a company;⁹ or where a Government agency takes up the *management* of property with liability to account for the income;¹⁰ or the management of private property is vested by the State in another body;¹¹⁻¹² or where the owners of private forests are restricted from cutting away timber without the permission of the prescribed authority;¹³ or where the rate of interest is reduced;¹⁴ or where injury is caused to adjoining land by drainage or irrigation works;¹⁵ or where blood is taken from the body of a person for the purpose of investigating an offence;¹⁶ or where cash grants are stopped.^{16a}

(iii) Where the State seeks to recover possession of a land *owned* by it, from a lessee;¹⁷ or to assess revenue-free land.¹⁸

(22) Cf. *Kochunni v. State of Madras* (II), A. 1960 S.C. 1080 (see p. 188, ante).

(23) *Srikrishan v. State of Rajasthan*, (1955) 2 S.C.R. 531.

(24) *Jageshwar v. Bircha*, A. 1956 Pat. 149 (151).

(25) Cf. *Bapubhai v. State of Bombay*, A. 1956 Bom. 21 (25).

(1) *Nageswara v. Andhra Pradesh S.R.T. Corp.*, A. 1959 S.C. 308 (318).

(2) *Ramchandra v. State of Orissa*, (1956) S.C.R. 346 (357).

(3) *State of W. B. v. Subodh Gopal*, (1952-4) 2 C.C. 403 (417).

(4) Cf. *Sadhu Ram v. Custodian*, (1956) S.C.A. 70 (73); *Shanta v. Custodian*, A. 1952 M.B. 181.

(5) *Abdul Majid v. Nayak*, A. 1951 Bom. 440.

(6) *Shew Pujan v. Collector*, A. 1952 Cal. 789.

(7) Cf. *Santhamma v. Neelamma*, A. 1957 Mad. 643 (656).

(8) *Bijayananda v. State of Bihar*, A. 1957 Pat. 266.

(9) *Dwarkadas v. Sholapur Spinning & Weaving Co.*, A. 1954 S.C. 119 (125).

(10) Cf. *Guru Datta v. State of Bihar*, A. 1961 S.C. 1684.

(11) *Bira Kishore v. State of Orissa*, A. 1964 S.C. 1501 (1508).

(12) *Govindalalji v. State of Rajasthan*, A. 1963 S.C. 1638.

(13) *Karrar Ali v. State of U. P.*, A. 1954 All. 753.

(14) *Raghubir v. Union of India*, A. 1954 Punj. 261.

(15) *Sashibhusan v. State of Bihar*, A. 1956 Pat. 493 (496).

(16) *Ratnaprova v. State of Orissa*, A. 1964 S.C. 1195 (1200).

(16a) *Ranojirao v. State of M.P.*, A. 1965 M.P. 77 (82).

(17) *Dhirendra v. State of W. B.*, A. 1956 Cal. 437.

(18) *Girijananda v. State of Assam*, A. 1956 Assam 33.

(iv) Where the State puts an end to certain interests, e.g., those of Hindu reversioners, by a law regulating succession.¹⁹

(v) Where the State refuses to be bound by an agreement to which it was not a party.²⁰

Thus, where a landlord created a licence or other contractual rights in favour of certain licensees, and upon acquisition of the estate of the landlord, seeks to oust the licensees, the licensees cannot complain of the violation of Art. 31, inasmuch as there has been no transfer of the ownership or possession of the licensees to the State, even assuming that the agreement with the landlord created any proprietary rights in favour of the licensees.¹⁷

Where a law does not, in reality, effect a transfer of ownership or possession, Art. 31 (2) cannot be invoked merely because the Legislature has, in fact, provided for some compensation with a view to mitigating hardship or otherwise.²¹

"Or to a corporation owned or controlled by the State."

The addition of these words effect an improvement upon the wording of the original cl. (2), and makes it clear that the scope of cl. (2) extends to cases of acquisition of property for purposes of a corporation owned or controlled by the State on the same footing as an acquisition for purposes of the State itself.

Legislation by Parliament.—In furtherance of the policy of nationalisation of essential business and industries, Parliament has provided for the transfer of private business concerns to statutory corporations owned or controlled by the State, e.g., Air Corporations Act, 1953; Life Insurance Corporation Act, 1956.

Legislative power.

(A) *Prior to 1-11-56*, the legislative power relating to 'acquisition' and 'requisitioning' was divided as between the Union and the States.²² Acquisition for the 'purposes of the Union' was a Union subject (Entry 33, List I), that for other public purposes was a State subject (Entry 36, List II), while the power in matters relating to compensation (Entry 42 of List III) was concurrent.

It is to be noted that while Entry 33 of List I referred to 'purposes of the Union', Entry 36 of List II was wide and referred to 'except for purposes of the Union.' A question arose as to what was a 'Union purpose' but the Supreme Court refused to give a wide interpretation to this expression so as to curtail the legislative power of the States relating to acquisition and requisitioning.²³

(B) *After 1-11-56*: The Constitution (Seventh Amendment) Act, 1956, has omitted Entries 33 of List I and 36 of List II, and substituted the original Entry 42 of List III as follows²⁴

"Acquisition and requisitioning of property".

The result is that both the Union and State Legislatures have now concurrent jurisdiction over the entire field of acquisition and requisitioning, and the question of *vires* of either Legislature can no longer be agitated on the footing of the 'purpose' of the acquisition, i.e., whether it is a Union or other than a Union purpose.

In the U.S.A., it is settled that the Federal and State Governments possess the power of Eminent Domain to serve the purposes of their respective governments,²⁵ so that a State Government cannot 'acquire' property for the exclusive purposes of the Federal Government and *vice versa*.²⁵

This was the state of the law in India before the Constitution (Seventh Amendment) Act, 1956. But the Amendment Act having made the power con-

(19) *Bhabani v. Sarat*, A. 1957 Cal. 527.

(20) *Mahadeo v. State of Bombay*, A. 1959 S.C. 735 (739, 742).

(21) *Nageswara v. Andhra Pradesh S.R.T. Corp.*, A. 1959 S.C. 308 (318).

(22) Vide C3, Vol. II, pp. 702, 767.

(23) *State of Bombay v. Gulshan*, (1955) 2 S.C.R. 867.

(24) See, further, under Entry 42 of List III.

(25) *Kohl v. U. S.*, (1875) 91 U.S. 367.

(1) *Via v. State Commn.*, (1936) 296 U.S. 549.

current, has removed the rigidity of the federal system as it obtains in the United States and ensured a speedier procedure both for national and State purposes.

CLAUSE (3).

OTHER CONSTITUTIONS

Government of India Act, 1935.—S. 299 (3) of this Act was as follows—

"No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor-General, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor."

INDIA

Legislation by State Legislature.

This clause corresponds to Sec. 299 (3) of the Government of India Act, 1935. No law of compulsory acquisition within the scope of Art. 31 (2), passed by a State Legislature shall be valid unless the Bill is reserved for consideration of the President (Arts. 200-1) and is assented to by the President. The present clause supplements the 2nd Proviso to Art. 200 (*post*), by requiring a compulsory reservation of such Bills.² The word 'law' in the clause has been loosely used to mean a Bill.

Art. 31 (3), read with Art. 200, does not require the President to give his assent twice over, once under Art. 31 (3) and again under Art. 200. He is not disabled from applying his mind to the Bill once for all and to see whether it has to be passed into law and whether it fulfils the requirements of Art. 31 (3).² The Governor's assent is not required in the case of such Bill. He has simply to reserve it for the President's consideration.² This clause refers to laws enacted subsequent to commencement of the Constitution.

The Supreme Court has held³ that cl. (3) is attracted only where the State Legislature enacts a substantive legislation relating to acquisition or requisition, after the Commencement of the Constitution. An Act which amends an existing law which is covered by cl. (5) (a) is also covered by that clause and need not comply with the requirement of cl. (3).⁴

Where the requirement of Art. 31 (3) has not been complied with, any proceedings taken under the Act shall be void.⁵

On the other hand,—

The assent of the President is required to enable the State Legislature to enact the law, but it does not preclude any challenge as to the invalidity of the law owing to contravention of any other provision of the Constitution, e.g., Art. 31 (2).⁶ In this respect, cl. (3) differs from cl. (4).⁶

CLAUSE (4).

Cl. (4) : Pending Bills.

As stated earlier, Cl. (4) provides an exception to the requirements of Cl. (2). Cl. (4) relates to Bills of a State Legislature relating to public acquisition which were pending at the commencement of the Constitution. If such a Bill has been passed

(2) Cf. *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (265 ; 300).

(3) *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (526).

(4) It is submitted that the above interpretation unduly widens the meaning of 'existing law' in Art. 31 (5) (a), which must be controlled by the definition in Art. 366

(10), and cannot accordingly, include any law passed after the commencement of the Constitution, whether amending or otherwise.

(5) *Rameshwar v. Misra*, A. 1959 Pat. 488 ; *Kadarap v. State of Hyderabad*, A. 1955 Hyd. 41.

(6) *Namasivaya v. State of Madras*, A. 1959 Mad. 548 (553).

and assented to by the President, the Courts shall have no jurisdiction to question the validity of such law on the ground of contravention of Cl. (2), i.e., on the ground that it does not provide for compensation⁷ or that it has been enacted without a public purpose.⁸

Of course, if such *pending* Bill is not reserved for the consideration of the President or does not receive his assent, it cannot have any effect at all, by reason of Cl. (3).

But Cl. (4) would not debar the Courts from examining the validity of the law on other grounds, e.g., legislative competence,⁹ or whether the law contravenes the guarantee of equal protection in Art. 14, say, by providing different principles of compensation for different sets of persons without any reasonable basis for such classification.⁹

Extent of the saving contained in cls. (4)-(6) of Art. 31 and Arts. 31A-B.

Cls. (4), (5) and (6) of Art. 31 as well as Arts. 31A-31B provide, *inter alia*, that legislation which comes under any of these provisions would not be void on the ground of contravention of Art. 31 (2).

I. It would, therefore, *prima facie* follow that such legislation would be immune from attack on any ground relating to compensation, i.e., either on the question of quantum or adequacy of compensation or of non-payment of compensation at all. But the majority of the Supreme Court in *State of Bihar v. Kameswar*¹⁰ was not prepared to go so far.

Even though their Lordships held that the obligation to pay compensation was provided by Art. 31 (2), and did not result from either Entry 36 of List II or Entry 42 of List III, which were mere heads of legislation,¹¹ it was nevertheless held that while *exercising* the power of legislation for acquisition, the Legislature must conform to the provisions of Entry 42 of List III and any legislation that seeks to commit a fraud on these provisions would be struck down as *colourable* by the Court. In other words, Entry 42 of List III (as it then stood) provided that while legislating for acquisition, the Legislature must lay down the '*principles on which compensation is to be determined*'. Hence, if a Legislature says that 'no compensation is to be paid', that is not laying down 'the principles on which compensation is to be determined' and thus the Legislature is committing a fraud on this power.

"The power of legislation in Entry 42 is for enacting the principles of determining such compensation . . . But it is difficult to imagine that there can be any principles for non-payment of compensation for negating the payment of compensation. No principles are required to be stated for non-payment of compensation . . . The key words in the Entry are 'compensation' and 'given'. Anything that is unrelated to compensation or the giving of it cannot be justified by legislation under Entry 42."¹²

"To negative compensation altogether by the enunciation of principles leading to such a result would be to contradict the very terms of the Entry and such a meaning could not be attributed to the framers of the Lists."¹³

Thus, according to the majority opinion in *State of Bihar v. Kameswar*,¹⁴ cls. (4)-(6) of Art. 31 and Arts. 31A-B precluded the Court from striking down a legislation coming within the purview of these provisions on the ground that the provision for compensation was inadequate but did not preclude the Court from striking down the law as 'colourable' if it provided for non-payment of compensation or for what is no compensation at all.¹⁴

The foregoing view of the majority in *Kameswar's* case¹⁰ stands *superseded* by the Constitution (Seventh Amendment) Act, 1956 which has taken out the

(7) Cf. *Umegh Singh v. State of Bombay*, (1955) 2 S.C.R. 164 (182).

(8) *Jagveera v. State of Madras*, (1954) S.C.R. 761 (764).

(9) *Kameswar v. State of Bihar*, A. 1951 Pat. 91 (101, 106); affirmed by *State of Bihar v. Kameswar*, A. 1952 S.C. 252 (273), Mahajan, Mukherjea and Aiyar JJ.

(10) *State of Bihar v. Kameswar*, (1953) S.C.A. 53 (Mahajan, Mukherjea & Aiyar JJ.).

(11) *Ibid.*, Mahajan J., pp. 81-2.

(12) *Ibid.*, pp. 94-5, Mahajan J.

(13) *Ibid.*, p. 137, Aiyar J.

(14) *Gajapati v. State of Orissa*, A. 1953 S.C. 375 (381).

condition of 'compensation' from the legislative power relating to 'acquisition and requisitioning of property' in Entry 42, List III. The amended Entry is as follows:

"Acquisition and requisitioning of property".

It follows, therefore, that the doctrine of colourable legislation can no longer be invoked on the basis of the legislative power in Entry 42, List III. Hence, in cases to which Cl. (4) is attracted, the Court would be powerless to interfere even though the law provides for no compensation at all.¹⁵

II. On the question whether cl. (4) also precluded inquiry as to the existence of a public purpose, there was a difference of opinion in *State of Bihar v. Kameshwar*.¹⁶ Sastri C.J. and Das J. held that since cl. (2) provided two limitations upon the power of acquisition, and one of them was the existence of a public purpose, cl. (4) took away the ground of attack relating to public purpose as well. Mahajan and Ayyar JJ., on the other hand, held that though cl. (2) assumed that compulsory acquisition could be made only for a public purpose, it did not expressly make the existence of a public purpose a condition precedent to acquisition, and that, accordingly, cl. (4) did not bar the jurisdiction of the Court to inquire whether the law was invalid because there was no public purpose.

The opinion of the fifth Judge, Mukherjea J., therefore, held the balance. His Lordship observed—

"The requirement of public purpose is implicit in compulsory acquisition.....This condition is implied in the provision of Art. 31 (2) of the Constitution.....My learned brother (Mahajan J.) has taken the view that the bar created by cl. (4) is confined to the question of compensation only and does not extend to the existence or necessity of a public purpose which, though implicit in, has not been expressly provided for by cl. (2) of the Article.

For my part I would be prepared to assume that cl. (4) of Art. 31 relates to everything that is provided for in cl. (2) either in express terms or even impliedly and consequently the question of the existence of a public purpose does not come within the purview of our inquiry in the present case."

The view of Mukherjea J. has since been accepted in *Gajapati v. State of Orissa*¹⁴ and *Jagaveera v. State of Madras*,¹⁶ so that the existence of a public purpose is not a justiciable issue where a law of acquisition comes under cl. (4) of Art. 31.

The latter position has since been made clear by incorporating the requirement of 'public purpose', expressly, in Cl. (2), so that if Cl. (2) is excepted, all its requirements, including that of public purpose, is excepted. After this, it is no longer permissible to refer to anything outside Cl. (2), such as the general principles relating to 'Eminent Domain'.¹⁷

Instances of Acts assented to by the President under Cl. (4).

- (a) Bihar Land Reforms Act, 1950.¹⁸
- (b) U. P. Zamindari Abolition and Land Reforms Act, 1950.¹⁸⁻¹⁹
- (c) Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950.²⁰
- (d) Orissa Estates Abolition Act, 1952.²¹

Scope of Arts. 31 (4) and 31A compared.—See under Art. 31A, *post*.

CLAUSE (5).

Scope of cl. (5) : Saving of certain laws from operation of cl. (2).

1. This clause provides a number of exceptions to the requirements of cl. (2). So, as regards laws coming under this clause [as under cl. (4)], too, the Courts

(15) Cf. *Umegh Singh v. State of Bombay*, (1955) 2 S.C.R. 164 (182).

(16) *Jagaveera v. State of Madras*, (1954) S.C.R. 761.

(17) Cf. *Jhandu v. State of Punjab*, A. 1961 S.C. 343 (345).

(18) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(19) *Surya Pal v. State of U. P.*, (1952) S.C.R. 1056 (1070).

(20) *Viseshwar v. State of M. P.*, (1952) S.C.R. 1020 (1035).

(21) *Gajapati v. State of Orissa*, A. 1953 S.C. 375.

shall have no power to examine the validity of the legislation either on the ground of absence of provision for compensation¹⁸ or on the ground of non-existence of public purpose;²² or because the Executive determination as to the existence of a public purpose has been made exclusive or non-justiciable.²³

2. But cl. (5) only excludes the application of cl. (2). Hence, the validity of a law coming under cl. (5) can be challenged for the violation of any other fundamental right, e.g., under Art. 14.²⁴

3. Cl. (5) applies to two classes of laws—

(a) 'Existing laws' other than those which come under cl. (6), i.e., laws enacted *more than 18 months* before commencement of the Constitution.²⁵

(b) Any law made by a State Legislature or by the Union Parliament (i.e., any law made after commencement of the Constitution), for any of the purposes mentioned in items (i) (iii) of sub-cl. (b).

Sub-cl. (a) : Existing laws.

1. As to 'existing law', see the definition in Art. 366 (10), *post*. Shortly speaking, it means any law made by any competent legislative authority before the commencement of the Constitution. Existing laws are covered by cls. (5) and (6). While laws made within 18 months before the Constitution come under cl. (6), *all other* existing laws fall under cl. (5). Cl. (5), in other words, is the residuary clause regarding existing laws.²⁶

2. The following laws would come within the scope of cl. (5) (a):

Provincial Acts like the Bombay Land Requisition Act¹ (XXXIII of 1948); West Bengal Premises Requisition and Control Act (V of 1947);² Bombay Land Requisition Act, 1948;³ or Central Acts like the Land Acquisition Act, 1891;⁴ Cantonments Act, 1924.⁵

3. Where an 'existing law' is amended by an Amending Act subsequent to the commencement of the Constitution or within 18 months prior to the commencement of the Constitution and the Amending Act contravenes the provisions of cl. (2) of Art. 31, it is only the amending provisions which will fail, if they are severable.⁶ But if the life of a pre-Constitution Act is *extended* by an amending Act, after the commencement of the Constitution, the Act ceases to have the protection of Art. 31 (5).⁶

4. But notifications issued after the commencement of the Constitution cannot be challenged as unconstitutional if the Act under which they are issued are protected by Art. 31 (5) (a).⁷⁻⁸

(22) It is to be noted that under the amended cl. (2), the existence of 'public purpose' is an express condition; hence, if the application of cl. (2) is excepted, the question of existence of public purpose to test the validity of laws coming under cl. (5) is also placed beyond question in the Courts. [Cf. *Jhandu v. State of Punjab*, A. 1961 S.C. 343 (345)].

(23) *Somawanti v. State of Punjab*, A. 1962 S.C. 151 (160).

(24) *Khandewal v. State of U. P.*, A. 1955 All. 12 (18).

(25) *State of W. B. v. Bela Banerjee*, A. 1954 S.C. 170.

(1) *State of Bombay v. Heman*, A. 1952 Bom. 16.

(2) *Sudhindra v. Sailendra*, A. 1952 Cal. 65 (67); *Srinivas v. State of West Bengal*, A. 1954 Cal. 171.

(3) *Lilavati v. State of Bombay*, A. 1957 S.C. 521 (526).

(4) *Barkaya v. State of Bombay*, A. 1960

S.C. 1203 (1206); *Jhandu v. State of Punjab*, A. 1961 S.C. 343 (345).

(5) *Sanjha v. Jaya*, A. 1958 Pat. 71 (74).

(5) *Okara E. S. C. v. State of Punjab*, A. 1960 S.C. 284 (289).

(6) *Satya Narayan v. State of W. B.*, A. 1957 Cal. 310 (314).

(7) *Mansoor v. T. C. Government*, A. 1952 T.C. 14.

(8) In *Ramjiban v. State of W. Bengal*, A. 1954 Cal. 56, Sinha J. expressed the opinion that the Essential Supplies Act being merely an enabling statute, conferring power to enact an Order having the force of law, the Order, if promulgated after the Constitution, cannot be said to be an 'existing law' within the meaning of cl. (5) and will not be exempted from the operation of cl. (2) of Art. 31. This view is supported by the Supreme Court decision in *State of Rajasthan v. Nathmal*, (1954) S.C.A. 347, which affirms *Nathmal v. Commr.*, A. 1952 Raj. 74.

5. When a law is protected by the present sub-clause, its validity cannot be challenged on the ground of non-compliance with any of the conditions enumerated in cl. (2) of Art. 31, including the existence of 'public purpose' except where the purpose, being patently a private purpose, would render the exercise of the statutory power 'colourable' or 'fraudulent'.⁹ But the Court has no jurisdiction to inquire into the propriety of the Executive determination in the absence of definite allegation that the Government has acted in fraud of its powers.⁹

Sub-cl. (b) (i).

'Taxation.'—In a sense, this sub-clause is redundant, for if cl. (2) be held as representing the power of 'Eminent Domain', it would be clear, according to American doctrines (see p. 201, *ante*) that taking of property under a separate power, such as taxation, would not come under cl. (2) of the present Article. This would also follow from the fact that taxation is treated separately by our Constitution, by taking it out of Part III and dealing with it in Art. 265.^{9a} It is, however, better that it has been made clear in the present context.

A law authorising the assessment of revenue-free land would come under this head.¹⁰

'Penalty.'—'Penalty' means a sum of money recoverable in a summary manner,¹¹ for breach of some statutory provision.

It is a form of punishment and includes forfeiture of property imposed for the violation of a law.

But before a penalty may come within the protection of the present sub-clause, it must be established that the act which is alleged to have been penalised was prohibited by the provision of a law. If there was no such prohibition, the penalty would amount to acquisition of property by the State without payment of compensation, e.g., where consideration received by a purchaser at an invalid sale is ordered to be forfeited, in the absence of a specific prohibition in the statute upon the purchaser not to purchase a land unless the statutory conditions are satisfied.¹²

Sub-cl. (5) (b) (ii) : Public health and safety.

The object of this sub-clause is to save from the operation of cl. (2) laws to be made *after the commencement of the Constitution* (either by the Union or by the States) for (a) the promotion of public health or (b) the prevention of danger to life or property, even though such laws might involve the 'acquisition' or 'taking possession of' property within the meaning of cl. (2). No compensation is, accordingly, payable for legislation having the following objects:

(a) *For the promotion of public health:*

(i) Authorising the opening out of a congested part of a town or clearing up slums,¹³ and acquisition of land for these purposes.

(ii) Acquisition of land for laying out of a public park for affording fresh air and other health amenities to the public in a congested area or for broadening the lanes to lay underground sewers.¹³

(b) *For the prevention of danger to life:*

Acquisition of land for the erection of a hospital for patients suffering from infectious diseases, e.g., *plague*.¹³

(9) *Somawanti v. State of Punjab*, A. 1963 S.C. 151 (164-5).

(9a) *Ramjilal v. I.T.O.*, A. 1951 S.C. 97.

(10) *Ratnaprova v. State of Orissa*, A. 1964 S.C. 1195 (1200).

(11) *R. v. Kildare Justice*, (1895) 2 I.R. 577.

(12) *Kuberdas v. State of Bombay*, A. 1960 Bom. 459 (460).

(13) *State of W. B. v. Subodh Gopal*, (1954) S.C.A. 65 (113, Das, J.). [But as Das, J. has pointed out (p. 114. *ibid*), under the existing law as embodied in the Land Acquisition

Act, 1894, compensation is always paid when land is acquired for such purposes as above. The result of Art. 31 (5) (ii) is that there is no constitutional obligation to pay compensation where property is acquired or taken possession of on grounds of public health or prevention of danger to life or property. Hence, the Legislature, if it so likes, may now provide for acquisition of taking possession of property for such purposes without payment of compensation and the Land Acquisition Act may be amended to provide this, if the Legislature so desires.

(c) *For the prevention of danger to property:*

Pulling down a dilapidated building or a house on fire in order to save neighbouring property.

But the following would not come under the protection of cl. (5) (b) (ii)—

(a) An enactment for the prevention of encroachment upon public lands.¹⁴

(b) A law causing deprivation of property on the ground of *morality*;¹⁵ production of an essential commodity¹⁵ or removal of unemployment,¹⁵ e.g., the Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950.¹⁵

Sub-cl. 5 (b) (iii) : Evacuee property legislation.

Implementation of an agreement relating to evacuee property.

Parliament has already enacted the Administration of Evacuee Property Act (XXXI of 1950), under the present power.¹⁶ Hence, no compensation is payable for taking possession of evacuee property.¹⁷

The word "otherwise" implies that the law need not always be based on an agreement with a foreign country.¹⁸

The protection attaches to any law relating to a property which has been 'declared by law to be evacuee property'. 'Law', in this context, includes a law which empowers an authority to make such declaration instead of itself declaring a property as evacuee property,¹⁹ as well as an *intra vires* subordinate legislation, such as a notification²⁰ issued under such law.

CLAUSE (6).

Cl. (6) : Validity of certain pre-Constitution laws.

This is another exception to cl. (2), and provides for ouster of jurisdiction of the Courts. While cl. (4) relates to Bills *pending* in the State Legislature at the commencement of the Constitution, cl. (6) relates to Bills *enacted* by the State within 18 months before commencement of the Constitution, i.e., Acts providing public acquisition which were enacted not earlier than 26-7-48. If the President *certifies*²¹ such an Act within 3 months from the commencement of the Constitution, the Courts shall have no jurisdiction to invalidate that Act on the ground of contravention of cl. (2) of this Article. Bills enacted more than 18 months before commencement of the Constitution come under Cl. (5).^{21a}

This clause lays down that a pre-Constitution State law shall not be questioned in any Court on ground of contravention of cl. (2) of Art. 31

(14) *Brij Bhukan v. S. D. O.*, A. 1955 Pat. 1 (14).

(15) *Dwarkanadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674 (697).

(16) *Mohan v. Custodian*, A. 1956 Pepsu 58.

(17) *Abdul Majid v. Nayak*, A. 1951 Bom. 440.

(18) *Sampuran v. Competent Officer*, A. 1955 Pepsu 148.

(19) *Harigir v. Asst. Custodian*, A. 1961 S.C. 1257.

(20) *Ambarnath Mills v. Godbole*, A. 1957 Bom. 119.

(21) Under different notifications, the President has certified the following Acts under Art. 31 (6) of the Constitution:

Not. No. 43/3/50 Judicial, d. 11-3-50: Bihar State Management of Estates Act (Bihar Act XXI of 1949). [Declared *ultra vires* by *Kameshwar v. Prov. of Bihar*, A. 1950 Pat. 392, on the ground, *inter alia*, of contravention of Art. 19 (1) (f)].

Not. No. 43/7/50 Judicial, d. 12-4-50: (1) Madras Estates (Abolition & Conversion into Ryotwari) Act (Mad. Act XXVI of 1948). [Validity upheld in *Jagveera v. State of Madras*, (1954) S.C.R. 761]. (2) Do. Amendment Act (Mad. Act I of 1950). (3) Madras Electric Supply Undertakings (Acquisition) Act (XLIII of 1949). (4) East Punjab Displaced Persons (Land Resettlement) Act (E. P. Act XXXVI of 1949). (5) Assam Management of Estates Act (Assam Act XVII of 1949).

S.R.O. 14, d. 25-4-50: Bombay Acts 67 of 1948, 61 and 63 of 1949.

S.R.O. 15, d. 25-4-50: Assam Requisition and Control of Vehicles Act, 1948. (Assam Act XVII of 1948).

S.R.O. 16, d. 25-4-50: Reserve Bank (Transfer to Public Ownership) Act (Central Act LXII of 1948).

S.R.O. 17, 25-4-50: Delhi Hotels (Control of Accommodation) Act (XXIV) of 1949.

(21a) *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096.

if it satisfies two conditions—(i) that it was enacted within 18 months before 26-1-50 and (ii) that it was submitted for the President's certification by 26-4-50 and was certified by him.

But if a provincial law was passed within 18 months before 26-1-50 and yet the certificate of the President was not obtained, it would not be entitled to the protection of the present clause against the operation of Art. 31 (2) of the Constitution,^{21a} e.g., (a) West Bengal Land Development and Planning Act, 1948;²² (b) Madras Aliyasanthana Act, 1949;²³ Orissa (Development of Industries, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced Persons) Land Acquisition Act, 1948;²⁴ Bihar Maintenance of Public Order Act, 1949.²⁵

The ambit of the protection given by cl. (6) is co-extensive with that given by cl. (4) [see p. 244, ante].

Certification would not, however, cure defects outside Art. 31 (2) of the Constitution, e.g., absence of legislative competence.¹ Thus, the Madras Electricity Supply Undertakings (Acquisition) Act (XLIII of 1949) was declared *ultra vires*¹ on the ground that under the Government of India Act, 1935, the power to acquire a commercial or industrial undertaking did not belong to any of the legislative lists and though the British Parliament had expressly entrusted the Provincial Legislature with power to make a law with respect to compulsory acquisition of land,² it did not grant any power either to the Federal or the Provincial Legislature, to make a law with respect to compulsory acquisition of a commercial or industrial undertaking. This power, therefore, was left to the residue and the Provincial Legislature could not make a law on the subject unless the Governor-General had authorised it under s. 104 of the Government of India Act, 1935.

Again, if a pre-Constitution law was void *ab initio* owing to contravention of s. 299 (2) of the Government of India Act, 1935, nothing in cl. (5) or (6) of Art. 31 can resuscitate such dead law.³⁻¹⁰

INDEX TO COMMENTS

ARTICLE 31.

Right to Property.

Amendment, 183; Objects of Amendment, 183; Effects of Amendment, 183; Amendment not retrospective, 184.

A short history of Arts. 31-31B, 184; Scope of Art. 31: Protection of private property, 189; Analysis of Art. 31, 189; Relation between Cls. (1) and (2) of Art. 31, 189; Arts. 19 (1) (f) and 31, 191.

Clause (1).

Other Constitutions:

(A) U.S.A., 194; (B) England, 195; (C) Eire, 196; (D) Fourth French Republic, 196; (E) Japan, 196; (F) West Germany, 196; (G) Government of India, Act, 1935, 196.

India:

Scope of Cl. (1): No deprivation except under law, 196; 'Deprived', 196; Save by authority of law: (A) U.S.A., 198; (B) England, 198; (C) India, 198; 'Law', 199; A right of property created or recognised by existing law cannot be taken without legislation, 199; 'Person', 199; Arts. 31 (1) and 265, 199.

Clause (2).

Other Constitutions:

(A) U.S.A., 200; (B) England, 204; (C) Australia, 205; (D) West Germany, 205; (E) Eire, 205; (F) Japan, 206; (G) Government of India Act, 1935, 206.

India:

Amendment, 207; The doctrine of Eminent Domain, 207; Conditions for the application of Cl. (2), 207.

I. What is property: (A) U.S.A., 208; (B) India, 209; whether any kind of property is exempt from the power of compulsory acquisition, 211; whether money and choses in action can be compulsorily acquired; (A) U.S.A., 211; (B) India, 212; Property of an alien, 213; Whether

(22) *State of W. B. v. Bela Banerjee*, (1953) S.C.A. 41 (44).

(23) *Santhamma v. Neelamma*, A. 1957 Mad. 642 (652).

(24) *State of Orissa v. Bharat*, A. 1955 Orissa 97.

(25) *Ajablal v. State of Bihar*, A. 1956 Pat. 137.

(1) *Rajamahmundry Electric Supply Co. v. State of Andhra*, (1954) S.C.A. 272 (277).

(2) Item 9 of List II of the Government of India Act, 1935.

(3-10) *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096 (1101).

Art. 31. (2) extends to Government property: (A) U.S.A., 214; (B) England, 214; (C) Australia, 215; (D) Canada, 215; (E) India, 215.

II. Public Purpose, 217; Jurisdiction of Courts to determine whether a purpose is a 'public purpose': (A) U.S.A., 220; (B) India: I. Prior to 27-4-55, 220; II. After 27-4-55, 220; Whether property acquired for one purpose may be used for another purpose, 221.

The question of necessity, 222.

III. Obligation to give compensation for acquisition or requisitioning, 222; 'Provides for compensation', 223; Or specifies the principle, 223; 'Manner in which compensation is to be determined and given', 223; 'Compensation', 224; Justiciability of the amount of compensation fixed by the Legislature: (A) U.S.A., 224; (B) Australia, 225; (C) India: I. Prior to 27-4-55, 226; II. After 27-4-55, 229; Effects of the 1955 Amendment on Compensation, 230; Matters still remaining justiciable in cases coming under amended cl. (2), 231; What constitutes a colourable legislation, 233; Limitations upon the rule of Compensation, 235.

Clause (2A).

Acquisition or requisitioning, 235; Cases where Cls. (2)—(2A) have been held to be not applicable, 241; Legislation by Parliament, 242; Legislative power, 242.

Clause (3).

Other Constitutions:

Govt. of India Act, 1935, 243.

India:

Legislation by State Legislature, 243.

Clause (4).

Pending Bills, 243; Extent of the saving contained in clauses (4)—(6) of Art. 31 and Arts. 31A & B, 244; Instances of Acts assented to by the President under cl. (4), 245; Scope of Arts. 31 (4) and 31A compared, 245.

Clause (5).

Saving of certain laws from operation of cl. (2), 245; Sub-clause (a): existing laws, 246; Sub-clause (b) (i): Taxation penalty, 247.

Sub-clause 5 (b) (ii): Public Health and Safety, 247.

Sub-clause 5 (b) (iii): Evacuee property legislation, 248.

Clause (6).

Validity of certain pre-Constitutional laws, 248.

As introduced on 18-6-51

¹⁰**31A.** (1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part:

Saving of laws providing for acquisition of estates, etc.

After 27-4-55

¹⁰**31A.** (1) *Notwithstanding anything contained in article 13, no law providing for—*

- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
- (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
- (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
- (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or

(10) This Article was first inserted by the Constitution (First Amendment) Act, 1951 and the italicised words were substituted by

the Constitution (Fourth Amendment) Act, 1955 and the (Seventeenth Amendment) Act, 1963, as indicated in the footnotes.

As introduced on 18-6-51

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received assent.

After 27-4-55

managers of corporations, or of any voting rights of shareholders thereof, or
(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31 :

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

*Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.*¹¹

(2) '(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any janmam right;

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans'.¹²

(11) The second Proviso was inserted by the Constitution (Seventeenth Amendment) Act, 1964.

(12) Cl. (2)(a) was first amended by the

Constitution (Fourth Amendment) Act, 1955. It has been substituted as above with retrospective effect, by the Constitution (Seventeenth Amendment) Act, 1963.

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, *raiyyat*, *under-raiyyat* or other intermediary and any rights or privileges in respect of land revenue.

Amendments.—I. Arts. 31A and 31B were added to the Constitution with retrospective effect by s. 4 of the **Constitution (First Amendment) Act, 1951**, which provides as follows—

"4. Insertion of new Article 31A.—*After Article 31 of the Constitution the following Article shall be inserted, and shall be deemed always to have been inserted, namely. . . .*"

Shortly speaking, the object of the introduction¹³ of Art. 31A was to validate the acquisition of zemindaries or the abolition of the Permanent Settlement without interference from the Courts.

In *Shankari Prasad v. Union of India*,¹⁴ Sastri C.J. explained the reason for the insertion of Arts 31A-31B thus:

"What led to that enactment is a matter of common knowledge. The political party now in power, commanding as it does a majority of votes in the several State Legislatures as well as in Parliament, carried out certain measures of agrarian reform in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may compendiously be referred to as Zemindary Abolition Acts. Certain zemindars, feeling themselves aggrieved, attacked the validity of those Acts in Courts of law on the ground that they contravened the fundamental rights conferred on them by Part III of the Constitution. The High Court at Patna¹⁵ held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad¹⁶ and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh respectively. Appeals from those decisions are pending in this Court. Petitions filed in this Court by some other zemindars seeking the determination of the same question are also pending. At this stage, the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a bill to amend the Constitution, which after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution (First Amendment) Act, 1951, (hereinafter referred to as the Amendment Act)".

The constitutionality of the Amendment, which was challenged in *Shankari Prasad's case*,¹⁴ was upheld by the Supreme Court.

Art. 31A, in short, provided that no law (past or future) affecting rights of any proprietor or intermediate holder in any *estate* shall be void on the ground that it is inconsistent with *any* of the fundamental rights included in Part III of the Constitution. That is to say, no such law shall be liable to attack on the ground that no compensation has been provided for, or that there is no public purpose¹⁷⁻¹⁸ or that it violates some other provision of Part III, *e.g.*, Art. 14,¹⁷ Art. 19.¹⁹

The insertion of Art. 31A was made retrospective by the words—"deemed always to have been inserted." Hence, it validates the Bihar Land Reforms Act, 1950, *ab initio*, notwithstanding the decision of the Patna High Court, noted above.¹⁵

II. Art 31A was amended by the Constitution (Fourth Amendment) Act, 1955, with retrospective effect *ab initio*, introducing the following changes—

(i) The first change is merely verbal, *viz.*, that instead of the blanket expression "any provisions of this Part", the Articles which appear to be relevant in this connection have been specified, *viz.*, "Art. 14, Art. 19 or Art. 31". To this extent, the scope of the protection offered by the Article has been restricted.

(13) C3, Vol. I, pp. 367-9.

(14) *Shankari Prasad v. Union of India*, (1952) S.C.R. 89 (95).

(15) *Kameshwar v. State of Bihar*, A. 1951 Pat. 91.

(16) *Surya Pal v. U. P. Govt.*, A. 1951 All. 674.

(17) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (263).

(18) *Visheshwar v. State of M. P.*, (1952) S.C.R. 1020.

(19) *Atma Ram v. State of Punjab*, A. 1959 S.C. 59; *Jadav v. H. P. Admn.*, A. 1960 S.C. 1008 (0112).

(ii) While the original Art. 31A was confined to laws for the acquisition of any 'estate' or of rights therein, the Article, as amended, includes within it laws of as many as four other classes, viz., laws providing for—

- (a) taking over the management of any property by the State for a limited period;
- (b) amalgamation of two or more corporations;
- (c) extinguishment or modification of rights of persons interested in corporations;
- (d) extinguishment or modification of rights accruing under any agreement, lease or licence relating to minerals.

It is obvious that while the original article confined itself to agricultural land and agrarian reform, the amended article also extends to industrial property for the purpose of social control as regards certain matters specified in sub-cl. (b)-(e) of Cl. (1).

So, after the amendment, no law having any of these objects (subject to the qualifications laid down in each sub-clause) was open to challenge on the ground of contravention of Arts. 14, 19 or 31.

(iii) The definition of 'estate' has been enlarged in order to include not only the interests of 'intermediaries' strictly so called but also of 'raiyats and under-raiyats' who are not regarded as intermediaries under the land laws prevailing in certain parts of the country, such as West Bengal.

The object of this amendment was to take out not only laws relating to the abolition of Zemindari but also other items of agrarian and social welfare legislation, which affect proprietary rights, altogether, from the purview of Arts. 14, 19 and 31. The object was thus explained in the Statement of Objects and Reasons—

"It will be recalled that the zemindari abolition laws which came first in our programme of social welfare legislation were attacked by the interests affected mainly with reference to articles 14, 19 and 31, and that in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts, articles 31A and 31B and the Ninth Schedule were enacted by the Constitution (First Amendment) Act. Subsequent judicial decisions interpreting articles 14, 19 and 31 have raised serious difficulties in the way of the Union and the States putting through other and equally important social welfare legislation on the desired lines, e.g., the following:—

(i) While the abolition of zamindaries and the numerous intermediaries between the State and the tiller of the soil has been achieved for the most part, our next objectives in land reform are the fixing of limits to the extent of agricultural land that may be owned or occupied by any person, the disposal of any land held in excess of the prescribed maximum and the further modification of the rights of land owners and tenants in agricultural holdings.

(ii) In the interests of national economy the State should have full control over the mineral and oil resources of the country, including particular, the power to cancel or modify the terms and conditions of prospecting licences, mining leases and similar agreements.

(iii) It is often necessary to take over under State management for a temporary period a commercial or industrial undertaking or other property in the public interest or in order to secure the better management of the undertaking or property. Laws providing for such temporary transference to State management should be permissible under the Constitution.

(iv) The reforms in company law now under contemplation, like the progressive elimination of the managing agency system, provision for the compulsory amalgamation of two or more companies in the national interest, the transfer of an undertaking from one company to another, etc., require to be placed above challenge.

It is accordingly proposed in clause 3 of the Bill to extend the scope of article 31A so as to cover these categories of essential welfare legislation."

The Supreme Court has held²⁰ that in view of the fact that Art. 31A has been enacted by two successive amendments and that the Fourth Amendment Act is a validating enactment purposely introduced into the Constitution with a view to saving legislation effecting agrarian reforms from attacks on the ground of constitutional invalidity, it should be given

"its fullest and widest effect, consistently with the purpose behind the enactment, provided, however, that such a construction does not involve any violence to the language actually used."²⁰

(20) *Atma Ram v. State of Punjab*, A. 1959 S.C. 519 (526); *Vajravelu v. Special Dy. Collector*, A. 1965 S.C. 1017.

On the other hand, such liberal construction cannot go to the length of over-reaching the object of the Article.²¹ Thus, the object of Art. 31A (1) (a) is *agrarian reform* and it provides for the acquisition or extinguishment or modification of the rights of the holder of an estate or the various subordinate tenure-holders in respect of their rights in relation to the estate. The Article has nothing to do with any law regulating *inter se* the rights of a proprietor in his estate and the junior members of his family. A contrary view would enable the State to divest a proprietor of his estate and vest it in another without reference to any agrarian reform. It would also enable the State to compel a proprietor to divide his properties, though self-acquired, between himself and other members of his family or create interest therein in favour of persons other than tenants who had none before. Such acts have no relation to land-tenures and they are purely acts of expropriation of a citizen's property without any reference to agrarian reform.²¹

III. The Article has been further amended by the **Constitution (Seventeenth Amendment) Act, 1964**,²³ introducing two changes—

A. A second Proviso has been added to Cl. (1). The object of this addition is as follows—

"where any law makes a provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure provides for payment of compensation at a rate not less than the market value thereof."²⁴

It has been seen that under Art. 31(2), as it stands amended, the question of *adequacy* of compensation for compulsory acquisition is no longer justiciable. Hence, even where the State allows a tenant to possess land not exceeding a particular ceiling area and provides for a transfer of the rest, and thereafter proceeds to compulsorily acquire lands falling within the permissible ceiling, the validity of the legislation could not be challenged on the ground that the compensation provided by it is less than the market value of the land, by reason of the amended Art. 31 (2). The instant Proviso has been inserted for the benefit of the actual tiller of the soil, to ensure that the Legislature may not take away even the area under his personal cultivation which does not exceed the ceiling prescribed by the Legislature itself, without paying the market value of the land to be acquired.

B. The original sub-clause (2) (a) has been substituted with **retrospective effect**, by using the words—

"in clause (2), for sub-clause (a), the following sub-clause shall be substituted and shall be deemed always to have been substituted, namely:—"

The original sub-clause (2) (a), as it existed at the date of the 17th Amendment, and the new sub-clause may be placed side by side for comparison:

Original Cl. (2) (a)

New Cl. (2) (a)

(2) In this article, :—

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant and in the States of Madras and Kerala any *janmam* right ;

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Madras and Kerala, any *janmam* right ;

(21) *Kochunni v. States of Madras & Kerala* (II), A. 1960 S.C. 1080; *Vajravelu v. Special Dy. Collector*, A. 1965 S.C. 1017.

(22) *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470).

(23) Validity of this amendment has been upheld in *Sajjan Singh v. State of Rajasthan*, A. 1965 S.C. 16.

(24) Statement of Objects and Reasons.

Original Cl. (2) (a)

New Cl. (2) (a)

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans.

The object of this amendment was thus explained in the Statement of Objects & Reasons of the Bill—

"Article 31A of the Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31. The protection of this article is available only in respect of such tenures as were estates on the 26th January, 1950, when the Constitution came into force. The expression "estate" has been defined differently in different States and, as a result of the transfer of land from one State to another on account of the reorganisation of States, the expression has come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments relate to lands which are not included in an estate. Several State Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of articles 14, 19 and 31 of the Constitution and that the protection of article 31A was not available to them.²⁵ It is, therefore, proposed to amend the definition of "estate" in article 31A of the Constitution by including therein lands held under ryotwari settlement and also other lands in respect of which provisions are normally made in land reform enactments."

CLAUSE (1).

'Notwithstanding anything in Art. 13'.

1. The words in Art. 31A (1) prior to the Amendment by the **Constitution (Fourth Amendment) Act, 1955** were 'notwithstanding anything in the foregoing provisions of this Part'. From one standpoint, the change is verbal, for either expression excludes the application of any of the fundamental rights conferred by the three Articles which are specified at the end of Cl. (1), viz., Arts. 14,¹⁻³ 19,²⁻³ 31⁴ (including the question of public purpose).¹

By reason of these words, a law which provides for the extinction of the interest of the landlords and a statutory conveyance thereof to the tenants cannot be challenged on the ground of contravention of Art. 14 or 19.⁵ The protection is so wide that it would validate even discriminatory legislation.²

2. But a challenge on the ground of contravention of Articles other than Arts. 14, 19 and 31 is not precluded by Art. 31A after the Amendment, e.g., that certain provisions of a law authorising State management of the property of a Mutt were held to infringe the provisions of Arts. 25-26.⁶

In this respect, the Constitution (Fourth Amendment) Act, 1955 is more liberal to the aggrieved owner than the First Amendment Act, 1954, for, while the original Art. 31A precluded a challenge on the ground of violation of "any of the rights conferred by any provisions of this Part," i.e., any of the fundamental

(25) E.g., *Kunhikonam v. State of Kerala*, (1962) 1 S.C.R. 829.

(1) Cf. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (364, 366); *State of Bihar v. Rameshwar*, A. 1961 S.C. 1649 (1654).

(2) Cf. *State of Bihar v. Kameshwar*, (1952) S.C.R. 889; *Suryapal v. State of U. P.*, (1952) S.C.R. 1056.

(3) *State of V. P. v. Moradhwaj*, A. 1960 S.C. 796.

(4) Cf. *Umegh Singh v. State of Bombay*, (1955) 2 S.C.R. 164 (182); *Jadav v. H. P. Administration*, A. 1960 S.C. 1008 (1012).

(5) *Parashram v. State of Bombay*, A. 1957 Bom. 252 (263); *Atma Ram v. State of Punjab*, A. 1959 S.C. 519.

(6) *Commr. of H. R. E. Board v. Lakshmindra*, (1954) S.C.R. 1005.

rights, the amendment of 1954 has restricted it to the contravention of three specified Articles only viz., Arts. 14, 19, 31.

3. Prior to the amendment of Art. 31 (2) by the Constitution (Fourth Amendment) Act, 1955, it was held by the majority of the Supreme Court in *State of Bihar v. Kameshwar*,² that the existence of a public purpose is an inherent condition for compulsory acquisition of private property by the State. Following the above view, the Saurashtra High Court held⁷ that Art. 31A did not debar the Court from questioning the existence of a public purpose behind a law coming under this Article. Such a contention would now be precluded since the amendment has laid down the existence of a public purpose as an express condition of acquisition or requisition under Art. 31. In the result, Art. 31A would preclude an attack on the ground of absence of public purpose as well.¹¹

4. Further, Entry 42 of List III having been amended at the same time, so as to omit any reference to compensation therefrom, it can no longer be contended that a provision for compensation is a condition for the exercise of the legislative power conferred by that Entry. The obligation to provide for compensation is now exclusively contained in Art. 31 (2), and since an application of that Article is excluded by Art. 31A, a law which comes under Art. 31A can no longer be challenged as a **colourable legislation**¹¹ on the ground of absence of compensation.⁸

Scope of Sub-cl. (a) : Acquisition, extinguishment, modification of rights in estate.

I. Cl. (a) extends to two different kinds of legislation⁹: (a) Providing for the acquisition of an estate or the rights therein by the State; (b) Providing for the extinguishment or modification of such rights, without effecting a transfer of such rights to the State.

(a) Acquisition of an estate or the rights to the State takes place where there is a transfer of the ownership of the property to the State or to a corporation owned or controlled by the State.⁹ Thus, there is no acquisition by the State where a law provides for a compulsory purchase of the lands of a landlord by his tenants.⁹

(b) There may be an extinguishment or modification of the rights of a landlord *without the process of acquisition by the State*. Thus, in the case of a legislation enabling the tenants to compulsorily purchase the right and interest of the landlord, the title of the landlord is transferred to the *tenants* on such purchase, and there is an immediate extinguishment of the landlord's rights, as distinguished from a mere suspension. Art. 31A (1) (a) would, therefore, protect such legislation from attack.⁹

II. Art. 31A (1) (a) would thus save a legislation providing for the transfer of property from one private person to another, which had been held not to constitute a 'public purpose', in *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (272) [see p. 219, ante]. Art. 31A takes a case completely out of the purview of Art. 31, so that the requirement of a 'public purpose' in cl. (2) of Art. 31 would also be dispensed with in such a case. The net result is that under Art. 31A (1) (a), it is competent for the State to compulsorily transfer the landlord's property to the tenant. But, as observed in *Kochunni v. States of Madras & Kerala*,¹⁰ such transfer from one private person to another will be protected by Art. 31A (1) (a) only if it relates to a scheme of *agrarian reform*, which is the object of the clause.¹¹ In the absence of such purpose of effecting agrarian reform, a compulsory transfer of the interest in an estate belonging to a private owner to another person, e.g., a rival claimant, would be a pure act of expropriation, outside the purview of Art. 31A (1) (a).¹⁰

(7) *Kalika Kumar v. Saurashtra State*, A. 1952 Sau. 114.

(8) This aspect appears to have been overlooked in *State of V. P. v. Moradhwaj*, A. 1960 S.C. 796 (801), but taken cognisance of in *State of Bihar v. Rameshwar*, A. 1961 S.C. 1649 (1654).

(9) *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470); *Atma Ram v. State of Punjab*, A. 1959 S.C. 519.

(10) *Kochunni v. States of Madras & Kerala* (II), A. 1960 S.C. 1080.

(11) Cf. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (332-3).

Two Full Benches of the Punjab High Court¹²⁻¹³ have, however, held that the expression 'agrarian reform' have to be understood in a liberal sense, so as to include measures which are conducive to the physical, social, educational and moral well-being of the members of the agricultural community. This view has been approved by the Supreme Court in *Ranjit Singh v. State of Punjab*,¹⁴ holding that proper planning of rural areas should be treated as a scheme of agrarian reform. The following observations of the Supreme Court in this case, explaining the decision in *Kochunni's case*:¹⁵

"From a review of these authorities it follows that when the Punjab High Court decided these cases on the authority of *Jagat Singh's case*¹² the view taken in this Court was in favour of giving a large and liberal meaning to the terms 'estate', 'rights in an estate' and 'extinguishment and modification' of such rights in Art. 31A. No doubt *Kochunni's case*¹⁵ considered bare transfer of the rights of the sthanee to the tarwad without alteration of the tenure and without any pretence of agrarian reform, as not one contemplated by Art. 31A however liberally construed. But that was a special case and we cannot apply it to cases where the general scheme of legislation is definitely agrarian reform and under its provisions something ancillary thereto in the interests of rural economy, has to be undertaken to give full effect to the reforms. In our judgment, the High Court was right in not applying the strict rule in *Kochunni's case*¹⁵ to the facts here. . . .

Provisions for the assignment of lands to village Panchayat for the general use of the general community, or for hospitals, schools, manure pits, tanning grounds etc. enure for the benefit of rural population and must be considered to be essential part of the redistribution of holdings and open lands to which no objection is apparently taken. . . .

The settling of a body of agricultural artisans . . . is a part of rural planning and can be comprehended in a scheme of agrarian reforms. It is a trite saying that India lives in villages and a scheme to make villages self-sufficient cannot but be regarded as part of larger reforms which consolidation of holdings, fixing of ceilings on lands, distribution of surplus lands and utilising of vacant and waste lands contemplate. The four Acts, namely, the Consolidation Act, the Village Panchayat Act, the Common Lands Regulation Act and the Security of Tenure Act are a part of a general scheme of reforms and any modification of rights such as the present has the protection of Art. 31A."¹⁶

I. 'Law providing for the acquisition of an estate'.

1. For the application of this Article, it is not necessary that the Act must expressly state that the Estate or the rights therein vest in the State. It is sufficient if the provisions of the Act by themselves show that the acquisition is by the State.¹⁶ Nor is it essential that the acquisition must be immediate. There is nothing wrong in its happening gradually or on the initiative of an intermediary person, such as a tenant, if the actual extinguishment of the rights in the estate takes place on payment of compensation by the State.

2. Where there is a law providing for the acquisition of an estate, any Act amending the same, enacted after the coming into operation of Art. 31A, shall be entitled to the protection of that Article.¹⁷

3. Resumption of a jagir for breach of a condition of the grant is not acquisition but if the State wants to take the property of the jagirdar for a public purpose, it is an acquisition within the meaning of Art. 31A.¹⁸

4. As a measure ancillary to the acquisition of an 'estate', the Legislature may provide for acquisition of buildings as appurtenant to the estates within which they lie,¹⁹ or for the allotment of land to the displaced landlord, for personal cultivation,²⁰ or for the investigation into and annulment of transfers fraudulently made immediately before the enactment of a law for the abolition of zamindari,—with the object of defeating the provisions of the law,²¹ or for the encouragement of self-cultivation, after the abolition of intermediaries.²¹

(12) *Jagat Singh v. State of Punjab*, A. 1962 Punj. 221 (F.B.).

(13) *Jit Singh v. State of Punjab*, A. 1964 Punj. 419 (F.B.).

(14) *Ranjit Singh v. State of Punjab*, A. 1965 S.C. 632 (637-8).

(15) *Kochunni v. States of Madras & Kerala* (II), A. 1960 S.C. 1080.

(16) *Kalika Kumar v. Saurashtra State*, A. 1952 Sau. 114.

(17) *Sankarsana v. Orissa State*, A. 1957 Orissa 96 (99).

(18) Cf. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (332-3).

(19) *Gajapati v. State of Orissa*, (1954) S.C.R. 1: (1952-54) 2 C.C. 500 (507).

(20) *State of V. P. v. Moradhwaj*, A. 1960 S.C. 796 (800).

(21) *Raghubir v. State of Ajmer*, A. 1959 S.C. 476.

II. (a) 'Extinguishment of such rights'.

1. This expression means the extinguishment of the rights in an estate without involving the process of its 'acquisition' by the State.²²

Hence, it would save even a law providing for the transfer of property from one person to another, provided it relates to a scheme of agrarian reform.²³ Thus,—

A measure of agrarian reform which fixes the ceiling area for the holding of the landlord for his personal cultivation and transfers the excess to his tenants, would be protected by this clause.²²

2. On the other hand, in the absence of 'agrarian reform', as properly understood, Art. 31A (1) (a) will not enable the State to divest a proprietor of his estate to vest it in another.^{22a}

(b) 'Modification of any such rights'.

1. The word 'modification', in the context of Art. 31A only means a substantive modification of the proprietary right of a citizen and has to be understood in juxtaposition with the word 'extinguishment'. It does not include a mere restriction imposed²³ upon the right, or a mere suspension²⁴ of the right of management of an estate.

2. The following have been held to constitute a 'modification' within the meaning of this provision:

(i) A law which limits the maximum holding of a landlord.^{24a}

(ii) A law which limits the landlord's right to recover possession of the land held by a tenant, for his personal cultivation.²⁴

(iii) A law providing for the transfer of the landlord's title to the tenant, subject to a condition of defeasance,¹ or enabling the tenants to acquire the interests of the landlord on payment of statutory compensation.²⁵

(iv) A law by which the *title* (as distinguished from the right of management) of the owner is kept in abeyance for a period of time.²²

On the other hand, the following have been held not to constitute an 'extinguishment or modification' of the rights in an estate, so as to attract the protection of Art. 31A (1) (a):

(a) The *suspension* of the right of *management* of the landlord by taking the estate over under the Court of Wards, on the ground of mismanagement.²⁴

(b) A procedural requirement imposed upon the right of the landlord to terminate the tenancy of his tenant.²³

'Estate'.—See under Cl. (2) (a), *post*.

'Rights in an estate'.—See under Cl. 2 (b).

What is barred by Art. 31A (1) (a).

What Art. 31A bars is the judicial review of a law which comes under any of the sub-clauses of cl. (1) of the Article, on the ground of contravention of Arts. 14, 19 or 31. It follows, therefore, that the provision does not protect the law in question from being challenged on any of the following grounds:

(i) That the law contravenes any of the mandatory provisions of the Constitution, *other than* Articles 14, 19, 31,—say, Arts. 25-26.²

(ii) That the Legislature which enacted the law had no legislative competence to make it. The following observation of Mahajan J. *State of Bihar v. Kameshwar*:³ made in connection with Art. 31 (4) are also applicable to Art. 31A—

(22) *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470).

(22a) *Vajravelu v. Special Dy. Collector*, A. 1965 S.C. 1017.

(23) *Kochunni v. State of Madras*, (II). A. 1960 S.C. 1080.

(24) *Raghubir v. Court of Wards*, (1953) S.C.R. 1049.

(24a) *Atma Ram v. State of Punjab*, A. 1959 S.C. 519.

(25) *Jadav v. H. P. Admn.*, A. 1960 S.C. 1008 (1012).

(1) *Bhagirath v. State of Punjab*, A. 1954 Punj. 167.

(2) *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.R. 1005.

(3) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889 (936).

"The provisions of this clause do not take away the court's power to examine whether the legislature that made the law has acted in the exercise of its law-making power within the lists or has merely made some other law though it has ostensibly exercised its powers under a certain legislative head which cannot be used to support the legislation".³

It is, therefore, open to the Court to examine whether the impugned law is, in its 'pith and substance' a law for 'acquisition' within the meaning of Entry 42 of List III, as amended, or for the 'extinguishment' or 'modification' of any rights in an estate; whether it relates to an 'estate' or 'rights in an estate'.

(iii) It has already been pointed out (p. 208, *ante*) that in *Kameshwar's* case³ the majority of the Supreme Court held that the existence of public purpose is a condition precedent to any compulsory acquisition or deprivation of property, not because it is expressly laid down in Art. 31 (2) but because it is an inherent condition of the power of the Sovereign to acquire private property: "Public purpose is a content of the power itself".

If this view were maintained by the Supreme Court, it would follow that by excluding the operation of Art. 31, Art. 31A could not possibly protect the law from being challenged on the ground of absence of a 'public purpose'.

But, as stated earlier, after the Legislature has, by the Constitution (Fourth Amendment) Act, 1955, introduced into Art. 31 (2) itself 'public purpose' as an express condition, and Art. 31 is, in *toto* excepted by Art. 31A (1), it would be against the canons of interpretation to hold that the existence of 'public purpose' nevertheless continues to be an extraneous condition for acquisition under Art. 31 (2), which has not been excepted by Art. 31A (1).⁴

But, as the Supreme Court has held in *Kochunni v. States of Madras & Kerala*,⁵ this does not prevent the Court from interpreting the very scope and object of Art. 31A (1) (a) and to hold that the law referred to therein is one for *agrarian reform*. Hence, where the protection of Art. 31A (1) (a) is sought, it is open to the aggrieved owner to contend that the law is not one for agrarian reform.

(iv) It has also been pointed out earlier, that prior to the amendment of Entry 42 of List III by the Constitution (Seventh Amendment) Act, 1956, it related to the provision for 'compensation' for acquisition and requisitioning. While Art. 31A was inserted by the First Amendment Act, 1951 (18-6-51) and then amended by the Fourth Amendment Act, 1955 (27-4-55), Entry 42 of List III was not amended simultaneously. In this situation, the Author observed, at p. 840 of Vol. I of the Third Edition of this Commentary—

"It is also to be noted that though Art. 31A specifically excludes the operation of Art. 31 in the cases specified in Art. 31A, Entry 42 of List III *has not been amended*, so that the contention that a law coming under Art. 31A constitutes a 'fraud' on Entry 42 of List III,—if the law is one for 'acquisition or requisitioning' property and yet offers 'no' compensation at all or lays down principles which, when carried out, result in the payment of no compensation at all,—still lies so long as the majority decision in *State of Bihar v. Kameshwar*^{16a} stands.

The view taken by the majority in that case was that even though the obligation to pay compensation may arise from the substantive provision in Art. 31 (2), Entry 42 of List III of the 7th Schedule governed the legislative power relating to 'acquisition' and 'requisitioning', so that any law for acquisition or requisitioning must comply with the requirements of that Entry and that, accordingly, if any such legislation seeks to avoid those requirements or seeks to make only a colourable compliance therewith, the law would constitute a 'fraud on the Constitution'."

Subsequent to the above observation, Art. 42 of List III has been amended by the Constitution (Seventh Amendment) Act, 1955 (1-11-56), removing all reference to 'compensation' from the Entry. Provision for compensation is not, therefore, a condition for exercise of the legislative power relating to 'acquisition' under that Entry. If that condition has been incorporated in Art. 31 (2) itself, by the Fourth Amendment, such question cannot be raised in a case coming under Art. 31A (1), which excepts Art. 31, altogether.

It follows, therefore, that a law which comes under Art. 31A can no longer be challenged on the ground that it is confiscatory in nature and, accordingly, a

(4) This view of the Author has just been upheld in *State of Bihar v. Rameshwar*, (1962) 1 S.C.R. 152.

(5) *Kochunni v. State of Madras*, (II), A. 1960 S.C. 1080.

colourable exercise of the legislative power relating to acquisition.⁴ It should be pointed out that in the case of *Burrakur Coal Co.*,⁶ the Court entered into the merits of such a contention because the Court held that some part of the impugned law was not covered by Art. 31A (1) (e) and that Art. 31 (2) was applicable to that part.

Sub-cl. (b) : 'Taking over of management of any property.'

I. This sub-clause is intended to counteract the effects of the two *Sholapur cases*.⁷⁻⁸

In January, 1950 the Government of India took over the management of the Sholapur Spinning and Weaving Co. (under powers conferred by the Sholapur Spinning & Weaving Co., Ordinance, 1950 later replaced by an Act), which had closed the mills causing serious unemployment amongst a certain section of the community. The closing down of the mills was also prejudicial to the interests of the public in a large sense because the mills were engaged in the production of an 'essential commodity'. On these two grounds, therefore, Government took over the management of the Company from the Directors of the Company and vested the management in statutory Directors appointed by the Government.

(I) In *Chiranjit Lal's case*,⁷ the Ordinance and the Act were challenged by a share-holder on the ground that they offended against Arts. 14, 19 (1) (f) and 31 (2). The majority negatived all these contentions for the following reasons—

(i) Art. 14 had not been contravened because the serious unemployment caused by the mismanagement of the company and the fact that it was engaged in the production of an essential commodity, differentiated the company from similar other concerns and, accordingly, there was a reasonable classification justifying the apparently discriminatory State action.

(ii) There was interference with some of the rights of the share-holders of the company but these were not 'proprietary' rights. Even if these might be considered as rights of property, the restrictions imposed by the impugned provision were reasonable and were in the interests of the general public, within the meaning of cl. (5) of Art. 19.

(iii) The share-holders had not been 'dispossessed' of their 'proprietary' rights and hence, no question of compensation under Art. 31 (2) arose.

(II) While the petition under Art. 32 in *Chiranjit Lal's case*⁷ was pending before the Supreme Court, a preference share-holder brought a suit before the Bombay High Court, challenging the right of the Directors appointed by Government under powers conferred by the Ordinance, to call on the preference share-holders to make payments of unpaid amounts on their shares. The issues involved in the appeal before the Supreme Court⁸ from this suit were the same as in *Chiranjit Lal's case*,⁷ viz., whether the Sholapur Spinning & Weaving Co. (Emergency Provisions) Ordinance, 1950, contravened Arts. 14, 19 or 31 (2). The majority of the Supreme Court thought it unnecessary to decide whether the impugned Ordinance contravened Arts. 14 and 19 but held that it contravened Art. 31 (2).

In short, the *rationale* of the decision was that even where the State does not acquire the property of a private owner by transferring to itself his title or take over possessions by requisitioning the property, Art. 31 (2) would come into operation if the regulatory action of the State oversteps the limits of 'legitimate social control legislation'⁹ and *virtually* amounts to 'taking possession of' the rights of the property owner.⁹

The decision in *Chiranjit Lal's case*⁷ was distinguished on the ground, *inter alia*, that in that case, the Petition had been brought by an ordinary share-holder and the finding of the Court was that though the ordinary share-holder had lost

(6) *Burrakur Coal Co. v. Union of India*, A. 1961 S.C. 954 (1963).

(7) *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10.

(8) *Dwarkanadas v. Sholapur Spinning & Weaving Co.*, (1954) S.C.R. 674 (683).

(9) Pp. 691, 707, *ibid.*

certain privileges by reason of the fact that the affairs of the company were, under the Ordinance, liable to be managed by Directors nominated by the Government instead of by Directors elected by the share-holders, the share-holder was not *dispossessed* of his proprietary right inasmuch as he still retained the right to enjoy the dividends and to dispose of his share. But in *Dwarkanadas's case*,⁸ the suit had been brought by a preference share-holder who was in danger of having his share forfeited in case he did not comply with the call made by the Directors appointed by Government, or of having to pay a heavy sum in pursuance of the call. In either case, it was held,¹⁰ the preference share-holder was being threatened to have his valuable property being 'taken possession of' by the State (in the sense in which 'taken possession of' was interpreted in this case, p. 186, *ante*).

The logical conclusions of the view taken by the majority in *Dwarkanadas's case* were far-reaching in so far as it laid down that compensation was payable even where the State had to take over the management of some property in exercise of its 'police powers', e.g., to prevent mismanagement leading to public loss, and the like.

(III) Ss. 52A-52G of the Insurance Act, 1938, as inserted by the Insurance Amendment Act, 1950, provide for the taking over the management of the business of an insurance company if at any time the Controller of Insurance "has reason to believe that an insurer carrying on life insurance business is acting in a manner likely to be prejudicial to the interests of holders of life insurance policies". The validity of this Amendment Act was challenged before the Punjab High Court¹¹ but it was held that Art. 31 (2) had not been infringed by the Amendment Act inasmuch as the *beneficial interest* of the insurance company had not been acquired or taken possession of by the State under the impugned legislation. This decision of the High Court was referred to by their Lordships in *Dwarkanadas's case*.¹² Though Mahajan J. said it was unnecessary to pronounce anything about the correctness of the High Court decision, he pointed out¹³ that the High Court had "construed the word 'acquisition' in the narrower sense". It was clear, accordingly, that the decision might have been otherwise if the word 'acquisition' had been interpreted in the manner Mahajan J. had done in *Dwarkanadas's case*.¹²

The powers conferred by these and similar enactments were considered essential by Government. Hence, sub-cl. (b) has been inserted in Art. 31A (1), in order to remove such legislation from any possible attack on the ground of contravention not only of Art. 31 but also of Arts. 14 and 19.

(IV) In the cases of *Raghubir v. Court of Wards*¹⁴ and *Jayantilal v. State of Saurashtra*,¹⁵ the State took over the management of private estates on the grounds that (a) the owner was habitually infringing the rights of tenants, or (b) that State management was necessary for the 'full and efficient use of the land for agriculture'. In both cases, the State action was nullified on the ground that it amounted to an unreasonable restriction on the right of property guaranteed by Art. 19 (1) (f) inasmuch as the proprietary right of the owner had been subjected to the absolute discretion and subjective satisfaction of the Executive. It is to obviate such objections that the present sub-clause has been inserted.

It is to be noted that sub-clause (b) is not restricted to industrial undertakings only, but extends to *any kind of property*. Hence, the State can now take over the management of any property, movable or immovable, for a limited period, simply for the sake of 'securing proper management of the property', without being obliged to justify its action in a court of law, with reference to Art. 14, 19 or 31.

Prior to the introduction of this clause it was held that the word 'modification' in cl. (a) meant the extinction of the proprietary right and that, accordingly, a

(10) P. 708, *ibid*.

(11) *Jupiter General Ins. Co. v. Rajagopalan*, A. 1952 Punj. 9.

(12) *Dwarkanadas v. Sholapur Spinning & Weaving Co.*, (1954) S.C.R. 674 (583).

(14) *Raghubir v. Court of Wards*, (1953) S.C.R. 1049.

(15) *Jayantilal v. State of Saurashtra*, A. 1952 Sau. 59.

mere suspension of the right of management of an estate for a definite time would not come under Art. 31A.¹⁴ The present clause covers such a case.

The conditions for the application of sub-cl. (b) are—

- (a) The taking over must be for a *limited* and not an indefinite period of time.
- (b) It must be either in the public interest or in order to secure the proper management of the property.
- (i) As instances of 'public interest' may be mentioned—prevention of infringement of the rights of tenants;¹⁴ full and efficient use of the land for agriculture;¹⁵ safeguarding of the interests of the holders of life insurance policies.¹⁶
- (ii) As instances of taking over for proper management may be mentioned the management of the property of a 'ward' or disqualified proprietor.¹⁷

Possible scope for challenge under Sub-cl.(b).

Though the sub-clause is *intended* not to leave any scope for the matter being taken to Court, perhaps the aggrieved person might still attempt to attack the law on any of the following grounds—

- (a) That the law does not merely provide for the 'taking over of management of the property', but provides for something more, *viz.*, the transference of the right of possession to the State, even though it may be for a nominally 'limited' period, *e.g.*, if the management is sought to be taken over for a period of 99 years.
- (b) That the law does not, in substance, relate to a 'limited' period.

It may be recalled (Vol. I, p. 454) that in *State of Rajasthan v. Monohar*,¹⁸ the Supreme Court invalidated s. 8A of the Rajasthan Jagirdars (Abolition of Powers) Ordinance, 1949, on the ground that it effected a discrimination between different parts of the State, in taking over management of *jagirs* in some of the areas while *jagirs* in other parts of the State remained unaffected. It is to be noted that this Ordinance provided for the taking over of management of the *jagirs* for an *indefinite* and *not a limited* period of time. Hence such provisions which provide for the taking over by the State of management of private property for an indefinite period remain outside Art. 31A and can be challenged on ground of contravention of Art. 14, 19 or 31.

It may also be recalled (Vol. I, p. 741), that one of the grounds on which the Supreme Court invalidated the Ajmer Tenancy and Land Records Act, 1950¹⁴ was that it deprived a person of his property for an 'indefinite' period by bringing it under the Court of Wards, on the subjective determination of an Executive officer. If the Author's interpretation of the word 'limited' be correct, such legislation will not be covered by Art. 31A (1) (b), however beneficial its object may be.

Some Acts, such as the ss. 52-52G of the Insurance Act, 1938, s. 3 of the Railway Companies Act, 1951 and Ch. IIIA of the Industries (Development and Regulation) Act, 1951, empower the Government to take over management of property for an *indefinite* period but provide for cancellation of such order and reversion of the property in the private owner at any time as the Government thinks fit. Apparently, such legislation would not be covered by cl. (b) of Art. 31A (1), as amended. Of course, some of these particular enactments are specifically enumerated in the Ninth Schedule in order to save them.

But there may be existing or future statutes of the same nature which would not be saved by the Ninth Schedule or by Art. 31A (1) (b). On a question of principle, thus, the amendment is not comprehensive enough to carry out the objects of the amendment.

- (c) That there is no 'public interest' to support the law or that it is not necessary to secure 'proper management' of the property.

The first question is whether these two questions are objective or subjective. The sub-clause does not expressly lay down whether the determination of these

(16) *Tropical Ins. Co. v. Union of India*, (1955) 2 S.C.R. 517 (519).

(17) *Kuldip v. State of Punjab*, A. 1954 Punj. 247.

(18) *State of Rajasthan v. Monohar*, (1954) S.C.R. 996.

two questions shall be left to the subjective satisfaction of the Executive or shall have to be established objectively in a Court of law just as 'public purpose' has to be established objectively under Art. 31 (2). If the Court holds that these facts must be established objectively in order to justify the taking over of the management, the scope of justiciability will be wide. Such a view can be sustained if the interpretation given to the sub-clause is that the taking over of the management would be immune from attack on ground of contravention of the specified Articles, provided the taking over is in conformity with the conditions laid down in the sub-clause. This is the line of interpretation which was followed in the *Darbhanga case*.¹⁹ This view is also in consonance with the interpretation given to the limitation clauses of Art. 19 where the expression 'interests' of the general public' and it has been held to be justiciable, on the objective test, as to whether, in each case, there is a public interest to sustain the restrictive legislation, even though the Courts would start with a respect for the legislative determination.

(d) That the law is liable to be challenged under Articles other than 14, 19 and 31. In this connection, reference may be made to the *Madras Religious Endowment case*,²⁰ where certain provisions of a law authorising State management of the property of a Mutt were held to infringe the provisions of Arts. 25-6.

Sub-cl. (c) : Amalgamation of corporations.

The object of this clause is to facilitate the elimination of unhealthy competition between rival concerns operating in the same field where the interests of the public call for such action, by precluding the objection that the amalgamation of existing companies constitutes an unreasonable restriction with the rights of share-holders guaranteed by Art. 19 (1) (f).²¹

Sub-cl. (d) : Extinction or modification of rights of directors or share-holders etc.

In *Chiranjit Lal's case*,²² a question was raised whether the voting right of a share-holder in a company was a right of 'property' or a mere personal privilege flowing from his proprietary right. The amendment seeks to avoid any such question and provides that no question of infringement of Art. 19 (1) (f) or 31 will arise if the voting rights of share-holders are affected by any law. The rights of managing agents, secretaries and treasurers, managing directors, directors or managers are also similarly treated. In a sense, cl. (d) reinforces cl. (b); but it is of a wider scope. Even where the State does not take over the management but makes some other law which extinguishes or modifies the rights of the persons referred to, such law will not be open to challenge on the grounds specified.

Sub-cl. (e) : Extinction or modification of rights under mining leases.

In some cases, the reasonableness of the Mining Concession Rules, made under the Mines & Minerals (Regulation & Development) Act, 1948, which vested some amount of discretion in the Executive in the matter of granting and cancellation of licenses, was challenged.²³ The insertion of the present sub-clause precludes such attack on ground of contravention of Art. 19.

It also precludes any contention that compensation is payable under Art. 31 (2) on account of cancellation of the existing licence. The scope of the amendment is even wider and includes not only licences but also agreements and leases. The Constitution Amendment Act thus empowers the State to affect even contractual rights relating to mineral development, without having to comply with Arts. 14, 19 or 31, if the purpose of the State is to 'search for or win' any mineral or mineral oil.

(19) *State of Bihar v. Kameshwar, A.* 1952 S.C. 252.

(20) *Commr., H. R. E. v. Lakshmindra*, (1954) S.C.A. 415.

(21) *Cf. Narayanprasad v. Indian Iron & Steel Co., A.* 1953 Cal. 69.

(22) *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10.

(23) *Cf. Mineral Development Ltd. v. Union of India*, A. 1954 Pat. 341.

The word 'modification' enables the State to deprive the right of a mine-owner or lessee to carry on his business for a certain period of time,²⁴ for the purpose of prospecting for minerals,²⁴ or to keep their proprietary rights in abeyance for a temporary period.²⁴

The present sub-clause does not, however, cover a case of *acquisition* of a mining land, which would, accordingly, come under Art. 31 (2).²⁴

Proviso.

The word 'law' in this Proviso means no more than a *Bill*.²⁵

The Proviso keeps alive the alternative provision in Art. 31 (3) for judging whether the State law has or has not complied with the requirements of Art. 31 (2). The provisions of Art. 31 (2), therefore, do not stand repealed by Art. 31A. The difference is that persons whose properties fall within the definition of the expression 'estate' in Art. 31A, are deprived of their remedy under Art. 32 and the President has been constituted the sole judge of deciding whether a State law acquiring 'estate' has or has not complied with the requirements of Art. 31 (2).¹

The Proviso, however, does not require that a bill must receive the assent of the President once under Art. 31 (3) and against under the Proviso to Art. 31A (1).

As an instance of a State law which received the assent of the President under this Proviso may be mentioned the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1954.³

Cl. (2) (a) : 'Estate'.

Read with the expression 'other intermediary' in cl. (2) (b), the word 'estate' refers to the interest of an intermediary, i.e., a person standing between the State and the actual tiller of the soil. It cannot include a tenant who is actually cultivating the land.⁴

On the other hand, it is not necessary that in an 'estate' there must be a *ryot* or tenant-at-will below the intermediary in every inch of such estate. Once a tenure is held to be an 'estate' according to the local law of land tenure, any area situated within the geographical limits of such tenure is also as 'estate' within the meaning of Art. 31A even though there may not be any inferior tenant within the particular area.⁵

Sub-cl. (a) says that for the definition of 'estate' we shall have to refer to the existing law of land tenure in force in the particular area in question.⁶ Thus, in West Bengal, the definition contained in s. 1 of Art. VII (B.C.) of 1868, which is as follows, will determine scope of Art. 31A—

"The word 'estate' means any land or share in land subject to the payment to Government of an annual sum in respect of which the name of a proprietor is entered on the register known as the General Register of all revenue-paying estates, or in respect of which a separate account may, in pursuance of section 10 or section 11 of the said Act XI of 1859, have been opened."

As the connotation of the term 'estate' was different in different parts of the country, the expression 'estate' has been broadly defined so as to cover all possible kinds of rights in estates,⁷ quantitative as well as qualitative,—in an area co-extensive with an estate or only a portion thereof.¹⁴ [See, further, under cl. (2) (a)].

Read with the expression 'other intermediary' in cl. (2) (b), the word 'estate' refers to the interest of an intermediary, i.e., a person standing between the State

(24) *Burrakur Coal Co. v. Union of India*, A. 1961 S.C. 954 (961-3).

(25) *Ram Dubey v. Govt. of M. B. A.* 1952 M.B. 57 (66).

(1) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (310).

(2) *Sankarsana v. Orissa State*, A. 1957 Orissa 96 (98-9).

(3) *Jadav v. H. P. Administration*, A. 1960 S.C. 1008 (1012).

(4) *Ajab Singh v. State of U. P.*, A. 1957 All. 153 (154).

(5) *Gajapati v. State of Orissa*, A. 1953 Orissa 185; *Biswambhar v. State of Orissa*, A. 1957 Orissa 247 (251).

(6) *Mahadeo v. State of Bombay*, (1952) 1 S.C.R. 733.

(7) *Atma Ram v. State of Punjab*, A. 1959 S.C. 519.

and the actual tiller of the soil. It cannot include a tenant who is actually cultivating the land,⁴ unless the existing law of land tenure in an area includes such interests also in the definition of 'estate'.⁶ 'Raiyats' and 'under-raiyats' have been specifically mentioned as exceptions to this proposition (see p. 267, *post*).

The following interests in land have been held to be 'estates' within the meaning of Art. 31A:

- (a) The holdings of Mulgirassia, Bhyat and Talukdar in Saurashtra.⁸
- (b) Tikanas of Jaipur.⁹
- (c) Pre-settlement minor inams in the district of Ganjam.¹⁰
- (d) Bhomicharas of Rajasthan,⁹ or Bhomias of Marwar.⁹
- (e) Vanta tenure in Bombay and Gujrat.¹¹
- (f) Bhagdars, Narwadars and Khotes, landholders as well as occupants of unalienated lands, in Bombay.¹²
- (g) Jagirdars of Rajasthan.¹³

'Same meaning as in the existing law relating to land tenures'.

Under the Bombay Land Revenue Code, 1879, "any interest in land", including that of occupants of unalienated lands is an 'estate'. As regards the area governed by the Code, therefore, the word 'estate' in Art. 31A should receive the same interpretation.¹²

'Existing law'.—See Art. 366 (10), *post*.

Sub-cl. (i) : 'Jagir or other similar grant'.

1. The object of Art. 31A being to save legislation which was directed to the abolition of intermediaries so as to establish direct relationship between the State and the tillers of the soil, the words in the Article should be construed in that sense which would achieve that object in a full measure.⁹

2. Thus, the word 'jagir' should not be given the restricted meaning of a grant made for military service but should be construed in the popular sense so as to include all grants in respect of persons who were not cultivators which conferred on the grantees rights in respect of land revenue. Thus, maintenance grants in favour of members of the ruling family would be covered by this word.⁹

3. The grant need not be express.⁹

4. An *istimrar*, *tikanadar*, *ijaradar*, would come within the expression 'other similar grant'.⁹

5. Resumption of a jagir for breach of a condition of the grant is not acquisition but if the State wants to take the property of the jagirdar for a public purpose, in exercise of its power of 'eminent domain' and supersession of the terms of the grant, it is an acquisition within the meaning of Art. 31A.¹³ But to determine whether a particular legislation is one for acquisition or resumption, the Court must look into the 'pith and substance' of the legislation.¹³

'Janmam right'.—In the Malabar district of Madras and certain areas of Kerala, land is owned by a class of intermediaries called '*janmis*'. The Malabar Tenancy Act seeks to fix the rent and tenure of sub-tenants held under these *janmis*. Some of the *janmis* brought a suit for a declaration that the Malabar Tenancy Act was ultra vires for contravention of Arts. 14, 19 and 31. The '*janmam*' right has been included within the definition of 'estate' in view of that suit.

Under the definition in cl. (2) (a), any *janmam* right is an 'estate'. The 'rights in a *janmam*' will, therefore, include the rights of a proprietor (called *janmi*) and

(8) *Kalika v. Saurashtra State*, A. 1952 Sau. 114.

(9) *Amar Singh v. State of Rajasthan*, (1953) 2 S.C.R. 303 (325): A. 1955 S.C. 504.

(10) *Sankarsana v. State of Orissa*, A. 1957 Orissa 96.

(11) *Gangadharrao v. State of Bombay*, A. 1959 Bom. 28.

(12) *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (468).

(13) *Raghubir v. State of Ajmer*, A. 1959 S.C. 475 (480).

subordinate tenure-holders in a *janmam* land.¹⁴ *Janmam* right is a freehold interest and the *janmi* may create any number of subordinate interests or tenures, with different incidents and rights. A law would be protected under Art. 31A (1) (a) if it seeks to extinguish or modify the incidents of these tenancies as between the *janmi* and his subordinate tenure-holders, relating to the tenure.¹⁴ If, however, the law does not relate to the tenure and does not effectuate any agrarian reform, but seeks to regulate the title of the members of the family of the *janmi inter se*, for instance, if it declares particular *sthanams* to be Marumakkathayam *tarwards* and the property pertaining to such *sthanams* as the property of the said *tarwards*, the law stands outside the protection of Art. 31A.¹⁴

Sub-cl. (ii) : Land held under ryotwari settlement.

The insertion of this sub-clause by the 17th Amendment overrides the view taken in cases such as *Purushothaman v. State of Kerala*¹⁵ that the interest of a ryotwari proprietor was not an 'estate' within the meaning of Art. 31A (1) inasmuch as there was no other person between such person and the State.

Sub-cl. (iii) : This new sub-clause also widens the protection offered by Art. 31A (1) (a), by including within its fold pasture and forest lands and even buildings and other structures occupied by cultivators and even 'village artisans'.

Scope of Cl. (2) (b) : 'Any rights in an estate'.

Sub-cl. (b) explains the rights or interests in the estate which may be affected by the legislation referred to in Art. 31A (1) (a). Broadly speaking, it includes all intermediate interests, assignees of revenue and the like.

The expression 'rights' in relation to an estate has been given in an all-inclusive meaning^{15a} comprising both . . . the horizontal and vertical division of an estate. A proprietor in an estate may be proprietor holding the entire interest in a single estate, or only a co-sharer proprietor.¹⁶

Art. 31A (1) (a) has no application in the following cases:

(i) Acquisition of 'arrears of rent' due to a landlord is not acquisition of an estate or of any rights therein but is an acquisition of money or of choses in action.¹⁷

(ii) Extinguishment of a right of pre-emption, for, such right is not a right in an estate but a right purely personal to the occupant arising only in the event of there being a sale.¹⁸

On the other hand, the following have been held to be rights in an estate—

A right to enter a forest and to cut trees in future;¹⁹ a right to hold a market or a *mela* on one's own land which is a transferable interest in land;²⁰ the right of lessees of underground mineral rights in an estate;²¹ the difference between full assessment and quit rent.²²

'Rights vested in a proprietor, sub-proprietor, under-proprietor, tenure-holder'.

The meaning of these words may be explained with reference to the following observations in *Baden Powell's Land Systems*,²³ which were relied on by the Supreme Court:²⁴

(14) *Kochunni v. States of Madras & Kerala* (II), A. 1960 S.C. 1080 (1087).

(15) *Purushothaman v. State of Kerala*, (1962) 1 Supp. 753; *Karimbil v. State of Kerala*, (1962) S.C.A. 1; A. 1962 S.C. 723.

(15a) Cf. *Sonatur Tea Co. v. Dy. Commr.*, A. 1962 S.C. 137 (140).

(16) *Atma Ram v. State of Punjab*, A. 1959 S.C. 519.

(17) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252.

(18) *Balabhai v. Nandanwar*, A. 1957 Bom. 233.

(19) *Saktipada v. State of W. B.*, A. 1959 Cal. 316.

(20) *State of Bihar v. Rameshwar*, (1962) 2 S.C.R. 382.

(21) *K. J. Coal Co. v. State of W. B.*, A. 1960 Cal. 646 (662).

(22) *Gangadhar v. State of Bombay*, (1961) 1 S.C.R. 943; A. 1961 S.C. 288.

(23) *Baden Powell's Land Systems of British India*, Vol. I. p. 217.

(24) *Chootabhai v. State of M. P.*, (1953) S.C.R. 476 (483-4).

"The interest in the soil has come to be virtually shared between two or even more grades . . . It is true that in many cases, only one person is called 'landlord' or 'actual proprietor' but his right is limited; the rest of the right, so to speak, is in the hands of the other grades, even though they are called 'tenants' or by some vague title such as 'tenure-holders'. In many cases, the division of right is accentuated by the use of the terms like 'sub-proprietor' or 'proprietor of the holding'. The 'proprietary right' seems then a natural expression for the interest held by a landlord, when that interest is not the entire 'bundle of rights' (which in the aggregate make up an absolute of complete estate) but only some of them, the remainder being enjoyed by other persons."²²

In order to be a proprietary right, there must be an interest in the land. Thus, the contractual right merely to cut, gather and carry away the produce of trees in the shape of leaves, lac, timber or wood without having any interest in the trees themselves, cannot be a proprietary right.²³

'Tenure-holder, raiyat, under-raiyat or other intermediary'.

Raiyats and *under-raiyats* are persons who hold land under the proprietor or a tenure-holder for the purposes of cultivation. Obviously, therefore, such persons are not intermediaries. The Supreme Court¹ has held that the words "*raiyat*" and "*under-raiyat*" were introduced into the definition to specifically include these persons even though they were not intermediaries and that the words "or other intermediaries" occurring at the end do not qualify or colour the meaning to be attached to the words *raiyat* and *under-raiyat* which were specifically introduced into the definition.

Effects of vesting of an estate in the State after acquisition.

1. When an estate vests in the State as a result of compulsory acquisition under the power of 'eminent domain', the entire interest of the intermediaries in such estate vests in the State, free of all incumbrances. The State can, accordingly, ignore pre-acquisition contracts with the intermediaries which created a mere *personal* right in favour of a third party, e.g., a right to enter and catch fish,¹ or a licence to do certain things upon the land.²

2. If, in any case, any pre-acquisition contract be binding upon the State, the remedy of the person aggrieved is to bring a suit for enforcement of the contract and not a petition under Art. 32, for, no fundamental right is infringed by refusing to comply with a contractual obligation.²

INDEX TO COMMENTS

ARTICLE 31A.

Amendments, 252.

Clause (1).

'Notwithstanding anything in Art. 13, 255.

Scope of Sub-cl. (a): 'Acquisition, extinguishment, modification of rights in estate', 256; I. Law providing for the acquisition of an estate', 257; II (a) Extinguishment of such rights, 258; (b) Modification of any such rights, 258; What is barred by Art. 31A (1), 258.

Sub-cl. (b): Taking over of management of any property, 260; Possible scope of challenge under Sub-cl. (b), 262.

Sub-cl. (c): Amalgamation of corporations, 263.

Sub-cl. (d): Extinction or modification of rights of directors or share-holders etc., 263.

Sub-cl. (e): Extinction or modification of rights under mining leases, 263; Legislation by Parliament, 263.

Proviso, 264.

Cl. (2) (a): Estate, 264; 'Same meaning as in the existing law', 265; 'Existing law', 265; 'Jagir or other similar grant', 265; Janmam right, 265.

Scope of Cl. (2) (b): 'Any rights in an estate', 266; 'Tenure-holder, raiyat, under-raiyat or other intermediary', 267.

Effects of vesting an estate in the State after acquisition, 267.

(25) *Chhotabhai v. State of M. P.*, (1953) S.C.R. 476 (483-4).

(1) *State of Bihar v. Rameshwar*, (1962) 2 S.C.R. 382.

(2) *Shantabai v. State of Bombay*, A. 1958 S.C. 532, explaining away the contrary view in *Chhotabhai v. State of M. P.*, (1953) S.C.R. 476.

***31B.** Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges and of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

Amendment.—Art. 31B was added to the Constitution by s. 5 of the **Constitution (First Amendment) Act, 1951.**

Effects of Amendment.

The amendment is retrospective, and validates the Acts included in the 9th Schedule, *ab initio*,⁴ even though when enacted, the Act contravened the provisions of s. 299 of the Government of India Act, 1935.⁵

Object of Art. 31B.

1. Notwithstanding Art. 31A, Art. 31B was inserted, by way of abundant caution, to save the particular Acts included in the Ninth Schedule of the Constitution, overriding any decision of a Court or tribunal that any of these Acts is void for contravention of any fundamental right. Nothing in Art. 31B shall be read as restricting the scope of Art. 31A.⁶

2. On the other hand, Art. 31B is not illustrative of the rule contained in Art. 31A, but stands independent of it, and validates certain Acts specified in the Ninth Schedule (see *post*), which has since been enlarged by the Constitution (Fourth Amendment) Act, 1955. Thus, the Madhya Pradesh Abolition of Proprietary Rights Act, 1950 is validated by being specifically included in the Ninth Schedule even though the *Malguzari* lands affected by it are not 'estates' within the meaning of Art. 31A (2) (a).⁷

3. While Art. 31A is confined to estates, Art. 31B includes Acts which relate to properties other than estates,⁸ and the scope of Art. 31B is not limited by Art. 31A.^{9a}

Scope of the protection.

Once an Act comes within the list given in the Ninth Schedule, it is protected from unconstitutionality on the ground of inconsistency with any provision included in Part III, to the same extent as under Art. 31A (1). The validity of such an enactment cannot, therefore, be challenged on the ground of want of public purpose;⁷⁻⁸ want of compensation;⁹⁻¹⁰ contravention of Art. 19.¹¹

Acts included in the Ninth Schedule should be interpreted by giving their words their ordinary meaning, uninfluenced by any pre-conceived notion.¹²

(3) Inserted by the Constitution (First Amendment) Act, 1951, s. 5.

(4) *Barrow v. State of U. P.*, A. 1958 All. 154 (158).

(5) *Dhirubha v. State of Bombay*, (1955) 1 S.C.R. 691; *State of U. P. v. Brijendra*, A. 1961 S.C. 14; (1961) 1 S.C.R. 362.

(6) *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

(6a) *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096 (1103).

(7) *Visheshwar v. State of M. P.*, (1952) S.C.R. 1020.

(8) *Surya Pal v. State of U. P.*, (1952)

S.C.R. 1056 [*U.P. Zamindari Abolition and Land Reforms Act, 1950*].

(9) *Sarwarlal v. State of Hyderabad*, A. 1960 S.C. 862 (866) [*Hyderabad Abolition of Jagirs Regulation, 1358F*; *Hyderabad Jagirs (Commutation) Regulation, 1359F*].

(10) *Ram Kissen v. Divl. Forest Officer*, A. 1965 S.C. 625 (628) [*West Bengal Estates Acquisition Act, 1953*].

(11) *State of W. B. v. Nabakumar*, A. 1961 S.C. 16.

(12) *Venkatagiri v. State of A. P.*, (1959) S.C. [C.A. 188/58].

The protection has been widened by the Supreme Court holding¹³ that though Art. 31B specifically excepts 'the rights conferred by the provisions of Part III' of the Constitution, it also saves the scheduled Acts from inconsistency with any corresponding right contained in s. 299 (2) of the Government of India Act, 1935. In other words, any of the Scheduled Acts which were enacted prior to 26-1-50 cannot be challenged on the ground that it does not provide for compensation as required by s. 299 (2) of the Government of India Act, 1935.

Not only the Acts themselves but notifications subsequently issued in exercise of powers conferred by the Acts are also entitled to the protection of Art. 31B.¹⁴

Power to amend the Acts specified in the Ninth Schedule.

The fact that an Act has been included in the Ninth Schedule does not preclude the appropriate Legislature from amending or repealing that Act.¹⁵

But the protection given by Art. 31B only applies to the Acts as they stood at the date when the Constitution (First Amendment) Act, 1951, which inserted Art. 31B, was enacted. If the Legislature subsequently seeks to *amend* any of these Acts, such amendment must be consistent with the Fundamental Rights conferred by Part III of the Constitution.¹⁵⁻¹⁶

Illustrations.

1. At the time of its inclusion in the Ninth Schedule, s. 34 (1) of the Bombay Tenancy and Agricultural Lands Act, 1948 provided that if a landlord required land held by his protected tenant *bona fide* for his personal cultivation, he could terminate the tenancy giving one year's notice. In 1952, the Act was amended by inserting sub-sec. (2A) in the section which laid down that the right of the landlord under sub-sec. (1) shall be subject to the condition that the name of the landlord must stand in the Record-of-Rights on the 1st January, 1952. In the area in question, no Record-of-Rights had been prepared in 1952, and the condition was, *prima facie*, an unreasonable restriction upon the right of property conferred by Art. 19 (1) (f).

Held, that the amended provision, which contravened Art. 19 (1) (f) and was not saved by Art. 31A, must be held to be void.¹⁶

2. In the case of Jammu & Kashmir, the Ninth Schedule was made applicable (with additions) by the Constitution (Application to Jammu & Kashmir) Order, 1954, with effect from 14-5-54. Any alteration or addition made after that date in any Act included in that list will be outside the protection of Art. 31B.¹⁷

INDEX TO COMMENTS

ARTICLE 31B.

Amendment, 268 ; Effects of Amendment. 268 ; Object of Art. 31B, 268 ; Scope of the protection, 268.

Power to amend the Acts specified in the Ninth Schedule, 269.

Right to Constitutional Remedies

Remedies for enforcement of rights conferred by this Part.

32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(13) *State of U. P. v. Brijendra*, (1961) 1 S.C.R. 362 ; *Jeejeebhoy v. Asstt. Collector*, A. 1965 S.C. 1096.

(14) *State of W. B. v. Nabakumar*, A. 1961 S.C. 16.

(15) *Sajjan Singh v. State of Rajasthan*, A. 1965 S.C. 845.

(16) *Abdul Rahiman v. Vithal*, A. 1958 Bom. 94 (97-8), approved by *Sri Ram v. State of Bombay*, A. 1959 S.C. 459 (470).

(17) *Sant Singh v. State of J. & K.*, A. 1959 J. & K. 35 (F.B.).

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Object of Art. 32 : Enforcement of Fundamental rights.

A declaration of fundamental rights is meaningless unless there are effective judicial remedies for their enforcement.

In *England*, individual rights are safeguarded, even without any declaration that they are fundamental, by means of the '*prerogative writs*', which have been called 'the bulwark of English liberty' (Dicey).

The Constitution of the *U.S.A.* assumed that these common law writs would be available in the United States. Hence, there is no specific provision for the issue of these writs in the Constitution even though there is specific prohibition against the suspension of *habeas corpus* [Art. I, sec. 9 (2)]. Federal laws have, however, been enacted laying down the conditions and procedure for the issue of these writs, e.g., the Jurisdictional Act, 1925. The writs are issued both by the Supreme Court and District Courts, but the Supreme Court uses the powers only in its appellate character.¹⁸

The present Article of *our* Constitution provides for the enforcement of the Fundamental Rights by means of these writs or writs of the same nature. As will be shown presently, the power conferred by the present Article is the most potent weapon in the hands of *our* Supreme Court and that it is the duty of the Supreme Court to use it in a case properly coming under the Article.¹⁹

CLAUSE (1).

OTHER CONSTITUTIONS²⁰

Japan.—Art. 11 of the Japanese Constitution says—

"The people shall not be prevented from enjoying any of the fundamental human rights."

Art. 81 then provides—

"The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

INDIA

Effects of the guarantee.

Cl. (1) *guarantees* the right to move the Supreme Court for such writs for the purpose of enforcing the Fundamental Rights included in Part III. In other words, the right to move the Supreme Court where a fundamental right has been infringed is itself a fundamental right.²¹ The effects of such guarantee are that—

(a) The power of Court to issue the writs cannot be suspended except as provided by Art. 359 read with cl. (4) of the present Article; and also that the power of the Supreme Court to issue these writs cannot be taken away by any legislation,² or by anything short of amendment of the Constitution.

(18) *Ex parte Clarke*, (1879) 100 U.S. 552.

(19) *Kochunni v. State of Madras*, A. 1959 S.C. 725 (729).

(20) Art. 8 of the Universal Declaration of Human Rights, 1948 says—

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."
(21) *Kochunni v. State of Madras*, A. 1959 S.C. 725 (729).

(b) Any law which renders nugatory or illusory the exercise of the Supreme Court's powers under Art. 32, is void,²² except where the Constitution itself shields a law from challenge on the ground of contravention of fundamental rights, e.g., Art. 31 (5), saving pre-Constitution laws.²³

Illustration.

S. 14 of the Preventive Detention Act, 1950, as it originally stood, was as follows—

"(1) No Court shall, except for the purposes of a prosecution for an offence punishable under sub-sec. (2), allow any statement to be made, or any evidence to be given, before it of the substance of any communication made under Sec. 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order; and, notwithstanding anything contained in any other law, no Court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an advisory board or that part of the report of an advisory board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-sec. (1)"

The Supreme Court struck down the above provision on the ground that it contravened Art. 32 by way of preventing the Supreme Court from effectively exercising its powers under Art. 32. The following observations of Mahajan J. are illuminating:

"This section is in the nature of an iron curtain around the acts of the authority making the order of preventive detention. The Constitution has guaranteed to the detained person the right to be told the grounds of detention. He has been given a right to make a representation [vide Article 22 (5)], yet section 14 prohibits the disclosure of the grounds furnished to him or the contents of the representation made by him in a Court of law and makes a breach of this injunction punishable with imprisonment."

Now it is quite clear that if an authority passes an order of preventive detention for reasons not connected with any of the six subjects mentioned in the 7th schedule, this court can always declare the detention illegal and release the detenu, but it is not possible for this court to function if there is a prohibition against disclosing the grounds which have been served upon him. It is only by an examination of the grounds that it is possible to say whether the grounds fall within the ambit of the legislative power contained in the Constitution or are outside its scope. Again something may be served on the detenu as being grounds which are not grounds at all. In this contingency it is the right of the detained person under Article 32 to move this court for enforcing the right under Article 22 (5) that he be given the real grounds on which the detention order is based. This Court would be disabled from exercising its functions under Article 32 and adjudicating on the point that the grounds given satisfy the requirements of the sub-clause if it is not open to it to see the grounds that have been furnished. It is a guaranteed right of the person detained to have the very grounds which are the basis of the order of detention. The court would be entitled to examine the matter and to see whether the grounds furnished are the grounds on the basis of which he has been detained or they contain some other vague or irrelevant material. The whole purpose of furnishing a detained person with the grounds is to enable him to make a representation refuting these grounds and of proving his innocence. In order that this Court may be able to safeguard this fundamental right and to grant him relief it is absolutely essential that the detenu is not prohibited under penalty of punishment to disclose the grounds to the Court and no injunction by law can be issued to this Court disabling it from having a look at the grounds. Section 14 creates a substantive offence if the grounds are disclosed and it also lays a duty on the court not to permit the disclosure of such grounds. It virtually amounts to a suspension of a guaranteed right provided by the Constitution inasmuch as it indirectly by a stringent provision makes administration of the law by this court impossible and at the same time it deprives a detained person from obtaining justice from this court. In my opinion, therefore, this section when it prohibits the disclosure of the grounds contravenes or abridges the rights given by Part III to a citizen and is *ultra vires* the powers of Parliament to that extent."²²

(c) The foregoing principle has been extended to hold that anything which operates as a hindrance to a fair hearing or smooth progress of a petition under Art. 32 would constitute an infringement of the fundamental right guaranteed by Art. 32 (1). The Supreme Court has, on this ground annulled a Rule made by the Court itself, in exercise of its power under Art. 145, which imposed a financial obligation on the Petitioner, by way of requiring him to furnish security

(22) *Gopalan v. State of Madras*, (1950) S.C.R. 88.

(23) *Somawanti v. State of Punjab*, A. 1964 S.C. 151 (165).

for costs in a petition under Art. 32.²⁴ Such a provision cannot be upheld even though its object may be beneficial in some respects.²⁴

(d) Since the right to move the Supreme Court, in case of violation of a fundamental right is itself a fundamental right,—the Supreme Court is constituted the protector and guarantor of fundamental rights, and it is the *duty* of the Supreme Court to grant relief under Art. 32, where the existence of a fundamental right and its breach, actual or threatened,²⁵ is *prima facie* established.¹ Hence, consistently with this responsibility, the Supreme Court cannot refuse an application under Art. 32, *merely* on the following grounds—

(i) That such application has been made to the Supreme Court in the first instance, without resort to a High Court under Art. 226.^{1, 2}

(ii) That there is some adequate alternative remedy available to the Petitioner.^{1, 3-4}

(iii) That the application involves an inquiry into disputed questions of fact or the taking of evidence.¹

(iv) That declaratory relief, such as a declaration as to the unconstitutionality of an impugned statute, together with consequential reliefs, has been prayed for.¹

(v) That the proper writ or direction has not been prayed for in the application.¹

(vi) That the common law writ has to be modified in order to give proper relief to the applicant.^{1, 5}

CLAUSE (2).

OTHER CONSTITUTIONS

U.S.A.—The American colonists brought with them the English common law. So, when the Constitution was drafted, the colonists were already familiar with the use by their Courts of the 'prerogative writs'. The framers of the Constitution, therefore, assumed the existence of these writs and their only anxiety was that the power to issue the writs should be above the reach of the Executive and the Legislature, except in national emergencies, and so they engrafted in the Constitution, Art. I, s. (2), safeguarding the writ of *Habeas Corpus* against suspension, assuming that it was available without a constitutional guarantee. There is no provision in the Constitution authorising the suspension of the writs other than *habeas corpus*, even in emergencies.

But the use of the writs and the Courts which are empowered to issue them are regulated by the legislation.

The Judiciary Act of 1789 (s. 14), thus, empowered *all* Courts of the United States "to issue writs of *scire facias*, *habeas corpus*, and *all other writs* not specially provided for statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

It follows that the power of the American Supreme Court to issue the writs is conferred and regulated by ordinary law. The main provisions are:

"The Supreme Court shall have power to issue writs of *prohibition* to the district courts, when proceeding as courts of admiralty and maritime jurisdiction;

and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party."⁶

"In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the

(24) *Prem Chand v. Excise Commr.*, A. 1963 S.C. 996 (1001).

(25) *Tata Iron & Steel Co. v. Sarkar*, A. 1961 S.C. 65 (68).

(1) *Kochuni v. State of Madras*, A. 1959 S.C. 725 (703).

(2) *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594.

(3) *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122.

(4) *Kharak Singh v. State of U.P.*, A. 1963 S.C. 1295.

(5) *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

(6) U. S. Code, 1946, Title 28, sec. 342.

United States, upon the petition of any party thereto, whether Government or other litigant, to require by *certiorari* either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."⁷

"The Supreme Court and the district courts shall have power to issue writs of *habeas corpus*." [See, further, under Art. 226. *post*].

INDIA

Scope of Cl. (2) : The Judicial writs.

This clause gives a very wide jurisdiction⁸ to the Supreme Court for the enforcement of the Fundamental Rights. It not only empowers the Supreme Court to issue the writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* as they are known in England, but also enables the Supreme Court to devise directions, orders or writs analogous to the above, or to improve upon the above writs so as to avoid their technical deficiencies, if any, or to adapt them to Indian circumstances.⁹⁻¹⁰ No legislation would be required to support the invention of directions or the modification of the writs as may be required for the effective enforcement of the fundamental rights. [See further under Art. 226].

Thus, in *Chiranjit Lal's* case,¹¹ Mukherjea J. observed—

"Art. 32 gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ has not been prayed for."

As has been observed in another case,¹² as regards Fundamental Rights, the Constitution has assigned to the Supreme Court the role of a "sentinel on the 'qui vive'." The Court cannot, accordingly, refuse to entertain an application for an appropriate constitutional remedy where a fundamental right has been infringed.¹³⁻¹⁵

It is acknowledged on all hands that a declaration of individual rights would be an idle formality if there is no effective means to enforce them. *Dicey* went to the extent of maintaining that if there is a machinery for enforcing the individual rights, it is not even necessary to embody them in a Bill of Rights. It is in this sense that he observed—

"The Habeas Corpus Acts . . . are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty".¹⁶

This is why Art. 8 of the Universal Declaration of Human Rights places the rights to an 'effective remedy . . . for violating the fundamental rights' as an independent right, and this is the precedent followed by Cl. (1) of Art. 32 of our Constitution which guarantees the right to approach the Supreme Court for an appropriate remedy for violation of the fundamental rights as a fundamental right itself, so that no legislative action can ever abolish or abridge it. The remedies, mentioned in Cl. (2), are the 'prerogative writs' by which individual rights are enforced in England, and which, as just seen, are worth 'a hundred constitutional articles guaranteeing individual rights'. But the Constitution makes the power of our Supreme Court much wider and more effective than that of the High Court of England, by giving a residuary power to our Supreme Court to suitably modify the writs, which, in England, have become technical and narrow,

(7) U. S. Code, 1946, Title 28, secs. 347, 451.

(8) The importance of this wide jurisdiction is well illustrated by the fact that some 470 and 670 applications under Art. 32 were filed in the Supreme Court in the years 1950 and 1951, respectively.

(9) *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566.

(10) *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

(11) *Chiranjit Lal v. Union of India*,

(1950) S.C.J. 869 (900, Mukherjea J.; 819, 927, Das J.); (1950-51) C.C. 10 (13).

(12) *State of Madras v. Row*, (1952) S.C.R. 597 (605).

(13) *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122.

(14) *Kochunni v. State of Madras*, A. 1959 S.C. 725.

(15) *Kharak Singh v. State of U. P.*, A. 1963 S.C. 1295 (1302).

(16) *Dicey*, Law of the Constitution, 9th Ed., 1952, pp. 197-8.

in certain respects, owing to historical reasons. The arms of *our* Supreme Court are, therefore, as long as could be desired or as may be necessary in the circumstances of any case, where the violation of a fundamental right is established. As will be seen under Art. 226, the position of *our* High Courts has also been placed on the same footing, as regards liberalisation of the writs.

The peculiarity of Art. 32 (2) of *our* Constitution is that the power to issue the writs is conferred by the Constitution itself and is not left to legislation as in the U.S.A. (p. 266, *ante*). As Dr. Ambedkar explained it in the Constituent Assembly¹⁷—

"If I was asked to name the particular article in the Constitution as the most important without which this Constitution would be a nullity, I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it It is not that the Supreme Court is left to be invested with the power to issue these writs by a law to be made by the Legislature at its sweet will. The Constitution has invested the Supreme Court with these rights and these writs unless and until the Constitution itself is amended"

Jurisdiction to issue the writs prior to the Constitution.

The old Supreme Court at Madras possessed the power of issuing these writs within the limits of its jurisdiction, and outside that jurisdiction, only as regards 'European British subjects'.

(i) The three High Courts in the Presidency Towns of Calcutta, Madras and Bombay, established by the Charter Act of 1861 (but not the High Courts established subsequently) got the power to issue the prerogative writs as successors of the Supreme Court, within the limits of their original jurisdiction. But as pointed out by the Privy Council, they did not have the power to issue these prerogative writs upon Mofussil Courts or to persons outside the limits of the Presidency towns who were not subject to their Original Jurisdiction.¹⁸

(ii) As to the jurisdiction of the High Courts to issue the writ of *habeas corpus*, however, it was settled by the Privy Council¹⁹ that by the High Courts Act 1861, and the Criminal Procedure Code, the Legislature had taken away the power of the High Courts to issue the prerogative writ of *habeas corpus* in matters contemplated by Sec. 491 of the Criminal Procedure Code.²⁰ The order under s. 491, C. P. Code, was wholly statutory²¹ and it was limited to the *appellate* jurisdiction of the High Court.

(iii) As regards the writ of *Mandamus* the power to issue the common law writ had been entirely taken away by the Specific Relief Act, 1877, which substituted an order in the nature of *Mandamus*, under s. 45 of that Act. S. 50 of the Act specifically barred the issue of the writ of *mandamus* in future. But the statutory order under s. 45 is limited to requiring anything to be done or forbore, within the local limits of the Ordinary Original Civil Jurisdiction of the High Courts.

(iv) Similarly, the High Courts had no jurisdiction to issue the writ of *Certiorari* to any Mofussil Court or any body of persons exercising quasi-judicial functions over lands situated outside the original jurisdiction of the High Courts and as between parties residing outside that jurisdiction not being European British subjects.²²

(v) The Bombay High Court held that it had the power to issue the common law writ of *Prohibition*²³ on the ground that though s. 45 of the Specific Relief Act combined relief in the nature of both *mandamus* and *Prohibition*, s. 50 prohibited the issue only of the writ of *mandamus*.

(17) C.A.D., Vol. VII, p. 953.

(18) *Ryots of Garabandhu v. Parlakimedi*, (1943) 48 C.W.N. 18 (P.C.).

(19) *Mathen v. Dt. Magistrate of Trivandrum*, (1939) 43 C.W.N. 981 (P.C.).

(20) *K. Emperor v. Shibnath*, (1945) 50 C.W.N. 25 (P.C.).

(21) *Birbal v. Emperor*, A. 1958 F.C. 2 (12).

(22) A statutory power to call for records for revision is contained in Ss. 435-439 of the Criminal Procedure Code and in Sec. 115 of the Civil Procedure Code.

(23) *Dinbai v. Noronha*, A. 1946 Bom. 407.

(vi) The High Court in its original jurisdiction inherited from the Supreme Court the jurisdiction to issue a writ in the nature of *Quo warrant* but the jurisdiction was confined to the limits of the Presidency town.²⁴

The Constitution seeks to remove these historical anomalies by laying down that the Supreme Court as well as the High Courts shall have full power to issue writs or orders in the nature of the common law writs, irrespective of any statutory remedies or the limitations thereof.²⁵

Scope of Arts. 32 and 226 : Jurisdiction of Supreme Court confined to enforcement of Fundamental Rights.

I. While under Art. 226 the High Courts have the jurisdiction to issue the writs not only for the enforcement of fundamental rights but also for the enforcement of other legal rights, the Supreme Court can issue these writs *only* for the enforcement of the Fundamental Rights.¹

II. The sole object of Art. 32 is the enforcement of the fundamental rights guaranteed by the Constitution. Whatever other remedies may be open to a person aggrieved, he has no right to complain under Art. 32, where no 'fundamental' right has been infringed.²⁻³ For the same reason, no question other than relating to a fundamental right will be determined in a proceeding under Art. 32.⁴

Illustrations.

(i) A person, who has entered into a voluntary settlement under the provision of a statute cannot challenge the constitutionality of the statute under Art. 32 until the settlement is cancelled in appropriate proceedings.⁵

(ii) The Court will not, under Art. 32, interfere with an administrative order, however erroneous, where the constitutionality of the statute or the order made thereunder is not challenged on the ground of contravention of a fundamental right.⁶

(iii) A person cannot come to the Supreme Court under Art. 32, where the right infringed is a *personal right* of contract, not amounting to a right of property within the meaning of Art. 19 (1) (f) or Art. 31 (1);⁷ nor amounting to an interference with the right to carry on a profession or business under Art. 19 (1) (g).⁸

(iv) As there is no fundamental right to enter into a business with the Government;⁹ or to obtain recognition from the Government,¹ an application under Art. 32 would not lie for an alleged violation of such rights, under Art. 19 (1) (g). (See Vol. I, pp. 653-4).

(v) On the other hand, though the right not to be taxed except by authority of law is embodied in Art. 265, which is not a fundamental right,¹⁰ an application under Art. 32 will lie if that tax relates to a person's right to carry on a business or profession and thus constitutes an infringement of his fundamental right guaranteed by Art. 19 (1) (g).¹¹

But except where the impugned State Act constitutes an infringement of a fundamental right included in Part III, an application under Art. 32 shall not lie for a violation, *simpliciter*, of Art. 265 or Art. 301.¹²

III. If the validity of some provisions of a statute is challenged on the ground of contravention of fundamental rights and other provisions are challenged on *other grounds*, the Court would not enter into the validity of those other provisions.¹³

IV. Even where the Court finds that a law must be held to be void, being in contravention of some provision of the Constitution, the Supreme Court cannot give relief under Art. 32 unless it is satisfied that the right the infringement of which is complained of by the Petitioner is a fundamental right.¹²

(24) *Nomani v. Banwarilal*, (1947) 51 C.W.N. 716 (P.C.).

(25) *Cooverjee v. Excise Commr.*, (1952-54) 2 C.C. 227 (2313).

(1) *Gopal Das v. Union of India*, A. 1955 S.C. 1.

(2) *Sadhu Ram v. Custodian-Genl.*, (1955) 2 S.C.R. 1113 (1117).

(3) *Ram Jawaya v. State of Punjab*, (1959) 2 S.C.R. 225 (239).

(4) *Amarsinghi v. State of Rajasthan*, A. 1955 S.C. 504.

(5) *Gulabdas v. Asstt. Collector*, A. 1957 S.C. 733.

(6) *Rameshwar v. Commrs., Land*

Reforms, A. 1959 S.C. 498; *Shantabai v. State of Bombay*, (1959) S.C.R. 265 (269).

(7) *Achutan v. State of Kerala*, A. 1959 S.C. 490 (492).

(8) *Ramjilal v. Income-Tax Officer*, A. 1951 S.C. 97: (1950-51) C.C. 242.

(9) *Kailash Nath v. State of U. P.*, A. 1957 S.C. 790.

(10) *Ramchandra v. State*, (1956) S.C.R. 28 (42).

(11) *Khyerbari Tea Co. v. State of Assam*, A. 1964 S.C. 925 (941).

(12) *Nain Sukh v. State of U. P.*, (1953) S.C.R. 1184. [See also *Cooverjee v. Excise Commr.*, (1954) S.C.R. 873].

Illustration.

The Petitioners who are three residents of Etah, complained that they were deprived of their rights to exercise their votes and seek their election as candidates at the Municipal election at which the respondents were elected on the basis of communal electorates, contrary to the provisions of the Constitution. The Petitioners, accordingly, prayed for issue of appropriate writs against the respondents to show under what authority they were acting as members and also against the District authorities directing them not to hold or permit the holding of any meeting of the Board which was said to have been illegally constituted.

The Supreme Court held that "it cannot be held that any law providing for elections on the basis of separate electorates for members of different communities offends against Art. 15 (1) of the Constitution This constitutional mandate to the State not to discriminate against any citizen on the ground, inter, alia, of religion clearly extends to political as well as other rights and any election held after the Constitution in pursuance of such a law must be held void"

Nevertheless, the Court held that the Petitioners were not entitled to any relief under Art. 32, because—

"Any rights, for instance, which the Petitioners may have as rate-payers in the Municipality to insist that the Board should be legally constituted and the respondents . . . who are not properly elected members, should not be permitted to take part in the proceedings of the Board is not a fundamental right conferred by Part III."

"The Petitioners could claim such relief as rate-payers of the Municipality in appropriately framed proceedings, but there is no question of enforcing Petitioners' fundamental right under Art. 15(1)"

In another case,¹³ on the contrary, the Supreme Court made a *finding* that the order of an administrative authority was *ultra vires* the statute under which it was purported to have been made, even though the Court held that the Petitioner was not entitled to any *relief* under Art. 32 inasmuch as the impugned statute was not unconstitutional and no question about the fundamental right of the Petitioner was involved.

V. A person who has no legal right to carry on a business at the date of his petition under Art. 32, is not entitled to maintain the petition on the ground that his fundamental right has been infringed by State action. Thus,—

Where a person's license to ply buses has been extinguished under a valid law, he cannot, in a petition under Art. 32, question the right of the State Transport Undertaking to ply buses without permits.^{14,15}

VI. Since Art. 21 itself is confined to deprivation of liberty by the State, no petition under Art. 32 lies where a person has been detained by a private individual,¹⁶ or where the petitioner has been affected by his voluntary action without any compulsion by the State.¹⁷

A writ of *mandamus* cannot be asked for where the Petitioner's fundamental right under Art. 19 has been infringed by another private person,¹⁸ except where the infringement takes place with the aid of the State or a law made by it.¹⁹ In the latter a case, such private person may properly be made parties to the application under Art. 32.¹⁹

Application under Art. 32 against an order of taxation.

1. Though the right not to be taxed except by authority of law is embodied in Art. 265, which is not a fundamental right,²⁰ an application under Art. 32 will

(13) *Keshavlal v. Lalbhai*, A. 1958 S.C. 507 (512). [Strictly speaking, it is difficult to support the course adopted by the Supreme Court in this case, which is contrary to the view taken in a number of cases that no question other than relating to a fundamental right would be determined in an application under Art. 32; cf. *Amarsingji v. State of Rajasthan*, A. 1955 S.C. 504].

(14) *Kalyan Singh v. State of U. P.*, A. 1962 S.C. 1183.

(15) *Sobhraj v. State of Rajasthan*, A. 1963 S.C. 640.

(16) *Vidya Verma v. Shiv Narain*, A. 1956 S.C. 108.

(17) *Gopal Das v. Union of India*, (1955) 1 S.C.R. 773.

(18) *Shamdasani v. Central Bank*, (1952) S.C.R. 391.

(19) *Kochunni v. State of Madras*, A. 1959 S.C. 725 (730, 733).

(20) *Ramjilal v. Income-Tax Officer*, A. 1951 S.C. 97: (1950-51) C.C. 242.

lie if that tax relates to a person's right to carry on a business or profession and thus constitutes an infringement of his fundamental right guaranteed by Arts. 14;²¹ 15²²; 19(1) (f)²³; 19(1) (g).²⁴

2. Where the impugned order is a quasi-judicial order which violates the fundamental right, application under Art. 32 will lie if such order is—

- (i) made under an *ultra vires* statute,^{25,26} or rule.¹
- or (ii) without jurisdiction,² though the statute may be *intra vires*;³
- or (iii) made under a procedure which is *ultra vires*;⁴
- (iv) violative of a principle of natural justice, which is also regarded as an instance of order without jurisdiction.⁵

3. But an application under Art. 32 will *not* lie where the order of the taxing⁶ or other⁷ quasi-judicial authority, though it has violated a fundamental right, and is based on a *misconstruction* of the law⁶⁻⁷ or an error of fact,⁷⁻⁸ is *intra vires*.⁹

4. Except where the impugned State Act constitutes an infringement of a fundamental right included in Part III, an application under Art. 32 shall not lie for a violation, *simpliciter*, of Art. 265⁸ or Art. 301.¹⁰

Art. 32 and Privileges of the Legislature.

Though the situation on this topic is in a state of turmoil, so long as the opinion of the majority of the Supreme Court in the Special Reference Case¹¹ is not superseded by an amendment of the Constitution, the following propositions may be asserted:

I. Since, under Art. 208 (1) of the Constitution, the rules made by the Legislature are subject to the provisions of the Constitution, the privileges of a Legislature in India cannot be asserted in contravention of the fundamental rights guaranteed by Arts. 20 and 21.¹²⁻¹³

II. It follows that, whatever be the position in England, when a person is committed for contempt of a Legislature in India, such person is entitled to approach the High Court under Art. 226¹⁴ and the Supreme Court under Art. 32¹⁵ with the complaint that he has been deprived of his liberty in contravention of Art. 21.¹¹ The English principle that a general warrant issued by the Parliament is not questionable by a court of law is not applicable in India, in view of these provisions of *our* Constitution.¹⁵ Otherwise the constitutional powers of these superior Courts would be rendered nugatory.¹⁵

Applications under Arts. 32 and 226.

Since the jurisdiction relating to the enforcement of fundamental rights is concurrent, several questions arise as to the choice of forum.

(21) *Meenakshi Mills v. Viswanatha*, (1955) 1 S.C.R. 787.

(22) *Chhotabhai v. Union of India*, A. 1962 S.C. 1006 (1021).

(23) *Kunnathat v. State of Kerala*, A. 1961 S.C. 552.

(24) *Kailash Nath v. State of U. P.*, A. 1957 S.C. 790; *Balaji v. I. T. O.*, A. 1962 S.C. 123.

(25) *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122.

(1) *Mehrab & Co. v. State of Madras*, A. 1963 S.C. 928.

(2) *Tata Iron & Steel Co. v. Sarkar*, (1961) 1 S.C.R. 379; *Gokal v. Asstt. Collector*, (1960) 2 S.C.R. 852; *Mohanlal v. State of M. P.*, (1955) 2 S.C.R. 509; *Madanlal v. E. & T. O.*, A. 1961 S.C. 1565.

(3) *State Trading Corp. v. State of Mysore*, A. 1963 S.C. 548 (550).

(4) *Narendra v. Union of India*, A. 1960 S.C. 430 (438).

(5) *Sinha Govindji v. Dy. Collector*, (1962) 1 S.C.R. 540.

(6) *Ujjam Bai v. State of U. P.*, A. 1962 S.C. 1621.

(7) *Gulabdas v. Asstt. Collector*, A. 1957 S.C. 733; *Bhatnagars v. Union of India*, (1957) S.C.R. 701; *Kunhamina v. Ministry of Rehabilitation*, 1962 S.C. 1616.

(8) *Ramjilal v. Income-Tax Officer*, A. 1951 S.C. 97; (1950-51) C.C. 242.

(9) *Pioneer Traders v. Chief Controller*, A. 1963 S.C. 734 (741).

(10) *Ramchandra v. State*, (1956) S.C.R. 28 (42).

(11) Ref. under Art. 143 of the Constitution, A. 1965 S.C. 745 (786).

(12) *Ibid.*, p. 786.

(13) *Sharma v. Krishna Sinha*, A. 1959 S.C. 395; (1959) Supp. (1) S.C.R. 806.

(14) *Ibid.*, p. 767.

(15) P. 787, *Ibid.*

(A) As regards *Fundamental Rights*.—

1. Since both the High Court and the Supreme Court have jurisdiction to entertain an application for the issue of a writ the question arises whether a person can apply direct to the Supreme Court without first applying to the High Court.

It is established¹⁶ that an application under Art. 32 lies in the first instance to the Supreme Court, without first resorting to the High Court under Art. 226.¹⁶

2. An analogous question which has arisen and is bound to arise is whether a party who has brought an application under Art. 226 which has been dismissed by the High Court can make an application to the Supreme Court under Art. 32, instead of appealing from the decision of the High Court.

In one case¹⁷ the Supreme Court heard the petition under Art. 32 on the merits and dismissed it but observed that the Court would not encourage the practice.

But in later cases,¹⁸ the Supreme Court has disposed of an application under Art. 32 on the merits, without entering into the question of maintainability of the application without obtaining a leave to appeal from the order of dismissal of the previous application under Art. 226 on the same grounds, even where the Petitioner's application for certificate for appeal to the Supreme Court from the order under Art. 226 had been rejected by the High Court.¹⁹

In the latest case,²⁰ however, a unanimous Bench (Gajendragadkar, Wancho, Das Gupta & Ayyangar JJ.) has held that when a High Court has dismissed an application under Art. 226, *on the merits*, and such dismissal is not set aside on appeal, the principle of *res judicata* operates and that, accordingly, an application under Art. 32, on the same grounds, will not lie.

With great respect, it is submitted that the question is not one of procedural but of substantive law. Since the right to approach the Supreme Court by an original petition²⁰ under Art. 32 is itself guaranteed by the Constitution,¹⁶ it is not apparent how the Supreme Court can refuse to hear an application under Art. 32 on the ground that the Petitioner has not *appealed* to it from a judgment of a High Court under Art. 226. Of course, the judgment under Art. 226 may contain good reasons to show that the applicant has no case on the merits; and it would be open before the respondent in the proceeding under Art. 32 to rely on those grounds. But that itself cannot constitute a reason for denying the constitutionally protected right to present a petition under Art. 32 and to show that a fundamental right has been *prima facie* infringed. It may be noted that in *Amar Singh's case*,¹⁸ the Petitioner succeeded in part, notwithstanding the dismissal of his application in the High Court.

(B) Since the Supreme Court has no power to issue a writ for *any purpose other than the enforcement of Fundamental rights*, it may not be prudent for a Petitioner to apply direct to the Supreme Court where he applies for a writ both on the ground of infringement of Fundamental Rights as well as on other grounds. For, it is not possible for the Supreme Court to deal with the case completely even though it is satisfied that the Petitioner may be entitled to a writ on a ground other than the infringement of a Fundamental Right. Thus, in a case where the Supreme Court found that no Fundamental Right was infringed, the Court dismissed the application with the observation—"It is open to the Petitioner under Art. 226 to approach the High Court for a *mandamus* if the officers concerned have conducted themselves not in accordance with law or if they have acted in excess of their jurisdiction."²¹ It seems that even without such observations the

(16) *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594: (1950-51) C.C. 40 (51).

(17) *M. K. Gopalan v. State of M. P.*, (1954) S.C.A. 557 (562).

(18) *Purushottam v. Desai*, (1955) 2 S.C.R. 887 (892); *Achutan v. State of Kerala*, A. 1959 S.C. 490 (492); *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (310).

(19) Cf. *Babulal v. State of Maharashtra*, A. 1961 S.C. 886.

(20) *Daryao v. State of U. P.*, A. 1961 S.C. 1457: (1962) 1 S.C.R. 574.

(21) *Cooverjee v. Excise Commr.*, (1954) S.C.A. 256.

Petitioner would be entitled to apply again to the High Court under Art. 226 on the other grounds in respect of which the Supreme Court had no jurisdiction to dispose of the application this way or that.

But in any case, the very object of approaching the Supreme Court first would be frustrated if the Petitioner has to come to the High Court again.

Arts. 32 and 132-4.

The procedure to be followed when an application under Art. 32 is brought to quash a proceeding when a regular appeal against the decision in that proceeding is pending before the Supreme Court under Art. 132-4, has not yet been decided. In some cases,^{1,2} the Supreme Court has heard the matter relating to fundamental rights under Art. 32 as a preliminary point in the appeal itself, and dismissed the application under Art. 32 upon the finding at that preliminary hearing.

In others, where a decision on the constitutional question is sufficient for the disposal of the appeal, the Court has heard the application under Art. 32 and then disposed of the appeal in conformity with that decision,³ or heard them together.⁴

This much is certain, however, that a party is not debarred from presenting an application under Art. 32 simply because he has already brought the matter before the Court by appeal.^{4,5}

Amplitude of Supreme Court's Jurisdiction under Art. 32.

1. The powers given to the Supreme Court under Art. 32, for the enforcement of Fundamental Rights are not confined to issuing prerogative writs only, and are not necessarily circumscribed by the conditions which limit the exercise of the prerogative writs.⁵

2. The language used in articles 32 and 226 of the Constitution is very wide and the powers of the Supreme Court as well as of the High Courts in India extend to issuing orders, writs or directions including writs in the nature of *habeas corpus*, *mandamus*, *quo warranto*, prohibition and *certiorari* as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions of the Constitution, there is no need to look back to the procedural technicalities of these writs in English law. The Court can make an order in the nature of these prerogative writs in all appropriate cases and in an appropriate manner, so long as the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law are observed.⁶

3. An application under Art. 32 cannot be thrown out simply because the proper direction or writ has not been prayed for. Thus, where an order in the nature of *mandamus* is sought in a particular form, nothing debars the Court from granting it in a different form. Art. 32 gives the Court a very wide discretion in the matter of framing the writs to suit the exigencies of particular cases.⁷

While the general rule relating to the prerogative writs is that the proper writ must be specifically asked for by the petitioner, because of the peculiar position of our Supreme Court under Art. 32 (1), the Court entertains petitions where 'an appropriate writ' is asked for, without specifying any particular writ at all.⁸

4. What Art. 32 aims at is the enforcement of fundamental rights no matter whether the necessity arises out of an action of the executive or of the legisla-

(1) *Qasim Razvi v. State of Hyderabad*, (1953) S.C.R. 583 (594).

(2) *Haheeb Mohamed v. State of Hyderabad*, (1953) S.C.A. 789 (792).

(3) *Jagannath v. State of Orissa*, (1954) S.C.R. 1046 (1049).

(4) *Niemla Textiles Mills v. 2nd Punjab Tribunal*, A. 1957 S.C. 329 (333).

(5) *Rashid Ahmad v. Municipal Board*, (1950) S.C.R. 566: A. 1950 S.C. 163.

(6) *Basappa v. Nagappa*, (1955) 1 S.C.R. 250: (1952-54) 2 C.C. 475 (477).

(7) *Chiranjit Lal v. Union of India*, (1950-51) C.C. 10 (35).

(8) Cf. *Babulal v. State of Maharashtra*, A. 1961 S.C. 886.

ture. But Art. 32 is not directly concerned with the determination of the constitutional validity of a particular legislative enactment. To make out a case under this Article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competency of the particular legislature as not being covered by any of the items in the relevant legislative list, but that it affects or invades his fundamental rights guaranteed by the Constitution of which he could seek enforcement by an appropriate writ or order.⁹

Territorial Jurisdiction of Supreme Court Under Art. 32.

Though no territorial limit has been specified in this Article, it has been held¹⁰ that the Supreme Court is not competent to issue a writ under this Article against a quasi-judicial authority situated in a place outside the territory of India, even though such authority may have been appointed by the Government of India. The Court does not, in such a case, acquire jurisdiction even if subsequent to the impugned order of such authority, that place comes within the territory of India.¹⁰ The Court, however, suggested that the situation would be different if the authority was administrative,¹¹ the reason being that while an administrative authority appointed by the Government of India is under its control, a quasi-judicial authority could not be said to be under the control of the Government, in the exercise of its functions.¹⁰

Who may apply under Art. 32.

(i) Any person who complains of any infraction of any of the Fundamental Rights guaranteed by the Constitution is at liberty to move the Supreme Court,—including corporate bodies except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons.

(ii) A company and its share-holders are separate legal entities. Hence, when some fundamental right of a company is infringed (e.g., when property of the company is taken possession of without compensation), it is the company and not any of its share-holders that must come forward to vindicate its rights. In other words, when a share-holder applies under Art. 32, he can succeed only if some fundamental right of a share-holder as distinguished from that of the company has been infringed.⁹ Thus, where the Government assumed control over a company under a law which was void for contravention of Art. 31 (2), it was held that, nevertheless, a preference share-holder could apply for a writ on the ground that the law being void, the directors appointed by the Government had no right to call for the amounts unpaid on the preference shares.¹²

(iii) The rights that could be enforced under Art. 32 must ordinarily be the rights of the petitioner himself who complains of the infraction of such rights and approaches the Court for relief, and the proper subject for investigation by the Court would be what rights, if any, of the petitioner have been violated by the impugned legislation. An exception to the above general proposition is admitted in the case of *habeas corpus*: not only the man who is imprisoned or detained in confinement but any person, provided he is not an absolute stranger, can institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating the person who has been illegally imprisoned.⁹

(iv) The right to apply under Art. 32 arises not only where a fundamental right has been actually infringed, but also where a serious threat¹³ to infringe it has been offered by the State, e.g., a threat to use the coercive machinery of

(9) *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (898-9, 930).

(10) *Ramamurthy v. Chief Commr., A.* 1963 S.C. 1464: (1964) 1 S.C.R. 656.

(11) *Masthan Sahib v. Chief Commr., A.* 1963 S.C. 533.

(12) *Dwarkanadas v. Sholapur Spinning Co.*, (1954) S.C.R. 674 (711-2).

(13) *Rooch Chand v. State of Punjab*, A. 1963 S.C. 1503 (1508).

the State to realise an *ultra vires* or unconstitutional import, affecting one's freedom of business under Art. 19 (1) (g).¹⁴

(a) There may be cases when the very coming into operation of an enactment infringes a fundamental right of a citizen so that he may apply under Art. 32 without waiting for any overt act to be done by the State under the enactment in question. Thus, in *Kochunni v. State of Madras*¹⁵ the Supreme Court entertained an application under Art. 32 as soon as a State Act which would have the effect of depriving the petitioner of his estate was brought into force even though the State had not yet issued notifications under the Act which were required to vest in the State.

(b) Where a final administrative order is made against the Petitioner as a result of which another person would be entitled to ask for delivery of possession of the lands of the Petitioner, there is an immediate threat to the right of property of the Petitioner and he is not bound to wait till his right is actually affected.¹²

How far existence of alternative remedy bars applications under Art. 32.

Though the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting prerogative writs, this is not an absolute ground for refusing a writ under Art. 32 of the Constitution, because the powers given to the Supreme Court under Art. 32, are much wider and are not confined to issuing 'prerogative writs' only.¹⁶ The existence of an alternative remedy is, therefore, no bar to the issue of a writ where a fundamental right has been infringed.¹⁵

Once it is established that a fundamental right has been infringed, it is the duty of the Supreme Court to afford appropriate relief.¹⁷

Whether declaratory relief may be given under Art. 32.

1. It has already been said (p. 272, *ante*) that the jurisdiction under Art. 32 is not confined to the issue of 'prerogative writs' and that the Supreme Court has wide discretion in the matter of framing the writs to suit the exigencies of particular cases.¹⁸

2. In a number of cases under Art. 226, the High Courts had held that declaratory relief cannot be had in a petition for a writ, and even the Supreme Court had early held¹⁶ that a declaration that an impugned Act is invalid and consequential relief by way of injunction are inappropriate to an application under Art. 32, and in *Umegh Singh v. State of Bombay*,¹⁹ the Court relegated the petitioner to filing a regular suit.

3. But a declaration that the impugned Act was void was made in *Ebrahim v. State of Bombay*²⁰ and in *Kochunni v. State of Madras*²¹ the Supreme Court has, on a review of the previous authorities, laid down that the Court's powers under Art. 32 are wide enough to make even a declaratory order (with consequential relief by way of injunction), where that is the proper relief to be given to the aggrieved party.

How far interim relief can be granted in a petition under Art. 32 or 226.

There is no doubt that when a petition under Art. 32 is admitted the Supreme Court may grant such interim relief as would prevent the ultimate relief in the proceedings being rendered infructuous. Thus, where the constitutionality of a statute is challenged, on the ground of infringement of a fundamental right, the Court may issue an appropriate order staying the operation of the impugned

(14) *Tata Iron & Steel Co. v. Sarkar*, A. 1961 S.C. 65 (68); *State of Bombay v. United Motors*, (1953) S.C.R. 1069; *Himmatlal v. State of M. P.*, (1954) S.C.R. 1122.

(15) *Kochunni v. State of Madras*, A. 1959 S.C. 725 (731, 733).

(16) *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566; A. 1950 S.C. 163. [See further, under Art. 226, *post*.]

(17) *Kharak Singh v. State of U. P.*, A. 1963 S.C. 1295 (1302).

(18) *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869; A. 1951 S.C. 41.

(19) *Umegh Singh v. State of Bombay*, (1955) 2 S.C.R. 164; A. 1955 S.C. 540.

(20) *Ebrahim v. State of Bombay*, A. 1954 S.C. 229; (1954) S.C.R. 933 (1941).

Act pending the disposal of the petition,¹⁹ or restraining the respondents from asserting any rights under the Act.²¹

The question has arisen whether the Court can issue such relief where it holds that the case of the Petitioner *cannot* be determined in a proceeding under Art. 32 but that it is the proper subject-matter of a suit and that an interim relief is essential for the Petitioner to preserve the *status quo* until the Petitioner has brought his suit.

There has been an apparent conflict²² between the views taken by the Supreme Court in the cases of *State of Orissa v. Madan Gopal*²³ and *Umegh Singh v. State of Bombay*,¹⁹ but the two decisions appear to be slightly distinguishable.

(a) In *Madan Gopal's case*,²³ no fundamental right appears to have been involved. The case of the Petitioners for a writ of *mandamus* under Art. 226 was that the State had no legal right to cancel the leases granted to the Petitioners before the period mentioned therein. The High Court held that the Petitioners had a *prima facie* case to be tried on taking evidence, in a civil suit, which could not be investigated in a proceeding under Art. 226 but that the Petitioners would suffer irreparable injury unless the *status quo* was maintained during the period of notice under s. 30, C. P. Code, which was necessary for bringing the suit. The Court, therefore, 'allowed the application in part', by issuing the following direction.

"We direct that till three months from to-day or one week after the institution of their (respondents') contemplated suit, whichever is earlier, the Government of the State of Orissa should refrain from disturbing the petitioner's possession over the mining areas in question and that thereafter this order will cease to have effect."

The Supreme Court quashed this decision on the ground that relief in a petition under Art. 226 could be granted only where the Court came to a finding that the Petitioner had a legal right for the enforcement of which a writ could issue. Where the Court is prepared to determine such right in the proceeding, the Court is competent to make a suitable interim order "for maintaining the *status quo ante*". But where the Court was *not prepared* to enter into the merits as to the existence of such right, a writ under Art. 226 could not be issued, as a final relief in the proceeding, simply to enable the Petitioner to bring a suit for the establishment of such right.

".....when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Article 226 of the Constitution."

(b) In *Umegh Singh's case*,¹⁹ it was a petition under Art. 32. The Petitioners challenged the constitutionality of the Bombay Merged Territories (Jagirs Abolition) Act, 1953 and also contended that their holdings were not 'jagirs' within the impugned Act, and, accordingly prayed for appropriate writs to restrain the State of Bombay to give effect to the provisions of the impugned Act. The Court came to a clear finding that the impugned Act was not unconstitutional,²⁴ but as regards the contention that the Petitioners' holdings were not 'jagirs' within the definition in the Act, the Court observed—

"The question requires to be completely thrashed out and adjudicated upon by a Court of Law after going into the evidence adduced before it by both the parties",

but felt that the Petition under Art. 32 should be 'adjourned' till after the disposal of a civil suit to be filed by the Petitioners, which required a notice under s. 80, C. P. Code. At the time of admission of the Petition, the Court had already granted an interim order restraining the State from enforcing the impugned Act

(21) *Kochunni v. State of Madras*, A. 1959 S.C. 725 (733).

(22) As noticed in 59 C.W.N. cxxxiii.

(23) *State of Orissa v. Madan Gopal*, (1952) S.C.R. 28.

(24) *Umegh Singh v. State of Bombay*, (1955) 2 S.C.R. 164.

against the Petitioners. The Court now directed that order of stay to continue till the final disposal of the suit to be brought by the Petitioner, in these terms:

"Petition No. 364 will stand adjourned *sine die* till after the disposal of the civil suit to be filed by the Petitioner If no such suit is filed within the aforesaid period (three months from this date), this petition will stand dismissed".

The distinguishing feature of this case is that the Court, instead of finally disposing of the Petition under Art. 32, 'adjourned' it till the final disposal of the suit to be brought by the Petitioner.

Though, with respect, the grounds for the above order are not explained in the judgment, the grounds appear to be as follows:

Apart from challenging the constitutionality of the impugned Act, namely, the Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953, the Petitioners, in the aforesaid Petition, contended that the impugned Act for abolition of Jagirs did not apply to his property, because it was not a *jagir*. As regards this latter question, the appropriate relief was a suit in the Civil Court for a declaration of the Plaintiff's title that it was not affected by the impugned Act, and for an injunction to restrain the State from enforcing it against the Petitioner's property. Now, the decision of the primary question in the case, namely, that the impugned Act was protected from the challenge under Arts. 14, 19 and 31 by Art. 31A (1), was founded on the assumption that the Petitioner's property was a *jagir*. Since this assumption was disputed, the Court was obliged to postpone a disposal of the case until the disputed question was adjudicated upon by the proper tribunal.

What distinguishes *Umegh Singh's case*²⁴ from *Madan Gopal's*²⁵ is that while in *Madan Gopal's* case, the Court held that there was nothing to decide in the application brought before the Court, in *Umegh Singh's* case, there was a point for decision of the Court under Art. 32, but that for a complete disposal of the Petition, a determination of another question outside the purview of Art. 32 was necessary. It was, accordingly, necessary for the Court to adjourn the proceeding under Art. 32 till the extraneous question was decided by a competent Court.

Quite apart from the above controversy, it is now settled since *Kochunni v. State of Madras*¹ that in a Petition under Art. 32 it is possible for a Petitioner to obtain a declaration as to the invalidity of the impugned Act and also to obtain consequential relief in the nature of an injunction to restrain the State from enforcing the unconstitutional Act. It is, therefore, evident that an interim relief is available in such a case pending disposal of the application under Art. 32 if the Petitioner can establish a *prima facie* case at the institution of the proceeding.

Whether evidence can be taken in a writ proceeding.

(A) *England*.—The procedure relating to writ proceedings is governed by Order 59 of the RSC. Broadly speaking, the procedure is as follows:

An application for any of the writs must be accompanied by an affidavit and the respondent in opposition to a motion may file a counter-affidavit. If he wants to dispute the facts stated in the application, the Court may grant leave to the applicant to file additional affidavit upon any new matter arising out of the affidavit of the opposite party. But cross-examination on affidavits is not, as a rule, allowed,² and if the facts are in dispute on the affidavits, the Court does not issue a writ.³ But no evidence would be taken unless that is allowed by a statutory provision, e.g., s. 3, Habeas Corpus Act, 1816.

In particular, in a proceeding for *mandamus*, the applicant must bring to the notice of the Court the facts constituting the ground of application by an affidavit,

(25) *State of Orissa v. Madan Gopal*, (1952) S.C.R. 28.

(1) *Kochunni v. State of Madras*, A. 1959 S.C. 725 (733).

(2) *Re X v. Stokesley JJ.*, (1956) 1 W.L.R. 254.

(3) *Re Bussell*, (1919) 63 Sol. Jo. 835.

for example, that an inferior tribunal has refused to exercise jurisdiction or has been influenced by irrelevant considerations.⁴

In a proceeding for *certiorari*, the applicant must file an affidavit stating the alleged defects where error on the face of the proceeding is alleged or where the ground relied upon is that the tribunal has taken into consideration irrelevant matters,⁵ but except where the jurisdiction of the tribunal is in question even an affidavit is not admissible to show that the inferior tribunal has committed an error on a question of fact.⁶

(B) *U.S.A.*—The general rule is that in a proceeding to determine the constitutionality of a statute, the Court will act on the facts stated or admitted in the pleadings and the affidavits⁷ or facts of which the Court may take judicial notice,⁸ and those which appear on the face of the record.⁸

Exceptions have, however, been acknowledged to admit evidence—

(i) Where the reasonableness of the statute in relation to the permissible objects depends on factual considerations,⁹⁻¹⁰ e.g., the reasonableness of classification;¹⁰ the reasonableness of rate;¹¹ the reasonableness of the exercise of a regulatory power.¹⁰

(ii) Where the validity of the statute is challenged on the ground that the circumstances on the existence of which the statute was based have changed and that the application of the statute to the changed circumstances has become unconstitutional.¹²⁻¹³

Thus, where a law was enacted to meet an emergency, for instance, shortage of accommodation, facts may be proved to show that the emergency has ceased to exist and that, accordingly, the law has also ceased to be valid.¹³

(iii) In the sphere of equal protection, it has been held that it is open to the complainant to prove—

That a statute, valid on its face, when applied to a particular article, is without support in reason because the article, though within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.¹⁴

In such cases, even an appellate Court may remand a case for taking evidence "if there is a reasonable likelihood that the production of evidence will make the answer to the questions clear".^{11,13}

When evidence as to facts is thus necessary, any kind of legitimate proof,¹⁰ including expert testimony, is admissible;¹¹ and where it is not convenient for the evidence to be taken in the Supreme Court, as a Court of appeal, the case is remanded to the trial Court for taking evidence.¹⁵⁻¹⁶

(C) *India.*

I. Prior to the Supreme Court decision in *Kochunni v. State of Madras*,¹⁷ the generally accepted view was that in a writ proceeding,—

A disputed question of fact cannot be determined by taking evidence as in a suit.

(i) In a number of cases it was held by the High Courts¹⁸ as well as by the Supreme Court¹⁹⁻²⁰ that an application under Art. 226 is to be determined on

(4) *R. v. Cotham*, (1898) 1 Q.B. 802.

(5) *R. v. Fulham Rent Tribunal*, (1953) 2 All E.R. 4 (6).

(6) *Baldwin v. Patents Appeal Tribunal*, (1958) 2 All E.R. 368 (373) C.A.

(7) *Hadacheck v. Sebastian*, (1915) 239 U.S. 394.

(8) *O'Gorman v. Hartford Fire Ins. Co.*, (1931) 282 U.S. 251 (257).

(9) *Weaver v. Palmer Bros.*, (1925) 270 U.S. 402.

(10) *Borden's Farm Products v. Baldwin*, (1934) 293 U.S. 194.

(11) *United Fuel Gas Co. v. Railroad Comm.*, (1928) 278 U.S. 300.

(12) *Nashville Ry. v. Walters*, (1934) 294 U.S. 405.

(13) *Chastleton Corp. v. Sinclair*, (1923) 264 U.S. 543.

(14) *Railroad Retirement Board v. Alton R. Co.*, (1934) 295 U.S. 330 (349-52).

(15) *Hammond v. Schappi Bus Line*, (1927) 275 U.S. 164.

(16) *State Tax Commrs. v. Jackson*, (1930) 283 U.S. 527.

(17) *Kochunni v. State of Madras*, A. 1959 S.C. 725 (734).

(18) *Ganesh v. State of W. B.*, 1958 Cal. 114 (117); *Tejraj v. State of M. B.*, A. 1958 M.B. 115 (122).

(19) *Sohan Lal v. Union of India*, A. 1957 S.C. 529.

(20) *Union of India v. Varma*, A. 1957 S.C. 882 (884).

admitted facts or on facts established by affidavits²¹ and that the Courts cannot take evidence to determine disputed questions of fact.

(ii) Even as regards an application under Art. 32, the Supreme Court held that it is only on facts admitted or taken as proved that the question of violation of a fundamental right can be decided by the Supreme Court under Art. 32. When facts are in dispute, the matter is to be inquired into and decided by proper legal proceedings.²²⁻²³

II. But in *Kochunni v. State of Madras*,¹⁷ Chief Justice Das cut the 'Gordian knot' of the English obsession. Taking up the thread from the celebrated words of Mukherjea J. that in India we should not feel oppressed by the "procedural technicalities of these writs in English law",²⁴ Das C.J. held²⁵ that in a proceeding under Art. 32, the Court is not debarred from determining disputed questions of fact by taking evidence inasmuch as *fundamental rights* are affected.

The principle upon which the exception was acknowledged was the *duty* of the Supreme Court, under Art. 32, to act as the guardian and protector of fundamental rights which makes it obligatory upon the Supreme Court to decide an application on the merits, whenever it is established, *prima facie*, that a fundamental right had been infringed. While in previous cases, such as *Kathi Raning v. State of Saurashtra*,²¹ and *Ramkrishna v. Tendolkar*,²¹ the Court decided disputed questions of fact on affidavits, in *Kochunni's case*,²⁵ the Court overruled the preliminary objection that the application should be rejected in limine because it involved disputed questions of fact which could not be disposed of without taking evidence. In this case,²² the grievance of the Petitioners was that the Madras Marumakkathayam (Removal of Doubts) Act, 1955, was a discriminatory piece of legislation (contravening Art. 14) which had signed out the '*sthanam*' of the Petitioners, for hostile treatment. In order to dispose of this case, it was necessary to investigate the question of fact, namely, "whether there are or are not other *sthanams* or *sthanams* similarly situate as the petitioners are". Rejecting the preliminary objection in the following words, the Court set the application down 'for trial on evidence', if the question of fact could not be disposed of on affidavits:

"..... we do not countenance the proposition that, on an application under Art. 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground. If we were to accede to the aforesaid contention..... we would be failing in our duty as the custodian and protector of fundamental rights..... We are not unmindful of the fact that the view that this Court is bound to entertain a petition under Art. 32 and to decide the same on the merits may encourage litigants to file many petitions under Art. 32 instead of proceeding by way of suit..... But that consideration cannot, by itself, be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may, *prima facie*, appear to have been infringed..... it is possible very often to decide questions of fact on affidavits. If the petition and the affidavits in support thereof are not convincing and the Court is not satisfied that the Petitioner has established his fundamental right or any breach thereof, the Court may dismiss the petition on the ground that the petitioner has not discharged the onus that lay on him. The Court may, in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases by filing further affidavits or by issuing commission, or even by setting down for trial on evidence, as has often been done on the original sides of the High Courts of Bombay and Calcutta, or by adopting some other appropriate procedure.

Such occasions will be rare indeed and such rare cases should not, in our opinion, be regarded as a cogent reason for refusing to entertain the petition under Art. 32 on the ground that it involves questions of fact".²⁵

In a proceeding under Art. 32, the Supreme Court is not, therefore, debarred from taking evidence of witness by issuing commission or examining witnesses in Court, where necessary.²⁵

(21) *Kathi Raning v. State of Saurashtra*, A. 1952 S.C. 123; *Ramkrishna v. Tendolkar*, A. 1958 S.C. 538.

(22) *Kailash v. State of U. P.*, A. 1957 S.C. 790 (792).

(23) *Gulabdas v. Asstt. Collector*, 1957 S.C. 733 (737).

(24) *Basappa v. Nagappa*, (1955) 1 S.C.R. 250 (256).

(25) *Kochunni v. State of Madras*, A. 1959 S.C. 725.

But the Court cannot enter into the investigation of a fact which has been negated by the decision of a competent tribunal which has become final; and where that fact constitutes the foundation of the alleged fundamental right, the application under Art. 32 must be dismissed.¹⁻²

III. The existence of disputed questions of fact is no bar to grant relief under Art. 32, where it is not necessary to go into those disputed questions in order to come to the finding that the Petitioner's fundamental right has been infringed.^{2a}

Right of intervention of Attorney-General or Advocate-General.

Under O. XLI, r. 2 of the Supreme Court Rules, 1950, the Attorney-General for India or the Advocate-General of a State may, with the permission of the Court appear and be heard in any proceedings before the Court.

The Rules do not expressly permit any other party to intervene, but in practice, the Supreme Court, in the exercise of its inherent powers, allows a third party to intervene when such third party is a party to some proceedings before the Supreme Court or a High Court where the same or similar questions are in issue,—for, the decision of the Supreme Court on the issue will conclude the case of such party.³ The Court may even hear persons who are not parties to any such proceedings, as *amicus curiae*, where the nature and importance of the question before the Court would require the assistance of such persons.³

Practice and Procedure.⁶

I. It would not be right to permit the Petitioner to raise questions which depend on facts which were not mentioned in his petition⁴ but were put forward in a rejoinder to which the respondents had no opportunity to reply.⁵

II. The principle applicable to suits for possession, namely, that all co-owners must join in a suit to recover property unless the law otherwise provides and, if some of the co-owners refuse to join, they must be impleaded as defendants, has no application to a petition under Art. 32 and it cannot be thrown out on the mere ground that all persons equally interested with the Petitioner have not been joined.⁷

Nature of Order.

Though ordinarily an application should be dismissed where the applicant fails to establish his case, the Court may, in its discretion, simply reject an application, where he is not ready with evidence, with the observation that he may bring a fresh application with adequate particulars, supported by evidence.⁸

Res Judicata.

The principle of *res judicata* has been applied to judgments pronounced in Petitions under Article 32.⁹⁻¹⁰

Illustration.

Where a petition under Art. 32 to quash proceedings for breach of privilege of a State Legislature is refused, the Petitioner cannot bring another petition on the same grounds, to reopen the previous decision, merely because the Committee of Privileges has been reconstituted and a fresh notice issued upon the Petitioner.⁹

(1) *Sayed v. State of M. B.*, (1960) 3 S.C.R. 138.

(2) *Aniyoth v. Ministry of Rehabilitation*, A. 1962 S.C. 1616; (1962) 1 S.C.R. 505.

(2a) *Bishun Das v. State of Punjab*, (1962) 2 S.C.R. 69 (78).

(3) *Hanif Quareshi v. State of Bihar*, (1958) S.C.A. 783 (795).

(4) *Bhikaji v. State of M. P.*, (1955) 2 S.C.R. 589.

(5) *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (407).

(6) For Supreme Court Rules relating to Application under Art. 32, see Author's 'Acts, Rulers and orders under the Constitution', Vol. I, pp. 346-8.

(7) *Mahendra v. State of U. P.*, A. 1963 S.C. 1019 (1025).

(8) *Sahas Karan v. State of Rajasthan*, (1960) S.C. [Petn. 137/58].

(9) *Sharma v. Sree Krishna (II)*, (1961) 1 S.C.R. 96; *Jagannath v. State of U. P.*, A. 1962 S.C. 1563 (1566).

But the doctrine of constructive *res judicata* would not generally be applied to petitions under Art. 32 or 226.¹⁰

The decision in a proceeding for tax relating to a *previous* period would not, accordingly, operate as *res judicata* in a proceeding for a subsequent period except where a basic and general issue, e.g., as to the validity of the taxing statute has been decided in the previous proceeding.¹⁰ This does not mean however that in respect of the *same* period, the Petitioner would be at liability to make successive applications, adding new grounds each time.¹¹

Whether decision under Art. 226 bars jurisdiction of Supreme Court under Art. 32 by *res judicata*.

A. In some early cases¹² the Court simply observed that it would not encourage, except for good reasons, the practice of "direct approach to the Supreme Court matters which have been taken to the High Court and found against, without obtaining leave to appeal therefrom. No question of *res judicata*, however, was raised in these cases.

B. But in some later cases^{12a} the Court disposed of an application under Art. 32 on the merits without entering into the question of maintainability of the application on the ground that no leave to appeal from the order of dismissal from the previous application under Art. 226 had been made.

C. The question has later been fully examined by a unanimous Bench in *Darayao v. State of U.P.*^{12b} In this case it has been held that the principle of *res judicata* being one of universal application and a final judgment being binding on the parties thereto, an applicant under Art. 226 cannot apply on the same grounds under Art. 32 without getting the adverse judgment under Art. 226 set aside on appeal. The court has, however, made a distinction between cases where the application under Art. 226 has been dismissed on the merits and cases where they have been dismissed on some preliminary ground thus^{12a}—

(i) Where the application has been dismissed on merits an application under Art. 32 will not be maintainable on the same facts and on the same grounds and for obtaining similar writs or orders.

(ii) Where the petition under Art. 226 is dismissed as withdrawn or it is dismissed on the ground that disputed facts cannot be decided in a writ proceeding and the petitioner must therefore bring a regular suit, an application under Art. 32 would not be heard.

(iii) If the petition under Art. 226 is dismissed *in limine* without passing a speaking order such dismissal cannot create a bar of *res judicata*.

(iv) If the petition under Art. 226 has been dismissed not on the merits but on the ground of laches, acquiescence or on the ground that there was alternative remedy available to the petitioner, the dismissal would not operate as a bar to an application under Art. 32 though of course the Court in disposing of the application might consider whether those grounds would suffice to dismiss the application also.

(v) If the petition under Art. 226 is dismissed *in limine*, with a speaking order whether it would operate as *res judicata* would depend upon the grounds on which the dismissal has been made.

With great respect, it is submitted that the question is not one of procedural but of substantive law. Since the right to approach the Supreme Court by an original petition^{12b} under Art. 32 is itself guaranteed by the Constitution,^{12c} it is not apparent how the Supreme Court can refuse to hear an application under Art. 32 on the ground that the Petitioner has not *appealed* to it from a judgment

(10) *Amalgamated Coalfields v. Janpada Sabha*, A. 1964 S.C. 1013.

(11) *Devilal v. S.T.O.*, A. 1961 S.C. 1150.

(12) *M. K. Gobalan v. State of M. P.*, (1955) 1 S.C.R. 168 (174).

(12a) *Purushottam v. Desai*, (1955) 2 S.C.R.

887 (892); *Achutan v. State of Kerala*, A. 1959 S.C. 490 (492); *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (310).

(12b) *Daryao v. State of U. P.*, A. 1961 S.C. 1457.

(12c) *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594.

of a High Court under Art. 226. Of course, the judgment under Art. 226 may contain good reasons to show that the application has no case on the merits; and it would be open before the respondent in the proceeding under Art. 32 to rely on those grounds. But that itself cannot constitute a reason for denying the constitutionally protected right to present a petition under Art. 32 and to show that a fundamental right has been *prima facie* infringed. It may be noted that in *Amar Singh's case*,^{12d} the Petitioner succeeded in part, notwithstanding the dismissal of his application in the High Court.

CLAUSE (3).

OTHER CONSTITUTIONS

U.S.A.—In the United States, not only the Supreme Court but all Courts established by Congress may issue all the writs necessary or appropriate in aid of their respective jurisdictions.^{12e}

INDIA

Power of Parliament to empower other Courts.

This clause enables Parliament to empower any Court, other than the Supreme Court, to issue the writs mentioned in cl. (2), for the purpose of enforcement of the Fundamental Rights. 'Other Courts' in this clause refers to Courts other than High Courts (High Courts have constitutional power to issue the writs under Art. 226), such as subordinate Courts, or the Courts, if any, established under Art. 247, *post*.

Analogous Provisions : Which Courts may issue these writs.

Under different provisions of our Constitution, the following Courts shall have the jurisdiction to issue the writs or orders mentioned above:

(i) *For the enforcement of the Fundamental Rights.*—The High Court as well as the Supreme Court shall have jurisdiction to issue the writ. But the power of the High Court shall not be in derogation to that of the Supreme Court in this respect [Art. 226 (2)]. In other words, notwithstanding the refusal or granting of an application by the High Court, the Supreme Court shall have the power to direct otherwise, under Art. 32, whereupon the order of the High Court shall be superseded.

Besides the High Court and the Supreme Court, subordinate Courts may also be vested by Parliament with the power to issue the writs for the enforcement of the Fundamental Rights. [Art. 32 (3)].

(ii) *For other purposes.*—The Constitution also provides for the issue of these writs for purposes other than the enforcement of Fundamental Rights. Thus, the High Courts shall have jurisdiction to issue a writ or order for any purpose other than the enforcement of Fundamental Rights, and this jurisdiction shall extend throughout the territories in relation to which each High Court has its jurisdiction, Civil, Criminal or otherwise. [Art. 226].

The Supreme Court may also be vested with similar power, by Parliament [Art. 139]. But until Parliament so legislates, the Supreme Court shall have no power to issue the writs mentioned in Art. 32 for purposes other than the enforcement of fundamental rights. (In this respect, thus, the powers of the Supreme Court are narrower than those of the High Court).

CLAUSE (4).

OTHER CONSTITUTIONS

(A) **U.S.A.**—There is no provision for the suspension of any of the writs other than that of *habeas corpus*.

(12d) *Amar Singh v. State of Rajasthan*,
(1955) 2 S.C.R. 303 (310).

(12e) U.S. Code. 1946, Art. 1651.

Art. I, Sec. 9 (2) of the Constitution says—

"The privilege of the writ of *Habeas Corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

It has been held that the power of suspension given above cannot be exercised by the President without express authorization of Congress.¹³ "Congress is of necessity to judge whether the public safety does or does not require it."¹³ But Congress cannot authorise a suspension of the writ outside the theatre of actual war or invasion, and it is for the Courts to say whether such a condition prevails at any particular place.¹⁴ There cannot be any such situation in an area where the ordinary courts are open and still functioning.¹⁴

(B) *Eire*.—Art. 28 (3) of the Constitution of 1937 says—

"Nothing in this constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in pursuance of any such law."

"In this sub-section, 'Time of war' includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall be resolved that arising out of such armed conflict a National emergency exists affecting the vital interests of the State." (First Amendment of the Constitution Act, 1939).

"'Time of war' shall also include such time after the termination of the said armed conflict as may elapse until each of the Houses of the Oireachtas shall have resolved that the said National emergency occasioned by such armed conflict has ceased to exist." (Second Amendment of the Constitution Act, 1941).

This clause provides the 'emergency' power under the Irish Constitution. The Supreme Court has held that this provision overrides every other provision of the Constitution, so that when a law is duly made under the present power, the law cannot be invalidated on the ground of contravention of any other provision of the Constitution,¹⁵ e.g., Art. 34 (that justice should be administered in the public courts);¹⁶ or 38 (that no person shall be tried on a criminal charge save in due course of law);¹⁶ or Art. 40 (4) 1 (that no citizen shall be deprived of his personal liberty save in accordance with law).¹⁶

Nor can the validity of a law made under the emergency power be challenged on the ground that it affects acts or transactions taking place before the making of the law,¹⁵ or that it effects an alteration in the laws of evidence to be followed by the tribunal set up by the law.¹⁷

INDIA

Scope of Cl. (4) : Suspension of Fundamental Rights.

This clause provides that the right guaranteed by Art. 32 (1), i.e., the right to move the Supreme Court for the enforcement of the Fundamental Rights shall not be suspended except as provided by this Constitution, i.e., except as provided in Art. 359.

The mode of suspension provided by Art. 359 is an order of the President subject to legislative approval, when a Proclamation of Emergency is in operation.

The need for an emergency provision is obvious. It exists in all the foreign Constitutions cited *above*. The need was explained by Dr. Ambedkar in the Constituent Assembly¹⁸ in these words—

"There can be no doubt that while there are certain fundamental rights which the State must guarantee to the individual in order that the individual may have some security and freedom to develop his own personality, it is equally clear that in certain cases, where, for instance, the State's very life is in jeopardy, those rights must be subject to a certain amount of limitation. In times of emergency, the individual himself will be found to have

(13) Ex parte *Merryman*, (1861) Taney's Rep. 246.

(14) Ex parte *Milligan*, (1866) 4 Wall. 2.

(15) *In re McGrath & Harte*, (1941) Ir. R. 68.

(16) *In re* 26 of the Constitution, (1940) Ir. R. 470.

(17) *The State v. Lennon*, (1942) Ir. R. 112.

lost his very existence. Consequently, the superior right of the State to protect itself in times of emergency, so that it may survive that emergency and live to discharge its functions in order that the individual under the aegis of the State may develop, must be guaranteed as safely as the right of the individual".¹⁸

The effect of an Order under Art. 359 (1) is that during the operation of the Proclamation of Emergency under Art. 356, no application under Art. 32 will lie to enforce any of the fundamental Rights specified in the Order under Art. 359 (1).¹⁹

By his Order of the 11th November, 1962, the President has declared that the rights under Arts. 14, 21 and 22 shall remain suspended during the Proclamation of Emergency made in view of the Chinese aggression on the 26th October, 1962 in respect of a person arrested or sentenced under the Defence of India Ordinance, 1962 or the Rules made thereunder.

See further under Art. 359, *post*.

INDEX TO COMMENTS

ARTICLE 32.

Right to Constitutional Remedies.

Object of Art. 32: Enforcement of Fundamental rights, 270.

Clause (1).

Other Constitutions :

Japan, 270.

India :

Effects of the guarantee, 270.

Clause (2).

Other Constitutions :

U.S.A., 272.

India :

Scope of Cl. (2): The Judicial writs, 273; Jurisdiction to issue the writs prior to the Constitution, 274; Scope of Arts. 32 and 226, 275; Application under Art. 32 against an order of taxation, 276; Art. 32 and Privileges of the Legislature, 277; Applications under Arts. 32 and 226, 277; Arts. 32 and 132-4, 279.

Amplitude of Supreme Court's Jurisdiction under Art. 32, 279; Who may apply under Art. 32, 280; How far existence of alternative remedy bars applications under Art. 32, 281; Whether declaratory relief may be given under Art. 32, 281; How far interim relief can be granted in a petition under Art. 32 or 226, 281; Whether evidence can be taken in a writ proceeding:

(A) England, 283; (B) U.S.A., 284; (C) India, 284.

Right of intervention of Attorney-General or Advocate-General, 280; Practice and Procedure, 286; Nature of order, 286; Res Judicata, 286; Whether decision under Art. 226 bars jurisdiction of Supreme Court under Art. 32 by res judicata, 287.

Clause (3).

Other Constitutions : U.S.A., 288.

India :

Power of Parliament to empower other Courts, 288;

Analogous Provisions: Which Courts may issue these writs:

(i) For the enforcement of the Fundamental Rights, 288;

(ii) For other purposes, 288.

Clause (4).

Other Constitutions :

(A) U.S.A., 288; (B) Eire, 289.

India :

Scope of Cl. (4): Suspension of Fundamental Rights, 289.

33. Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Power to Parliament to modify the rights conferred by this Part in their application to Forces.

proper discharge of their duties and the maintenance of discipline among them.

(18) C.A.D., Vol. VII, p. 950.

(19) *Mohan v. Chief Commr.*, A. 1964 S.C. 173 (177).

OTHER CONSTITUTIONS

(A) *England*.—In England, a member of the armed forces stands under a dual liability. On the one hand, he is subject to all the special duties and discipline of the army; on the other hand, he is subject to all the duties and liabilities of an ordinary citizen. From this results an apparently paradoxical proposition. A soldier is bound to obey any lawful order which he receives from his military superior, but obedience to superior orders is not of itself a defence to a charge of crime, committed in obedience to such orders. A soldier cannot, any more than a civilian, avoid responsibility for breach of the law pleading that he broke the law in *bona fide* obedience to the orders of superior. So, "he may be liable to be shot by a court-martial if he disobeys an order, and to be hanged up by a judge and a jury if he obeys it." (Lord Haldane). The true rule laid down by the Courts is that a soldier is bound to obey, and will be protected if he obeys, an order of his superior which is *not manifestly illegal*, but he cannot escape liability to the ordinary law if he commits a crime by acting in obedience to an order for which the superior might be reasonably supposed not to have any good ground.¹⁹

On the other hand, there is a Code of special law, called military law, to enforce discipline amongst soldiers. This is embodied in the Army Act, 1881, the King's Regulations and Army Orders. It is a Code to which *soldiers alone* are subject, and it constitutes a number of acts "military offences". The military offences mainly include offences committed by one soldier against another, but they also include certain offences which are ordinary crimes. In respect of military offences a *soldier* is subject to the jurisdiction of the Courts-martial, but that does not relieve him of his duties as an ordinary citizen, and *he may be tried in the ordinary Courts as well for breaches of the ordinary law*.

But over *purely* military offences, the jurisdiction of Courts-martial is exclusive. Thus, a superior officer cannot be sued in the ordinary Courts for wrongly suspending his subordinate for a military offence and bringing him to trial before a Court-martial by which he is acquitted.²⁰ But if the officer punishes a subordinate for an act wholly beyond military control, he would be liable before the ordinary Court.²¹

(B) *U.S.A.*—The position in the United States is similar to that in England. Members of Military forces, when in the enemy territory, are amenable only to military tribunals;²² but when within the United States territory, they are punishable not only by courts-martial under the articles of war, but also under the criminal laws of the State in which the offence may be committed, and for this purpose, a soldier shall be surrendered by the military authorities to the civil authorities, except in time of war or when he is actually awaiting a trial by the court-martial or is undergoing a sentence passed by it.²³

Courts-martial are not parts of the judicial system of the United States as provided for by Art. III of the Constitution and so trial of the military forces by courts-martial is exempted from the rules of indictment and jury trial in criminal cases.²³⁻²⁴

The jurisdiction of courts-martial to try a person is, however, subject to enquiry by the civil Courts. The Courts will interfere, *e.g.*, where the person sought to be tried by a Court-martial has no relationship with the armed forces at the time when the Court-martial seeks to exercise its jurisdiction.²⁵ Thus, while a Court-martial can try a *dishonourably* discharged ex-serviceman for an offence committed during service,²³ it cannot try an *honourably* discharged serviceman for a similar offence,²⁵ and a federal law providing for such trial has been invali-

(19) *Keighly v. Bell*, (1866) 4 F. & F. 763.

(20) *Johnston v. Sutton*, (1786) 1 T.R. 510 (548).

(21) *Warden v. Bailey*, (1811) 4 Taunt. 67 (88).

(22) *Coleman v. Tennessee*, (1878) 97 U.S. 509.

(23) *Kahn v. Anderson*, (1921) 255 U.S. 1 (9).

(24) *Dyns v. Hoover*, (1957) 20 How. 65.

(25) *Toth v. Quarles*, (1955) 350 U.S. 11.

dated. A civilian cannot be subjected to military law,¹ nor tried by a court-martial² even though the civilian is an employee of the Army³ or the dependent of a military personnel.⁴

Further, a Court-martial is not free to ignore the principles of 'due process',—i.e., the right of the accused to be informed of the charge, to have counsel and a speedy and public trial, to be confronted with witnesses, to have compulsory process for obtaining witnesses, not to incriminate himself, and not to be put in double jeopardy.⁵

But no judicial review of the decisions of Courts-martial is available for an irregular exercise of discretion not affecting jurisdiction⁶ or not amounting to a gross abuse of discretion,⁷ or mere errors of decision.⁸

(C) *Eire*.—Art. 38 (4) and (6) of the Constitution of 1937 are as follows—

"(4) 1. Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.

2. A member of the defence forces not on active service shall not be tried by any court-martial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any court-martial or other military tribunal under any law for the enforcement of military discipline.

(6) The provisions of Arts. 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section (3) or section (4) of this article."

INDIA

Scope of Art. 33 : Power of Parliament with respect to Armed Forces.

This Article provides an exception to the foregoing provisions of Part III. It says that the provisions relating to Fundamental Rights, which are otherwise applicable to all persons, may be restricted or abrogated by Parliament in their application to members of the armed forces,—in view of their special position, and the need of discipline amongst them.

The special feature of the present provision of *our* Constitution is that it applies not only to the Armed Forces but also extends to the ordinary police who are charged with the maintenance of "public order"⁹ [*Vide* Entries 1 and 2 of List II of Sch. VII].

Legislation by Parliament.

In pursuance of the power conferred by the present Article, Parliament has enacted the Army Act (XLVI of 1950), Air Force Act (XLV of 1950) and the Navy Act (62 of 1957), providing that some of the Fundamental Rights included in Part III of the Constitution shall not extend to members of the Indian Army, Air Force and Navy. These restrictions may be discussed with reference to the different Fundamental Rights, serially:

1. Ineligibility of Women for Enrolment or Employment.—S. 12 of the Army Act, 1950, 12 of the Air Force Act, 1950 and 9 (2) of the Navy Act, 1957, provide that no female citizen of India shall be enrolled or employed in the *regular*¹⁰ Army, in the Air Force, or in the Naval Forces, except in such department, branch etc., as the Central Government may, by notification, specify.¹¹

(1) *Duncan v. Kahnamaku*, (1946) 327 U.S. 304.

(2) *Kinsella v. U. S.*, (1960) 361 U.S. 234.

(3) *Grisham v. Hagan*, (1960) 361 U.S. 278.

(4) *Reid v. Covert*, (1957) 354 U.S. 1.

(5) *Parker*. Administrative Law (1951), p. 39.

(6) *Whelchel v. McDonald*, (1950) 340 U.S. 122.

(7) *Hiatt v. Brown*, (1950) 339 U.S. 103.

(8) *In re Yamashita*, (1946) 327 U.S. 1.

(9) Cf. *Chatterjee v. Sub-Area Commander*, A. 1951 Mad. 777.

(10) There is no such bar against enrolment of women to the territorial Army [s. 6 of the Territorial Army Act (LVI of 1948)]; National Cadet Corps. [s. 6 (2) of the National Cadet Corps Act (XXXI of 1948)]; Central Reserve Police Force [s. 5 of the Central Reserve Police Force Act (LXVI of 1949)]; Lok Sahayak Sena [s. 5 of the Lok Sahayak Sena Act, 1956]; Auxiliary Air Force [s. 21, Reserve and Auxiliary Air Forces Act, 1952].

(11) These provisions thus exclude the Armed Forces from the operation of Art. 16 of the Constitution.

II. Right of freedom of speech and expression, assembly and association.

—Ss. 21 of the Army Act and 21 of the Air Force Act empower the Central Government to make rules, restricting in such manner and to such extent as may be specified in such notification, the following rights of persons who are subject to the Army, Air Force and Naval Forces Acts:

(i) to be a member of, or to be associated in any way with, any trade union or labour union, or any class or trade unions or labour unions, or any society, institution or association, or any class of societies, institutions or associations;

(ii) to attend or address any meeting or to take part in any demonstration organized by any body of persons for any political or other purpose;

(iii) to communicate with the press or to publish or cause to be published any book, letter or other document.¹²

S. 19 of the Navy Act, 1957 requires the previous sanction of the Central Government for doing any of these acts.

III. Arrest and detention.—Special provisions have been made in these Acts as regards arrest and detention of persons subject to these Acts, and the corresponding provisions of Art. 22 of the Constitution will not, therefore, extend to that extent in such persons.

Ss. 101-2 of the Army Act and ss. 102-3 of the Air Force Act make detailed provisions in this behalf. Briefly speaking, these sections provide that a person who has committed an offence as defined in these Acts may be taken into military (or air force) custody but the arrested person shall not be detained in custody for more than 48 hours, without the charge being investigated, except where investigation of the charge within that period "seems to be impracticable having regard to the public service". But the case of every person being detained in custody beyond a period of 48 hours shall be reported by the commanding officer to the superior officer to whom application would be made to convene a court-martial for the trial of the person charged.

Subject to the above, the Central Government may make rules providing for the manner in which and the period for which any person subject to the Army and Air Force Acts may be taken into and detained in military custody, pending the trial by any competent authority, for any offence committed by him.

IV. Successive trials.—S. 121 of the Army Act and s. 120 of the Air Force Act prohibit a second trial in these words—

"When any person subject to this Act has been *acquitted or convicted* of an offence by a court-martial or by a criminal court, or has been dealt with under ss., he shall not be liable to be tried again for the *same offence* by a court-martial or dealt with under the said sections."

On the other hand, s. 127 of the Army Act and s. 126 of the Air Force Act provide that if the Central Government gives its sanction, a person who has been once tried by a Court-martial may again be tried by a criminal Court for the same offence.

The result of these provisions is that the rule against double jeopardy which is contained in Art. 20 (2) of the Constitution as regards ordinary persons, is to be found in the above provisions as regards military personnel and it is the terms of the above provisions which shall exclusively govern their rights.

Thus, it has been held that a refusal to confirm the sentence of the Court-martial (under Ch. XII of the Army Act) does not constitute an 'acquittal' within the meaning of s. 121 of the Act, and would not accordingly, bar a second trial.¹³ Further, it is not competent for the High Court, in a proceeding for *habeas corpus*, to interfere with the order of confirmation or refusal to confirm even if it be wrong.¹³ Nor would the bar apply, if one Court-martial is dissolved before 'acquittal' or 'conviction' and the accused is tried by another Court-martial.¹⁴

(12) The above provisions, thus, provide for the restriction of the fundamental rights conferred by sub-cl. (a-c) of Art. 19 (1), in their application to the Armed Forces.

(13) *Sardar Singh v. Crown*, Cr. Misc. Case No. 1026 of 1945 (Lah.).

(14) *Rawel Singh v. R.*, Cr. Misc. Case No. 357 of 1945 (Lah.).

Existing laws relating to Armed Forces.

While the present Article confers power on Parliament to make laws restricting or abrogating the Fundamental Rights in relation to the armed forces, Art. 35 (b) [read with cl. (a) (i) of that Article] maintains the validity of existing laws including laws made by the Provincial Legislatures, if any, so long as Parliament does not amend or repeal such laws, notwithstanding any contravention of the Fundamental Rights.¹⁵ A treatment of the existing law relating to the Defence personnel will, therefore, be useful.

Military Law in India.

As in *England*,⁴ military law in India is now contained in statutes, primarily, the Army Act (XLVI of 1950), Air Force Act (XLV of 1950), Navy Act, (62 of 1957). It governs persons who are 'subject to these Acts'⁵ whether in time of war or of peace, and such persons include not only members of the Regular Army, Air Force or Navy, but also persons, not otherwise subject to military laws, who are either employed by, or accompany, any portion of the regular forces, e.g., a whole-time nurse in a military hospital;¹⁶ a civilian storekeeper in an Army Depot or a member of the Military Engineer Service.¹⁷

The primary object of these Acts is to constitute certain 'military offences'. The military offences mainly include offences committed by one soldier against another, but they also include certain offences which are ordinary crimes. In respect of military offences a *soldier* is subject to the jurisdiction of the Courts-martial, but that does not relieve him of his duties as an ordinary citizen, and *he may be tried in the ordinary Courts as well for those acts which are also offences under the ordinary law*. Military law, in fact, imposes on *soldiers additional* liabilities from which civilians are exempt, without exempting them from the liabilities to which all citizens are subject alike.

Offences which are purely offences against the military law, i.e., relating to matters of discipline, are triable exclusively by special tribunals constituted under the military law, called courts-martial. As to *other* offences, the jurisdiction of courts-martial is concurrent with that of the ordinary courts of the land.

Though these military offences are triable by specially constituted tribunals under a special procedure as laid down in these Acts, the trial before them is in the nature of a regular trial before a criminal court inasmuch as courts-martial are bound to follow the provisions of the general law of evidence contained in the Indian Evidence Act, 1872,¹⁸ except in so far as modified by the provisions of the Army or Air Force or Navy Act, as the case may be. But the proceedings before a court-martial cannot be described as 'criminal proceedings'.¹⁹

Dual position of defence personnel.

As in *England*,²⁰ the constitutional position of armed personnel in *India* is one of dual liability. A soldier has all the rights and liabilities of ordinary citizens,²¹ in so far as they are not abrogated or modified by the law or the Constitution and superimposed above that is their military character from which follow the special incidents²² under the military law which we have already discussed. The general principles of English law on this point are also applicable in India.

(15) *Chatterjee v. Sub-Area Commander*, A. 1951 Mad. 777.

(16) Army Act, 1811 (44 & 45 Vict. C. 58).

(17) See s. 2 of the Army, Air Force and Navy Acts.

(18) *Perry v. Emp.*, Cr. Rev. Misc. Case No. 141 of 1945 (Cal.).

(18) S. 133 of the Army Act; s. 132 of the Air Force Act; s. 130 of the Navy Act.

(19) *Mahmud v. Crown*, Cr. Misc. Case No. 358 of 1945 (Lah.).

(19) *Meads v. K. Emp.*, (1944) 49 C.W.N. (F.R.) 23, affirmed by *Meads v. King*, (1948) 52 C.W.N. 834 (P.C.).

(20) *Burdett v. Abbot*, (1812), 4 Taunt. 401; *Grant v. Gould*, (1792) 2 H. Bl. 69 (98).

(21) This is also specifically safeguarded by provisions like those contained in ss. 69-70 of the Army Act, 1950.

(22) The special incidents will be discussed under the next caption.

I. Liabilities:

(a) *Duty to obey orders of a military superior and liability under the ordinary law.*—A paradoxical situation results from the dual liability of a soldier to the military as well as the civil law.

(i) A soldier is bound to obey any lawful order which he receives from his military superior, but obedience to superior orders is not of itself a defence to a charge of crime, committed in obedience to such orders. A soldier cannot, any more than a civilian, avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience to the orders of a superior. So, "*he may be liable to be shot by a court-martial if he disobeys an order, and to be hanged up by a judge and a jury if he obeys it.*" The true rule laid down by the Courts is that a soldier is bound to obey, and will be protected if he obeys, an order of his superior which is *not manifestly illegal*.²³

(ii) But he cannot escape liability to the ordinary criminal law if he commits a crime by acting in obedience to an order for which the superior might be reasonably supposed not to have any good ground and is *manifestly illegal*. Thus, (a) 'soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence', but (b) 'soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended.' In case (a), the soldiers carrying out such orders are performing their duty both as soldiers and as citizens. In case (b), the soldiers, no less than the officer who gives the command, are responsible for the death of any person killed by the firing, and are liable to be punished for it when convicted in due course of law. In such cases, therefore, the duty of soldiers is to obey the law of the land, even at the risk of disobeying their superior.

(iii) Even under military law, a soldier would not be liable for disobedience to a lawful order of his superior where it is physically impossible to carry out the order.²⁴ But—

"A subordinate officer must not judge of the *danger, propriety, expediency or consequence* of the order he receives; he must obey; nothing can excuse him but a physical impossibility."²⁴

(iv) But order of a superior is no defence to a civil action for damages against a soldier for an act which constitutes an actionable wrong.²⁵

(b) *Military and 'civil' offences.*—It has already been pointed out (p. 286, *ante*) that the Army, Air Force and Navy Acts create certain 'military offences' which are triable by courts-martial according to the provisions laid down in these statutes. The offences, however, include some acts which are also offences under the criminal law of the land and are triable by the ordinary criminal courts, e.g., theft, assault, murder, rape, cheating, extortion. These offences are called 'civil offences' in these Acts.¹ The expression 'civil offence' does not refer to a civil proceeding: it is a technical expression referring to offences triable by a criminal court as distinguished from offences which are exclusively triable² by courts-martial under the military law.

As regards 'civil offences', the position under the Army and Air Force Acts is as follows:

(i) Certain civil offences are not triable by a court-martial at all.—S. 70 of our Army Act provides that a court-martial has no jurisdiction to a military person accused of having committed the offence of—

murder, culpable homicide not amounting to murder or rape,
against a person *who is not subject to the Army Act*, unless such offence is committed by the accused (a) while on active service, or (b) at any place outside

(23) *Keighly v. Bell*, (1866) 4 F. & F. 763 (790); *Keir & Lawson, Cases on Constitutional Law*, 3rd Ed., p. 848.

(24) *Johnstone v. Sutton*, (1786) 1 R.R. 257 (269) H. L.

(25) *Wade & Phillips, Constitutional Law*, 6th Ed., p. 374.

(1) Cf. s. 3 (c) (ii) of the Army Act.

(2) E.g., mutiny, desertion, absence without leave.

India, or (c) at a frontier post specified by the Central Government by notification in this behalf.

(ii) Other 'civil offences' are within the jurisdiction of the criminal courts as well as courts-martial. Hence, provisions are necessary to avoid conflict between the two jurisdictions.

(a) The general rule is that when a criminal court and a court-martial have each jurisdiction in respect of an offence, it is at the discretion of the competent military authority to decide whether the accused shall be tried by a court-martial or by the criminal court.³ This general rule is, however, subject to the following:

(b) If in any such case, a criminal court, having jurisdiction, considers that the offence should be tried by itself instead of by a court-martial, it may require⁴ the prescribed military authority to deliver over the offenders or make a reference to the Central Government whose decision shall be final.⁵

(c) Conviction or acquittal by a court-martial does not bar a second trial by a criminal court for the same offence, provided the Central Government gives its sanction for such trial.⁶ If, however, he is convicted or acquitted by the criminal court, he cannot be tried again for the same offence by a court-martial.⁷

In practice, the military authorities give up in favour of civil courts in the case of more serious offences, particularly where intricate questions of law are involved.

(d) While a municipal court cannot try an offence unless committed within the national territory, a court-martial can try any of the specified offences, e.g., murder committed by a military personnel in foreign territory.⁸

II. Rights.

(a) **Electoral rights.**—Our Constitution guarantees universal adult suffrage and soldiers are not excepted [Art. 326]. The result is that members of the Defence Forces have electoral right like ordinary persons but, like, any other public servant, they cannot take an active part in politics⁹ or stand for election themselves. Special provision for voting by members of the Armed Forces is made in s. 60 (a) (i) of the Representation of the People Act, 1951.

(b) **Pleas available under the ordinary law.**—When an action or proceeding is brought against a military officer under the ordinary law for anything done in his official capacity, he is entitled to all the privileges which are available to other public officers, e.g., the pleas under s. 80, Civil Procedure Code;¹⁰ s. 76, Indian Penal Code; s. 197, Criminal Procedure Code [see under Art. 361, *post*].

Special privileges of defence personnel.

Just as there are special disabilities attaching to persons subject to the Army and Air Force Acts, so they are entitled to some special privileges which distinguish them from the ordinary citizens or the civil population of the land. These are:

(i) **Immunity from attachment.**—Under s. 28 of the Army Act, 1950, s. 28 of the Air Force Act, 1950, and s. 20 of the Navy Act, 1957, (a) the military equipments and other 'necessaries', as well as (b) the pay and allowances¹¹ of any person subject to these Acts are absolutely free from attachment under any decree or order of any civil or revenue court or revenue officer.¹²

(3) S. 125, Army Act; s. 124, Air Force Act.

(4) This power should not be exercised by a criminal court where any of the offences with which the accused has been charged is a military offence (such as desertion) in respect of which the Criminal Court has no jurisdiction [*Emb. v. Lachmi Dat*, Cr. Ref. 411 of 1928 (Allahabad)].

(5) S. 126, Army Act; s. 125, Air Force Act.

(6) S. 127, Army Act; s. 126, Air Force Act.

(7) S. 121, Army Act; s. 120, Air Force Act.

(8) *Cf. R. v. Page*, (1953) 2 All E.R. 1355.

(9) As to the latter, see under Art. 309, *post*.

(10) *Shingara Singh v. O'Callaghan*, F.A.O. no. 8 of 1946 (Lahore).

(11) Also pensions, by virtue of the Pensions Act, 1871 and s. 60 (g) of the Civil Procedure Code.

(12) See s. 60 of the C. P. Code as to the partial immunity of ordinary citizens and civil officers in these matters.

(ii) *Immunity from arrest for debt.*—Under s. 29 of the Army and Air Force Acts, and s. 21 of the Navy Act, any person subject to any of these Acts (as the case may be), so long as he belongs to the regular Army, Navy or Air Forces, shall be absolutely immune from arrest for debt under any process issued by any civil or revenue court or revenue officer.¹³

(iii) *Immunity of persons attending courts-martial from arrest.*—No members of a court-martial or other person attending a court-martial whether as party, witness or lawyer shall, while attending or returning from a court-martial, be liable to arrest under civil or revenue process (s. 30 of the Army and Air Force Acts and s. 22 of the Navy Act).

(iv) *Immunity from municipal taxation.*—Under s. 3 of the Municipal Taxation Act, 1881, the Central Government may prohibit a municipality to levy any specified municipal tax upon members of the Armed Forces residing within the jurisdiction of the municipality, on military duty.

(v) *Right to pay without deductions save those which are 'authorised' by statute.*—A military servant enjoys a better status than that of a civil servant. S. 25 of the Army and Air Force Acts and s. 27 of the Navy Act guarantee to every person who is subject to either of these Acts the right to get his pay without any deduction except those which are 'authorised' by these Acts. The list of 'authorised deductions' is to be found in Ch. VII of each Act. The result of this statutory enumeration of the 'authorised' deductions is that the list cannot be enlarged by subordinate rules or executive orders made thereunder as in the case of civil servants.

(vi) *Priority in respect of litigation.*—Under s. 32 of the Army and Air Force Acts and s. 24 of the Navy Act, courts are to give priority to litigations in which persons subject to these Acts are parties, so that they may return to their duties on the expiry of the leave granted to them for the purpose of attending the litigation.

The Indian Soldiers (Litigation) Act (IV of 1925) provides for the postponement, in certain circumstances, of civil and revenue proceedings in which an unrepresented Indian soldier or airman is a party, during 'war conditions' and six months thereafter, and also modifies the law of limitation for this purpose.

Privileges under the ordinary law.

(a) Another privilege, which is conferred by the ordinary law, is the right to make a 'privileged will', which may be made either by a word of mouth or by writing without complying with the formalities of signature and attestation which is required in the case of wills made by ordinary persons. This privilege belongs to 'any soldier being employed in an expedition, or engaged in actual warfare, or an airman so employed or engaged, or any mariner at sea', who has completed the age of 18 years (ss. 65-6 of the Indian Succession Act, 1925). It is obvious that this exemption from formalities is given to military personnel having regard to the nature of their employment.¹⁴

(b) As in England, persons in the Indian Army, Navy and Air Force are exempted from liability to serve as jurors, unless they are made so liable by any special law [s. 320 (g), Criminal Procedure Code, 1898].

(c) Under s. 3 of the Tolls (Army and Air Force) Act (II of 1901) soldiers and airmen, while moving under orders of military or air force authorities are, together with members of their families and all belongings, exempted from payment of any tolls.

(d) Under O. XXVIII of the Civil Procedure Code, 1908, any person serving in the Defence Forces, who cannot obtain leave of absence, may authorise any person to sue or defend a suit on his behalf and such person can take all steps

(13) *Vide* ss. 55-9 of the C. P. Code as to the position of ordinary citizens in this respect.

(14) The law in England is the same (s. 11, Wills Act, 1837).

or to do all the acts which could be taken or done by the military servant concerned personally.

(e) S. 19 (i) of the Court-Fees Act, 1870 exempts from fees a power-of-attorney executed by a member of the Army, who is not in civil employment.

(f) Similarly, the *Exemptions* to Art. 53 of Sch. I of the Stamp Act, 1899 exempt from duty receipts given by members of the Defence Forces for pay, allowances and pensions.

Special obligations and disabilities of defence personnel.

The primary disability of a member of the Defence Forces arises out of the nature of his duties, viz., that he is under the exclusive jurisdiction of military law regarding all questions relating to military duty and discipline. From this result the following consequences:

(i) Questions of military duty and discipline are within the exclusive cognisance of the military authorities prescribed by the military law, and the aggrieved soldier or airman has no remedy under the ordinary law.¹⁵

Thus, a person, subject to the military law, who is aggrieved by any act or order of his superior officer,¹⁶ has the right to complain to the next superior officer or the Central Government, as provided by Ch. V of either Act.

(a) If the superior has exercised a power conferred upon him by the statute, the soldier who is aggrieved by such order has no remedy in the ordinary course, even though the superior officer has acted *maliciously* and without reasonable and probable cause.¹⁷ So, no action lies against a superior officer for libel contained in a letter written by the latter to some other military authority, *in the course of his duty*,⁷ or for malicious prosecution, if the prosecution was made in exercise of the statutory power of the superior authority.¹⁸

(b) But the superior officer would be liable in an action for damages in tort if he acts *without jurisdiction*,¹⁹ e.g., where he punishes an inferior officer for non-compliance with an order which amounts to taxation without legislation.²⁰

(c) The superior officer would also render himself criminally liable, where his act amounts to a criminal offence and is done in excess or oppressive abuse of jurisdiction.²¹

(ii) In the interests of military discipline and efficiency, military law inflicts a more severe penalty for offences like desertion or disobedience to orders which are mere breaches of contract under the ordinary law.

(iii) The Army and Air Force (Disposal of Private Property Act (XL of 1950) makes special provisions for the disposal of private property of persons subject to the Army and Air Force Acts, who die or desert or are ascertained to be of unsound mind or while on active service are officially reported to be missing.

Courts-martial.

It has already been stated (p. 294, *ante*) that offences which are punishable under the Army and Air Force and Navy Acts are triable by courts-martial.

Courts-martial under the Army and Air Force Acts belong to the following different categories²²—

(a) General court-martial.

(b) District court-martial.

(c) Summary general court-martial.

Besides, there is a fourth category under the Army Act, viz., 'summary court-martial'.

(15) *Dawkins v. Rokeby*, (1873) 8 Q.B. 255 (271).

(16) See *post* regarding his remedies against orders of a court-martial.

(17) *Dawkins v. Paulet*, (1869) 5 O.B. 94; *Sutton v. Johnstone*, (1786) 1 T.R. 493 (549).

(18) *Dawkins v. Paulet*, (1869) 5 Q.B. 94.

(19) *Heddon v. Evans*, (1919) 35 T.L.R. 642.

(20) *Warden v. Bailey*, (1811) 128 E.R. 253.

(21) *Governor Wall's Case*, (1802) 28 Howell's St. Tr. 51.

(22) S. 108. Army Act; s. 109, Air Force Act.

Generally speaking, the difference between the different kinds of courts-martial lies in their composition, jurisdiction, the extent of punishment they can award, and the authorities who can convene them.²³

No appeal to the Courts.

There is no appeal to the ordinary courts from the decisions of courts-martial. But there is provision for confirmation, revision and annulment by authorities prescribed by the military law itself [Ch. XII of the Army and Air Force Acts].

(a) No sentence of a court-martial is valid unless and until it is confirmed by the authority prescribed by the Act.

(b) The confirming authority may revise a sentence of a court-martial which requires confirmation, either *suo motu* or on a petition from the person aggrieved.

(c) The person aggrieved may also present a petition to the Central Government, Commander-in-Chief or other prescribed authority against a confirmed sentence.

(d) Besides the Central Government, the Commander-in-Chief or a prescribed authority may annul the proceedings of a court-martial on the ground that they are 'illegal or unjust'.

Control of Court-martial through writs.

Though there is no appeal to the Courts, a court-martial is subject to the control of the Supreme Court and the High Courts under their power to issue the writs under Arts. 32 and 226. [See general principles relating to these writs under Art. 226, *post*].

JURISDICTION TO ISSUE THE JUDICIAL WRITS AGAINST COURTS-MARTIAL AND MILITARY TRIBUNALS.

Courts-martial should be distinguished from military tribunals set up by the military in a state of war or under martial law.²⁴

I. Military Tribunal.

(A) *England*.—While courts-martial may be set up to try the military personnel or other persons subject to the military law, under the Army or the Air Force Acts, 1950, a military tribunal is a tribunal which the military authorities may establish for the trial of civilians, when martial law has been proclaimed in an area and it is *not physically possible* (in view of the state of war) for the ordinary courts to function. The conditions under which martial law may be proclaimed and military tribunals established are dealt with under Art. 34, *post*. Under the present head, we are considering the question how far these military tribunals are subject to the control of the ordinary courts through the prerogative writs.

The tribunals set up by the military *are not* judicial bodies but are set up only to advise the military commander.²⁵ Hence, the ordinary Courts have no right to issue a writ of prohibition or mandamus upon a military tribunal.²⁵ "To attempt to make the proceedings administering summary justice under the supervision of a military commander analogous to the regular proceedings of Courts of Justice is quite illusory".²⁵

As regards *habeas corpus*, there is conflict between Irish decisions but the position seems to be this: The ordinary Courts have jurisdiction to determine whether a state of war or armed rebellion did exist justifying the setting up of a military tribunal.¹⁻¹⁵ So, if the Court holds that a state of war did exist, there is

(23) Ss. 109-120, Army Act; ss. 110-119, Air Force Act.

while a military tribunal may be set up under Art. 34.

(24) Thus, under our Constitution, a Court-martial may be created under Art. 33,

(25) *Re Clifford and O'Sullivan*, (1921) 2 A.C. 262.

(1-15) *R. v. Strickland*, (1921) 2 Ir. R. 317.

no remedy by *habeas corpus* against a sentence passed by the military tribunal¹⁶ or otherwise to control any act of the military forces.¹⁷ But the fact that for some purposes the ordinary Courts have been permitted to function in a district in which martial law has been proclaimed is not conclusive to establish that war is not raging in that district.¹⁸

Thus, so long as rebellion is raging, the Courts have no power to interfere with the action of the military in restoring order,¹⁹ or to entertain any civil proceeding²⁰ against the military authorities for any wrongful act against person or property.

But *habeas corpus* would lie if the Courts hold that there was no state of war at the time of setting up of the tribunal. It would also lie in the former case, after the restoration of peace,²¹ unless an Act of Indemnity be passed in the meanwhile.²²

(B) U.S.A.—(a) When martial law is proclaimed, military tribunals may be set up by Congress for the trial of civilians for non-military offences, in such area.²³

Trial by military tribunals, substituting the civil courts can be authorised by Congress in an area of *active* military operations where the civil courts *cannot possibly function*,²⁴ and while the war goes on, the Courts have no power to review the decisions of these military tribunals.²⁵ The power can, however, be exercised only by the Legislature and can be exercised only in respect of an actual theatre of war and the Courts have the jurisdiction to review any such law and determine whether an actual operation of war was in existence. The Supreme Court has held that 'constant exposure to the danger of invasion' does not justify the substitution of civil courts by military tribunals¹ for the trial of civilians.

While military tribunals undoubtedly possess the power to try members of the armed forces, prisoners of war² or others charged with violating the laws of war³ or even civilians in occupied enemy territory or territory regained from an enemy where civilian government cannot function, the military have no power to close down and supplant civil courts which are *able* to function for the trial of civilians, for civil offences. In such a case, the prisoners, convicted by the military tribunals, are entitled to obtain their release by means of the writ of *habeas corpus*.¹

(b) As Commander-in-Chief of the Armed Forces of the United States, the President may, in times of war, establish military commissions and tribunals for the trial of civilians in *occupied territory* or territory regained by the enemy, where the civilian government cannot function;⁴ but not the civilian dependants of the United States military personnel.⁵

(c) Congress may provide for trial by military commissions of offences against the laws of war.²

In all these cases, the military tribunals are subject to the ordinary Courts only on points of jurisdiction,²⁻³ by means of the writ of *habeas corpus*.¹ But 'jurisdiction', in this context, also comprises the question of observance of the procedure prescribed by Congress.²

(16) *Ex parte Erskine Childers*, (1923) Ir. R. 5.

(17) *R. v. Military Governor*, (1924) 1 I.R. 32 (C.A.); *Wolf Tone's case*, (1798) 27 St. Tr. 613.

(18) *Ex parte Marais*, (1902) App. Cas. 109 (114).

(19) *Johnstone v. O'Sullivan*, (1923) 2 I.R. 13 (C.A.).

(20) *Higgins v. Willis*, (1921) 2 Ir. R. 386.

(21) *Higgins v. Willis*, (1921) 2 Ir. R. 386.

(22) *Tilonko v. A. G. for Natal*, (1907) A.C. 93.

(23) *Duncan v. Kahanamoku*, (1946) 327 U.S. 304.

(24) *Ex parte Milligan*, (1866) 4 Wall. 2.

(25) *Ex parte Vallandigham*, (1864) 1 Wall. 243.

(1) *Duncan v. Kahanomoku*, (1946) 327 U.S. 304.

(2) *Yamashita v. Styer*, (1946) 327 U.S. 1.

(3) *Quirin, ex parte*, (1942) 317 U.S. 1.

(4) *Madsen v. Kinsella*, (1952) 343 U.S. 341.

(5) *Reid v. Covert*, (1957) 354 U.S. 1.

(C) *India*.—Since Martial law has not so far been declared in India under the Constitution, we do not get precedents as to the exercise of the writ jurisdiction over military tribunals.

It is to be noted that the power to issue the writs under Art. 226 extends to 'any person or authority', which would obviously include military tribunals. Hence, the jurisdiction is not excluded. Of course, so far as prohibition or *certiorari* is concerned, they are not available unless it is held that the military tribunals are quasi-judicial bodies. But there is no reason why *habeas corpus* or *mandamus* shall not issue for illegal acts committed by such tribunals, if not validated by an Act of Indemnity, made by Parliament, under Art. 34, *post*.

II. Court-martial.

(A) *England*.—A Court-martial, on the other hand, is a tribunal set up under the Military Law (e.g., the Army Acts in England and India) for the enforcement of such law, whether in time of peace or of war. Again, while a military tribunal set up under Martial law has jurisdiction over the ordinary citizens, the jurisdiction of a Court-martial is restricted only to persons subject to military law, i.e., members of the Defence forces.

There is provision for a *regular trial* before a Court-martial, though the procedure does not, in all respects, compare with the procedure followed by an ordinary Criminal Court. The sentences passed by a Court-martial become matters of record and can be enforced by the military authorities; while punishments inflicted by military tribunals under martial law have no legal sanction and that is why an Act of Indemnity is required to save the tribunals themselves and those who enforce those awards, from illegality (see p. 305, *post*).

Courts-martial have their jurisdiction limited by the statutes under which they are created. If they *exceed* that jurisdiction, e.g., by applying military law to persons not subject to that law, or by exceeding the powers conferred by the statute, the civil courts may interfere with their action by the ordinary writs of *habeas corpus*,⁶⁻⁷ *certiorari* and the like.

(B) *U.S.A.*—Under Art. I, s. 8 (14) of the Constitution, Congress has the power to regulate the armed forces. Under this power, Congress has provided for the trial of offences committed by members of the armed forces. Courts-martial may be set up for the trial of offences committed by members of the armed forces, under the Uniform Code of Military Justice, 1950 (which replaces earlier enactments since 1789). Though the courts-martial do not exercise the 'judicial power' of the United States and appeal to the Supreme Court from their decisions is expressly prohibited by the Code, they are controlled by the Supreme Court through the writ of *habeas corpus*.

Though cases tried by the courts-martial are not criminal cases and the right to jury does not extend to them [Fifth Amendment], it has been held that other guarantees of the Constitution, such as that against 'Double Jeopardy'⁸ and that of 'Due Process', extend to Courts-martial.⁹ Hence, the writ of *habeas corpus* is available to determine whether any of these guarantees have been violated,⁸ as well as to determine whether the courts-martial have acted within jurisdiction.¹⁰ Barring these two grounds, however, the Courts would not interfere on the ground that the procedure required by the Articles of War has not been complied with.¹¹ Procedural questions are subject to review only if they affect jurisdiction.¹²

The Courts-martial being tribunals of special and limited jurisdiction for the trial of military offences, their judgments are always liable to collateral attack on the ground of want or excess of jurisdiction.¹³ But judgments which are *within*

(6) Wolfe Tone's Case, (1798) 27 St. Tr. 614.

(7) *R. v. Depot Battalion*, (1949) All E.R. 373.

(8) *Wade v. Hunter*, (1949) 336 U.S. 684.

(9) *Burns v. Wilson*, (1953) 346 U.S. 137.

(10) *Toth v. Quarles*, (1955) 350 U.S. 11.

(11) *Humphrey v. Smith*, (1949) 336 U.S. 695.

(12) *Hiatt v. Brown*, (1950) 339 U.S. 103.

(13) *Givens v. Zerbst*, (1921) 255 U.S. 11 (19).

jurisdiction cannot be reviewed or set aside by civil tribunals,¹⁴ however erroneous they be on the merits.⁹ A writ of *habeas corpus* is available to test the jurisdiction of a court-martial,¹⁵ even where the condemned person is *prima facie* a member of the armed forces or a prisoner of war.¹⁶ Thus, no usage of war could sanction a military trial for any offence whatever of a citizen in civil life, in no wise connected with the military service, at a place where the civil courts were in full operation.¹⁷

Similarly, military tribunals have no jurisdiction to try—

(a) civilian dependents of military personnel;¹⁸

(b) an ex-soldier, for crimes committed by him while a member of the armed forces.¹⁹

(C) *India*.—A Court-martial under the Army or Air Force Act (p. 301, *ante*) is a quasi-judicial tribunal. As stated earlier, such a tribunal is subject to the writ jurisdiction of the Supreme Court and the High Courts, under Arts. 32 and 226. The general principles governing the issue of these writs against courts-martial in *England* will, therefore, be broadly applicable:

(I) *Certiorari*.

Certiorari will lie in respect of proceedings before a Court-martial only when it exceeds jurisdiction, *e.g.*, by trying a person who is not a soldier or is not subject to military law,²⁰ or by determining matters outside the scope of military law, such as by affecting the 'civil' rights of a soldier.²¹ Where the Court-martial does not exceed its jurisdiction, the High Court cannot interfere on the ground that the Court-martial had not been properly constituted in accordance with the *Rules of Procedure* or had followed a wrong procedure,—these being matters of military law and procedure.²¹

If, however, the Court-martial is constituted in contravention of the statutory provisions of the Army or Air Force Act, there is lack of initial jurisdiction as distinguished from mere irregularity of procedure.

But *certiorari* will not issue to quash an order of dismissal by a Court-martial, having jurisdiction to make such order.²⁰

The general principle relating to the writs is that where the aggrieved person is a person subject to military law and the act or omission complained of relates to his military status or character, the Court will not interfere.²²

(II) *Mandamus*.

Similarly *Mandamus* will issue to prevent Courts-martial from exceeding their jurisdiction,²³ but not to interfere with their proper jurisdiction, *e.g.*, on issues of military discipline.²⁴

(III) *Prohibition*.

On principle, *Prohibition* may also issue,²⁵ in cases of absence or excess of jurisdiction in like cases where *certiorari* may be issued, provided motion for the writ is made in proper time.²⁵⁻¹

(IV) *Habeas Corpus*.

When a person is arrested under the military law but there is an unreasonable delay in bringing him to trial such as to amount to 'oppression', he may obtain

(14) *U. S. v. Pidgeon*, (1894) 153 U.S. 48; *Reaves v. Ainsworth*, (1911) 219 U.S. 296 (304); *Hiatt v. Brown*, (1950) 339 U.S. 103.

(15) *Ex parte Merryman*, (1861) Fed. Cas. 9487.

(16) *Yamashita v. Styer*, (1946) 327 U.S. 1.

(17) *Ex parte Milligan*, (1866) 4 Wall. 2.

(18) *Reid v. Covert*, (1957) 354 U.S. 1.

(19) *Toth v. Quarles*, (1956) 350 U.S. 11.

(20) *R. v. Mansergh*, (1861) 1 B. & S. 400; *R. v. Governor of Wormwood Prison*, (1948) 2 K.B. 193.

(21) *R. v. Secy. of State*, (1949) 1 All E.R. 242 (K.B.).

(22) *Roberts's Case*, (1879) (English) Manual of Military Law, 1914, 124.

(23) *Heddon v. Evans*, (1919) 35 T.I.R. 642.

(24) *Sutton v. Johnstone*, (1786) I.T.R. 493;

Dawkins v. Paulet, (1869) 5 Q.B. 94;

Dawkins v. Rokeby, (1875) 7 H.L. 744; *R.*

v. Army Council, (1940) 1 K.B. 719.

(25) But, as a matter of fact, there is no reported English decision where a writ of *Mandamus* or *Prohibition* was actually issued against a Court-martial [Hood Phillips, *Constitutional Law*, 1957, p. 314].

(1) *Grant v. Gould*, (1792) 2 H. Bl. 69; *Poe's case*, (1832) 5 B. & A. 681.

bail from the High Court until the court-martial is ready to try him, through an application for *habeas corpus*.² Whether there has been such delay depends on the circumstances of each particular case.²

Habeas corpus was also issued where the proceedings of a Court-martial were confirmed by an officer who had no authority to do so,³ or a person was imprisoned without complying with the formalities prescribed by statute;⁴ or where there was no legal warrant or order at all for the custody;⁴ or where the person kept in military custody was not subject to the Army Act.⁵⁻⁶

But where the court-martial acts within jurisdiction *habeas corpus* would not issue to interfere with its decision on the ground of mere insufficiency of evidence or irregularity of procedure,⁷ except where there has been no hearing at all or the rules of natural justice have not been followed.⁸⁻⁹

But mere informality or error in the order, warrant or other document or the authority by which a person has been imprisoned under the Army (s. 176) or Air Force (s. 174) Acts does not make the imprisonment invalid, so that no *habeas corpus* shall be available on these grounds.

Subject to the foregoing principles, it is sufficient return to a writ of *habeas corpus* that the person in custody has been sentenced by a court-martial, competent to pass such a sentence.¹⁰ But the Court issuing the writ would be entitled to enquire whether the court-martial had jurisdiction¹¹ or whether the person detained was subject to military law.¹²

Ordinary action against court-martial.

When a court-martial acts *without or in excess of jurisdiction*, it has no immunity from an ordinary action in tort for its order or sentence which amounts to assault, false imprisonment or other actionable wrong.¹³ In such cases, each member of the Court-martial is liable in damages, e.g., where the court-martial awards a sentence in excess of what it is authorised by the law to pass.¹⁴ The officer who confirmed the proceedings would also be liable.¹⁴ Where the act done without jurisdiction amounts to criminal offence, members of the court-martial would also be liable under the criminal law.¹⁵ In such cases, mistaken impression of duty will be no excuse.¹⁶

But no action would lie where the court-martial acts *within its jurisdiction* even though the act is done *maliciously*¹⁷ or *without reasonable and probable cause*,¹⁸ or is an *abuse of the authority*.

INDEX TO COMMENTS

ARTICLE 33.

Other Constitutions :

(A) England, 291 ; (B) U.S.A., 291 ; (C) Eire, 292.

(2) *R. v. Depot Battalion*, (1949) 1 All E.R. 373 (379).

(3) *Re Porrett*, (1844) Perry's Oriental Cases, 414.

(4) *Allen's case*, 30 L.J. Q.B. 38.

(5) *Fazlur Rahman v. Commander*, Cr. Misc. Cas. nos. 396-7 of 1941 (Allahabad).

(6) *Cf. Ibrat v. Commanding Officer*, P.L.D. (1956) Karachi 324.

(7) *Dunnette v. Emp.*, Cr. Misc. Cases no. 113 of 1945 (Lahore).

(8) *Meads v. Emp.*, A.I.R. 1946 Lah. 112 (113); *Mohyuddin v. K. E.*, (1946) 81 C.L.J. 263 (F.C.).

(9) *Meads v. K. E.*, (1944) 49 C.W.N. (F.R.) 23, affirmed by *Meads v. King*, (1948) 52 C.W.N. 834 P.C.

(10) *R. v. Siddis*, (1801) 1 East. 306.

(11) *R. Porrett*, (1844) Perry's Oriental Cases, 414.

(12) *Douglas Case*, 3 Q.B. 825.

(13) *Heddon v. Evans*, (1919) 35 T.L.R. 642.

(14) *Frye v. Ogle*; *Comyn v. Sabine*, cited in English Manual of Military Law, 1914, p. 121; *Warden v. Bailey*, (1810) 4 Taunt. 67.

(15) *Governor Wall's case*, (1802) 28 Howell's St. Tr. 51; *Warden v. Bailey*, (1810) 4 Taunt. 67 (77); *Dawkins v. Paulet*, (1869) 5 Q.B. 94.

(16) *Case of Ensign Maxwell*, (1807), Military Manual, 1914, p. 143.

(17) *Ex parte Marais*, (1902) A.C. 109; *Hood Phillips*, (1952) p. 590; *Keith*, pp. 440-2; *Stephen's Commentaries*, Vol. I, p. 568.

(18) *Dicey, Law of the Constitution*, 9th Ed., p. 293.

India :

Scope of Art. 33: Power of Parliament with respect to Armed Forces, 292 ; Legislation by Parliament, 292 ; Existing laws relating to Armed Forces, 294.

Military law in India, 294 ; Dual position of defence personnel: I. Liabilities, 295 ; II. Rights, 296.

Special privileges of defence personnel, 296 ; Privileges under ordinary law, 297 ; Special Obligations and disabilities of defence personnel, 298.

Courts-martial, 298 ; No appeal to the Courts, 299 ; Control of Court-martial through writs, 299.

Jurisdiction to issue the Judicial Writs against Courts-martial and Military Tribunals:

- I. Military tribunal:
 - (A) England, 299 ; (B) U.S.A., 300 ; (C) India, 301.
 - II. Court-martial:
 - (A) England, 301 ; (B) U.S.A., 301 ; (C) India: I. Certiorari, 302 ; II. Mandamus, 302 ;
 - III. Prohibition, 302 ; IV. Habeas Corpus, 302.
- Ordinary action against Court-martial, 303.

34. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

Restriction on rights conferred by this Part while martial law is in force in any area.

OTHER CONSTITUTIONS

(A) *England*.—Though the decisions of the Privy Council have been otherwise as regards the colonies and Ireland,¹⁹ so far as Great Britain herself is concerned, the following propositions are now established: (a) Martial law, in the proper sense of the term, in which it means the suspension of ordinary law and the temporary government of the country or parts of it by military tribunals, is unknown to the law of England.²⁰ In England, martial law means the common law right of the Crown as well as every citizen to maintain order at any cost. If the right amount of force is used to repel any violent resistance to the law or insurrection, there will be no redress at law against the use of such force. Martial law in this sense, need not be proclaimed, and officers and soldiers have no special privileges or responsibilities in the matter,²¹ and if excessive or unnecessary measures are adopted, the person responsible for such acts shall be liable before the ordinary Courts.²¹ (b) Martial law in the Continental sense cannot be proclaimed by the Executive by virtue of royal prerogative.²² Some authorities maintain that in strict theory, the Crown has a prerogative to declare martial law in time of war, but no such power has been exercised in England since the time of Charles I, and it may be said to be obsolete in view of the measures adopted during the severest crisis of World War II. There was no suggestion of proclaiming martial law by prerogative nor of trial of the civilians by military tribunals but instead, Parliament passed the Emergency Powers Act, 1940, authorising the creation of special war zone Courts to act in place of the ordinary Courts in the event of actual invasion. In fact, however, the setting up of these special Courts was not found to be necessary and the ordinary Courts continued to function throughout the gravest days of the war.

Hence, the supersession of the ordinary Courts can take place in England only by legislation, and in all cases where it has been declared by statute (*e.g.*, in

(19) *Ex parte Marais*, (1902) A.C. 109 ; Hood Phillips, (1952) p. 590 ; Keith, pp. 440-2 ; Stephen's Commentaries, Vol. I, p. 568.

(20) Dicey, *Law of the Constitution*, 9th Ed., p. 293.

(21) Rep. of the Featherstone Commission, (1893) C. 7234 ; Dicey, pp. 621-624 ; Select Committee on Employment of Military, (1908) H.C. 236.

(22) *Tilonko v. Att. Gen. of Natal*, (1907) A.C. 93.

Ireland), it has been followed by an Act of Indemnity.²³ Acts of Indemnity are passed by Parliament after the cessation of a war for the protection of the military and others in respect of unlawful acts done during the war, whether under a declaration of martial law or otherwise. In the absence of an Act of Indemnity, the acts of the military during war or rebellion can be challenged in the ordinary Courts after the cessation of the hostilities²⁴ and it is for the ordinary Courts to determine whether a state of war existed or not at the time of the act in question;²⁵ or whether the force employed by the military in suppressing insurrection or disorder was necessary or justified.

It is this jurisdiction of the courts which is taken away if an Act of Indemnity is passed.

(B) *U. S. A.*—The President, as the Commander-in-Chief of the armed forces, has the power to employ them to repel domestic violence in the States, on the application of the State Legislature or Executive [Art. 4 (4)], and, also without such application, if the resistance is against the execution of federal law,¹ and to declare martial law for that purpose.² The power may also be exercised by the President in times of war, during actual invasion.³ Martial law, when declared, establishes military rule in civil areas. In order to enable the military to function without interference by the civil courts, the President is given the power to suspend the writ of *habeas corpus* "when in cases of rebellion or invasion the public safety may require it" [Art. I, s. 9 (2)].

When honestly and reasonably coping with an insurrection or riot, a member of the military forces is not liable for his acts,⁴ but when the exigency is over, he would be liable before the ordinary Courts for acts done beyond the scope of *reasonable necessity*.⁵ While it is the business of the Executive to determine whether the military should be called in aid to establish order, "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are *judicial questions*".⁶ The Courts have the power to determine whether there was a 'substantial basis' for the contention that the action of the military was "a protective measure necessary to meet the threat."⁷

There is no power of the Legislature, under the American Constitution, to pass an Act of Indemnity.

The President is also competent to appoint military commissions or military Courts for the trial of civilians who had committed acts of a military character in regions under martial law and in territories occupied by the United States Armed Forces,⁸ but the President has no power to establish a military Court for the trial of civilians in areas remote from the actual theatre of war or insurrection where the civil courts are open.⁶ Martial law can never exist where the Courts are open and it is for the Courts to determine whether there exists such a state of war or not.³ Even an Act of Congress declaring martial law in Hawaii was interpreted as not authorising the supplanting of the civil courts by military tribunals, for the trial of *civilians*.⁹

(C) *France*.—In France and other Continental countries, Martial law means the suspension of the ordinary law and the substitution of government by the armed forces.

(23) Hood Phillips, 1952, p. 590; Keith, Constitutional Law, pp. 440-1.

(24) *Higgins v. Wills*, (1921) 2 Ir. R. 386.

(25) *R. v. Strickland*, (1921) 2 Ir. R. 317.

(1) *In re Debs*, (1895) 158 U.S. 564.

(2) Kelly and Harbison, American Constitution, pp. 443-447.

(3) *Ex parte Miligan*, (1866) 4 Wall. 2.

(4) *Moyer v. Peabody*, (1909) 212 U.S. 78.

(5) Burdick, Law of the American Constitution, p. 261.

(6) *Sterling v. Constantin*, (1932) 287 U.S. 378 (401).

(7) *Hirabayashi v. U. S.*, (1943) 318 U.S. 332 (347).

(8) *Madsen v. Kinsella*, (1952) 343 U.S. 341.

(9) *Duncan v. Kahanamoku*, (1946) 327 U.S. 304.

Under the Constitution of 1958, martial law may subsist beyond 12 days only if authorised by Parliament. Art. 36 says—

“Martial law shall be decreed at a meeting of the Council of Ministers. Its prorogation beyond twelve days may be authorized only by Parliament”.

The powers of the military and the duration of their authority shall be determined by legislation.

INDIA

Scope of Art. 34 : Martial Law and Fundamental Rights.

This article refers to martial law and Act of Indemnity. There is no specific legislative entry relating to martial law. But if Parliament seeks to proclaim Martial Law by legislation, it may use its residuary power under Entry 97 of List I.

The provision for an Act of Indemnity, however, shows that the Article acknowledges the possibility of the Executive proclaiming Martial law without any legislative sanction, as was done in Sind in 1942-43, which may be legalised *ex post facto* by Parliament passing an Act of Indemnity.

But ‘Martial law’ which is used in the present Article, is to be distinguished from the mere ‘use of the armed forces of the Union in aid of the civil power’ which is referred to in Entry I of List II, which power also belongs to Parliament. In the case of comparatively minor or local disturbances, the armed forces may be sent to help the civil authorities; in such a case, the armed forces act under the control of the civil authorities and the offenders are prosecuted before the ordinary Courts. But when martial law is declared, the command and administration of the area is exclusively given to the military and the power of the civil authorities as well as Courts is superseded by military law and procedure and offenders are tried by Courts-martial.

Martial Law.

In international law, Martial law means the law administered by a Military Commander in occupied enemy territory in time of war. The present Article does not mean that, for it refers to ‘maintenance or restoration of order in any area *within* the territory of India’. It means that Parliament may by law impose martial law in the Continental sense of governance of the country or any part thereof by military authorities in case of grave insurrection within the territory and the authority and powers of the military under such a law will be as laid down therein. The words ‘validating sentence’ etc., show that military tribunals may be created by such legislation. It has been held in England that a military tribunal is not a Court of law and that the ordinary Courts cannot interfere with them by prohibition.¹⁰ But after the emergency is over, there is nothing to prevent the Courts to question their decisions as well as the acts of military authorities, unless an Act of Indemnity is passed. It has also been stated (see p. 305, *ante*) that not being Courts of justice, the sentences passed by military tribunals have no legal sanction, and, therefore, unless an Act of Indemnity be passed, validating them, the tribunals themselves as well as the officers executing their sentences would be liable to the ordinary law, as soon as martial law was over. Hence, this article empowers Parliament to pass an Act of Indemnity.

Act of Indemnity.

An Act of Indemnity is, however, a contingency upon which the military cannot rely too much in doing wanton acts. For, usually Acts of Indemnity protect only *bona fide* acts,¹¹ e.g., the (English) Act of Indemnity, 1920, which followed

(10) In *re Clifford & O'Sullivan*, (1921) A.C. 570.

(11) *Phillips v. Eyre*, (1869) 4 Q.B. 225 (243); *Wright v. Fitzgerald*, (1799) 27 St. Tr. 765.

World War I.¹² It may be expected that *our* Parliament, too, will follow this practice. The absence of the expression 'purported to be done' in the present article should be noted. Like the English Acts, however, Art. 34 provides for the protection not only of military officers but also civil officers for any act done, during the continuance of martial law, 'in connection with the maintenance or restoration of order'.¹³⁻¹⁵

INDEX TO COMMENTS

ARTICLE 34.

Other Constitutions :

(A) England, 304 ; (B) U.S.A., 305 ; (C) France, 305.

India :

Scope of Art. 34: Martial Law and Fundamental Rights, 306 ; Martial Law, 306 ; Act of Indemnity, 306.

Legislation to give effect to the provisions of this Part.

35. Notwithstanding anything in this Constitution,—

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament ; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part ;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii) ;

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation.—In this article, the expression "law in force" has the same meaning as in article 372.

OTHER CONSTITUTIONS

U.S.A.—In the United States, a distinction has been made between self-executing and non-self-executing provisions of the Constitution. A provision is self-executing when no legislation is necessary to give effect to it and the Courts can enforce it without any further legislative implementation. On the other hand, a provision, though mandatory, may not be self-executing if it is addressed to the Legislature and it is intended by the framers of the Constitution that it will not be enforceable until the Legislature makes an appropriate legislation in pursuance of the constitutional direction. Conversely, a provision may be self-executing even though minor details have to be supplied by legislation.¹⁶ There are certain tests for determining whether a constitutional provision

(12) Wade & Phillips, p. 357 ; Stephen's Commentaries, Vol. I, p. 572.

(13-15) A law of indemnity of this nature was made in Pakistan by Ordinance No. II

of 1953 issued by the Governor-General under s. 42 of the Government of India Act, 1935.

(16) *Bailey v. Alabama*, (1911) 219 U.S. 219.

is self-executing or not; for instance, where a constitutional provision confers a right or creates a liability and also lays down the remedy, it is obviously self-executing. But the American courts have implied a remedy where the constitutional mandate is definite and positive and a prohibitory provision has been generally taken as self-executing, for anything done in violation of the prohibition is void.

(I) The following provisions have been held to be self-executing:

(i) The Fifth;¹⁷ Thirteenth;^{16,18} Fourteenth;¹⁶ Fifteenth;^{16,19} Amendments to the Constitution. Thus, the Thirteenth Amendment abolished slavery from the date of its enactment even though legislation was necessary to meet the various cases affected by the Amendment.¹⁸

(II) On the other hand, it has been held that—

(i) The Federal Constitution is not self-executing to the extent of implying that public officials who act under a statute which is subsequently declared unconstitutional must be liable for damages in an action for tort, without appropriate legislation to that effect.²⁰

(ii) The Twenty-first Amendment to the Federal Constitution prohibiting the transportation or importation of intoxicating liquors is not self-executing so as to create an offence, without legislation.²¹

INDIA

Cl. (a) : Legislation by Parliament to give effect to Fundamental Rights.

Some of the provisions relating to Fundamental Rights in Part III authorise legislation to give effect to such provisions and also to prescribe punishment for violation of those provisions which are declared offences by the Constitution. This power of legislation is, by the present clause, given to the Union Parliament exclusively, for, otherwise, the laws relating to fundamental rights would not have been uniform throughout the country. The power is specifically denied to the State Legislatures.

Sub-cl (i).—The provisions of this Part which require legislation by Parliament are:

Art. 16 (3): Prescribing residence within the State to be a condition for employment under a State.

Art. 32 (3): Vesting of inferior Courts with powers to issue writs for the enforcement of fundamental rights.

Art. 33: Power of Parliament to modify application of fundamental rights as regards Armed Forces and the Police.

Art. 34: Act of indemnity after application of martial law.

Sub-cl. (ii).—The provisions of this Part which declare offences are:

Art. 17: The enforcement of any disability arising out of untouchability is an offence.

Art. 23 (1): Traffic in human beings, imposition of begar or similiar form of forced labour are offences punishable in accordance with law.

'A State shall not have power . . .'—Under Entry 2 of List II, the State Legislature has exclusive power to legislate with respect to the police forces. But by virtue of the present clause, Parliament shall have the exclusive power to legislate in the matter of abrogating or modifying the fundamental rights in their application to the police forces in the States.

Similarly, matters coming within the purview of Arts. 16 (3) and 32 (3) would have otherwise come within the exclusive power of the State Legislature. But by virtue of the present clause, the power to legislate regarding these matters will belong exclusively to Parliament.

(17) *Adams v. Maryland*, (1952) 347 U.S. 179.

(18) *Civil Rights Cases*, (1883) 109 U.S. 3.

(19) *U. S. v. Reese*, (1876) 92 U.S. 214.

(20) *Burrill v. Locomobile Co.*, (1922) 258 U.S. 34.

(21) *Dunn v. U. S.*, 98 F. 2d. 119.

Cl. (b) : Validity of 'law in force'.

This clause simply validates any law in force at the date of commencement of the Constitution which may relate to any of the matters referred to in cl. (a) of the present article, *until* Parliament enters upon the field to legislate.

By reason of this provision, the validity of laws in force which deal with the matters specified in cl. (a) of the present Article cannot be challenged on the ground that it violates any other provision of Part III and is, therefore, void under Art. 13.

Such existing laws²²⁻²³ would, however, continue to remain in force only until Parliament repeals or amends them in exercise of the power conferred by Art. 35 (a). Thus,

(a) Prior to the enactment by Parliament of the Public Employment (Requirement as to Residence) Act, 1957 (see Vol. I, p. 476), many of the States excluded persons other than the 'permanent resident' from the State services, under various devices. Though these restrictions offended against Art. 16 (1), the validity of such laws could not be questioned in view of Art. 35 (b).²⁴ All such restrictive State laws have now been repealed by the Act of Parliament, just cited.

(b) The Untouchability (Offences) Act, 1955 (see Vol. I, p. 479) has similarly repealed State Acts relating to untouchability, such as the U. P. Removal of Social Disabilities Act, 1947.

(c) The Suppression of Immoral Traffic in Women and Girls Act (104 of 1956), which implements the International Convention of May 9, 1950, for the suppression of immoral traffic in women and girls, has repealed all relevant State Acts in force immediately before the coming into force of the Central Act.

INDEX TO COMMENTS**ARTICLE 35.****Other Constitutions :**

U.S.A., 307.

India :

Cl. (a): Legislation by Parliament to give effect to Fundamental Rights. 308; 'A State shall not have power', 308.

Cl. (B): Validity of 'law in force', 309.

(22) *Raj Bahadur v. Legal Ramembrancer*, A. 1953 Cal. 522 (524).

(23) *State v. Gulab Singh*, A. 1953 All. 483.

(24) Rep. of the States Reorganisation Commission, paras, 786-7.

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

Definition.

36. In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III.

INDIA

Scope of Art. 36.

This article says that the definition of the 'State' in Art. 12 shall apply throughout Part IV, wherever that word is used. This means that not only the Union and State authorities, but also local authorities¹⁻² shall have a moral obligation to follow the directives; e.g., the promotion of cottage industries, prohibition of consumption of intoxicants or of the slaughter of milch cattle,³ improvement of public health and of the level of nutrition of the people.¹⁻²

37. The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Application of the principles contained in this Part.

OTHER CONSTITUTIONS

Eire.—Art. 45 of the Constitution of Eire, 1937, says—

"The principles of social policy set forth in this article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this Constitution."

INDIA

Object of the Directives.

The Directives lay down the lines on which the State of India should work under this Constitution. Their contents may be divided into several groups. (i) Certain ideals, particularly economic, which the framers of the Constitution wish that the State should strive for. (ii) Certain directions to the future Legislature and the future Executive to show in what manner they should exercise their legislative and executive powers. (iii) Certain rights of the citizens which shall *not* be enforceable by the Courts like the 'Fundamental Rights' but which the State shall nevertheless aim at securing, by regulation of its legislative and administrative policy.

So far as the ideal is concerned, it is clearly that of a 'Welfare State',⁴ as distinguished from a mere 'Police State', which aims at social welfare and the common good and to secure to all citizens 'justice, social and economic' as declared by the very Preamble to the Constitution.⁵

According to Sir Iyor Jennings,⁶ the philosophy underlying most of these provisions is "Fabian Socialism without the socialism for only 'the nationalisation of the means of production, distribution and exchange' is missing". This much

(1-2) *Buddhu v. Allahabad Municipality*, A. 1952 All. 753.

(3) *Quareshi v. State of Bihar*, A. 1958 S.C. 731 (736).

(4) *Lokenath v. State of Orissa*, A. 1952

Orissa 42 (47): *State of A. P. v. Ginning Factory*, A. 1959 A.P. 538.

(5) Cf. *Crown Aluminium Works v. Workmen*, A. 1958 S.C. 30 (34).

(6) Jennings, *Some Characteristics of the Indian Constitution*, p. 31.

is clear, however, that *our* Constitution does not adhere to any particular 'ism' but seeks to effect a compromise between Individualism and Socialism by eliminating the vices of unbridled private enterprise and interest by social control and welfare measures as far as possible.

This is why a '*Socialistic pattern of society*', not 'Socialism', has been declared to be the objective of our Planning and the reasons may be best described in the words of Pandit Nehru⁷ himself:

"Marx is a famous name and many things were done by applying his theories. But many of the things explained by him do not exist today. And many of his predictions have proved to be incorrect. Marx did not envisage the tremendously prosperous America. Capitalism has shown amazing strength to adapt itself to circumstances. Scandinavia is a semi-socialist but fundamentally capitalistic State, with a higher standard of life.

The concept of Socialism is changing even in Western countries. Therefore, we in India have to be more wide awake and the conditions ultimately are governed by the state of our people, state of their minds.

In India, we are a very conservative people. In a sense, the Planning Commission does not discuss Socialism, but it has to keep the socialistic objective before it.....

Socialism to some people means two things: Distribution which means cutting off the pockets of the people who have too much money and nationalisation. Both these are desirable objectives, but neither is by itself Socialism.

Any attempt to distribute by affecting the productive machinery is utterly wrong, to do so would be to weaken ourselves. The basis of Socialism is greater wealth. There cannot be any Socialism of poverty. Therefore, the process of equalisation has to be phased.

Secondly, there is the question of nationalisation. I think it is dangerous merely to nationalise something without being prepared to work it properly. To nationalise we have to select things. My idea of Socialism is that every individual in the State should have equal opportunity for progress."

Officially, the '*socialistic pattern of society*' has been thus explained in the brochure on the Second Five Year Plan,^{7a} which seeks to establish such a society—

"Essentially this means that the basic criterion for determining the lines of advance must not be private profit and social gain, and that the pattern of development and the structure of socio-economic relations should be so planned that they result not only in appreciable increases in national income and employment, but also in greater equality in incomes and wealth. Major decisions regarding production, consumption and investment—in fact all significant socio-economic relationships—must be made by agencies informed by social purpose. The benefits of economic developments must accrue more and more to the relatively less privileged classes of society, and there should be a progressive reduction of the concentration of incomes, wealth and economic power. The problem is to create a milieu in which the small man who has so far had little opportunity of perceiving and participating in the immense possibilities of growth through organised effort is enabled to put in his best in the increase of a higher standard of life for himself and increased prosperity for the country."

Utility of the Directives.

A division of fundamental rights into two categories—justiciable and non-justiciable, was recommended by the Sapru Committee as early as 1945. At the time of framing the Constitution, the Advisory Committee on Fundamental Rights⁸ recommended:

"We have come to the conclusion that *in addition* to these fundamental rights, the Constitution should include certain directives of State policy which though not cognisable in any court of law, should be regarded as fundamental in the governance of the country".

The idea of incorporating in the Constitution non-justiciable directives was, of course, taken from the Constitution of *Eire* (p. 310, *ante*). As Dr. Ambedkar explained, the precedent under the Government of India Act, 1935, of issuing Instruments of Instructions to the Governor-General also influenced the makers of the Constitution:

"The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and the Governors of Colonies, and to those of India by the British Government under the 1935 Government of India Act. What is called 'Directive Principles' is *merely another name for the Instrument of Instructions*. The only difference is that they are instructions to the legislature and the executive. Whoever captures power will not be

(7) Hindusthan Standard, Delhi, 17-5-58, p. 7.

(7a) Second Five Year Plan, p. 22.

(8) Rep. of the Advisory Committee on Fundamental Right. Para. 2.

free to do what he likes with it. In the exercise of it he will have to respect these instruments of instructions which are called Directive Principles.”

These were not intended to be mere pious declarations. In the words of Dr. Ambedkar, again,¹⁰—

“In enacting this Part of the Constitution, the Assembly is giving certain directions to the future legislature and the future executive to show in what manner they are to exercise the legislative and the executive power they will have. Surely it is not the intention to introduce in this Part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip-service to these principles but that they should be made the basis of *all* legislative and executive action that they may be taking hereafter in the matter of the governance of the country”.

The *sanction* behind the Directives is, of course, *political* and not *juridical*. Though these Directives are not cognisable by the Courts and, if the Government of the day fails to carry out these objects, no Courts can make the Government implement them, yet these principles have been declared to be “fundamental in the governance of the country”. As Dr. Ambedkar observed in the Constituent Assembly, “if any Government ignores them, they will certainly have to answer for them before the *electorate* at the election time”.⁹ It would also be a patent weapon at the hands of the Opposition—to discredit the Government on the ground that any of its executive or legislative act is opposed to the Directive Principles.

So far as the Courts are concerned, the Directives are not enforceable by any judicial process. No Court would be entitled to declare any legislation as invalid on the ground that it does not conform to the *spirit* of any of the directive principles.¹¹ Nor will the Court be competent to compel the Government to carry out any directive within the time limited by the Constitution, e.g., the provision for free and compulsory primary education, within the period of 10 years as required by Art. 45; or to give assistance for unemployment, as required by Art. 41.¹² So viewed, the Directives are in the nature of ‘a moral homily’¹³ or ‘a manifesto of aims and aspirations’.¹⁵

Nevertheless, the Courts cannot altogether ignore the existence of the Directives in the body of the Constitution, and, as will be presently seen, *our* Supreme Court has aided the implementation of the Directives in a substantive manner, even in cases where the relevant legislation has been challenged as an inroad upon fundamental rights. In the working of *our* Constitution, thus, the Directives have gathered more weight than a mere ‘moral homily’.¹³

(A) Under the *Irish* Constitution, it has been suggested that the Courts, in deciding cases relating to the subject-matter of the declarations, are bound to take cognisance of the general *tendency* of these declarations, even while legislative effect has not yet been given to them.¹⁵ This may, however, take place only in cases of doubt or ambiguity and not where the statute is plain and clear.

(B) Under *our* Constitution, too, though the Courts cannot declare any law to be void on the ground of contravention of any of the Directives, the Courts have already taken cognisance of the *tendency* of the Directives for the purpose of upholding social legislation.

While at the time of the drafting of the Constitution, the Directives were considered by many as a surplusage because they were not justiciable, the working of the Constitution during the last few years has demonstrated the utility of the Directives even in the Courts. Thus,—

I. Though the Courts cannot declare a law to be *invalid* on the ground that it contravenes a Directive Principle, nevertheless the constitutional validity of many laws has been *maintained* with reference to the Directives. For instance,—

(9) C.A.D., Vol. VII. p. 41.

(10) C.A.D., Vol. VII. p. 476.

(11) Cf. *Deep Chand v. State of U. P.*, A. 1959 S.C. 648 (664).

(12) *Radhakrishna Mills v. Industrial Tribunal*, A. 1954 Mad. 686.

(13) Dr. Rowlatt in the *Dail Eireann*, quoted in O’Sullivan’s *Irish Free State and its Senate*.

(14) Prof. Wheare, *vide* 54 C.W.N. liv.

(15) Kohn, *Constitution of the Irish Free State*, 1932, p. 110.

(a) It has been held that when a law is challenged as constituting an 'unreasonable' restriction upon a fundamental right guaranteed by Art. 19, the court must reject that contention if the law seeks to carry out an object desired by the Directives because what the State is required to do by the Constitution itself cannot be said to be 'unreasonable'. In other words, restrictions, which are imposed on the exercise of Fundamental Rights for the purpose of securing the objectives enjoined by any of the Directives, would be regarded as 'reasonable' restrictions within the meaning of cls. (2) to (6) of Art. 19.¹⁶⁻¹⁸ Thus—

(i) Art. 47 has been relied upon to uphold the reasonableness of a law of prohibition imposing restrictions upon the possession, sale etc. of intoxicating liquors.¹⁶

(ii) Art. 43 has been relied upon to sustain the reasonableness of the restrictions imposed by the Minimum Wages Act, 1948.¹⁸

(iii) Art. 48 has been referred to uphold the reasonableness of the prohibition of slaughter of cows and calves.¹⁷

Thus, though the Court has laid down the general proposition that in case of a conflict between a Directive Principle and a Fundamental Right the latter shall prevail, so far as Art. 19 is concerned, the result will be just the reverse if in every case where a violation of Art. 19 is alleged, the Court upholds the encroachment as a 'reasonable' one within the meaning of the relevant exception clause in Cls. (2) to (6) of that Article, where the legislation seeks to implement a Directive.

(b) Acquisition of land for the purpose of achieving the objects of the Directives contained in Art. 39 (b)-(c) should be held to be for a 'public purpose' within the meaning of Art. 31 (2).¹⁹

II. A most portentous application of the Directives was made by the Supreme Court in the case of *State of W. Bengal v. Subodh Gopal*,²⁰ to propound the theory that the Legislature, under our Constitution, possesses a larger (almost unlimited) measure of 'police power' than what had been heretofore supposed.

The majority judgment, delivered by Sastri C. J. in *Subodh Gopal's case*,²⁰ is to the effect that even though cls. (2) to (6) of Art. 19 defined the limits of police power with respect to the fundamental rights guaranteed by cl. (1) of Art. 19, that *did not exhaust* the regulatory power of the State which pervaded the entire legislative field as an implied power under each item in the legislative lists:

"But the power of social control and regulation of private rights and freedoms for the common good being an essential attribute of a social and political organisation, otherwise called a State, and pervading, as it does, the entire legislative field, was not specifically provided for under any of the Entries in the Legislative List and was left to be exercised, wherever desired, as part of the appropriate legislative power."²⁰

According to this view, no police power was conferred by cl. (1) of Art. 31²⁰ nor did cl. (5) (b) (ii) of Art. 31²⁰ exhaust that power in relation to rights of property. The net result of this view is that in the exercise of the legislative power conferred by each entry in the Legislative lists, the Legislature has unfettered regulatory power, except in so far as it is controlled by any specific provision of the Constitution, e.g., cls. (2)-(6) of Art. 19, in relation to the fundamental rights guaranteed by Art. 19 (1), or cl. (5) (b) (ii) of Art. 31 which provides that compensation must be paid if the exercise of regulatory power with respect to private property amounts to 'deprivation' within the meaning of cl. (1) of Art. 31.

Jagannadhas J., who was in the minority, also agreed with this view:

"The respective legislatures in the country have plenary powers assigned to them with reference to the various subjects covered by the entire enumerated in the Lists in the Seventh Schedule These powers are subject to the limitation under Art. 13 that the power is not to be so exercised as to infringe the fundamental rights declared in Part III of the Constitution. And, therefore, the legislatures can exercise every power, including

(16) *State of Bombay v. Balsara*, (1951) S.C.R. 682: (1950-51) C.C. 308 (319). [See also under Art. 47, *post*].

(17) *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

(18) *Bejoy Cotton Mills v. State of Ajmer*, A. 1955 S.C. 33.

(19) *State of Bihar v. Kamleshwar*, A. 1952 S.C. 252 (Mahajan & Aiyar JJ.).

(20) *State of W. B. v. Subodh Gopal*, (1954) S.C.A. 65 (80-81, 87).

the police power, if it is necessary to import that concept—within these limits, in so far as it is not provided for in Art. 19 (2)-(6) and Art. 31 (5) (b) (ii) or other specific provisions in the Constitution.”²⁰

The net result of this is that in the matter of initiating social control legislation for the purpose of *implementing the Directives*, the State shall not be lacking in power owing to the absence of any specific provision conferring such regulatory power. It can assume that power within the ambit of the legislative entry to which the legislative measure relates, subject only to this limitation that no fundamental right is infringed by it.²¹

Until legislation, Directives are not binding.

This does not, however, mean that the Directives can be implemented or enforced without legislation. The Directives enjoin the Legislature to make laws in conformity with the Directives. But so long as such laws are not made, the existing laws are binding and neither an individual nor the State can travel beyond an existing statute for the purpose of implementing or following any of the Directives. Thus, a Municipality cannot pass a resolution closing down slaughter houses (infringing the fundamental rights of the owners under Art. 19 (1) (g)) professing to act under Art. 48, so long as the Legislature does not enact a law prohibiting slaughter of cattle, in pursuance of Art. 48.²²

It is also to be noted that though Art. 37 expects that the Legislature should try to seek the objects referred to in the Directives, the Directives, *per se*, do not confer any legislative power upon the Legislatures. Legislative competence must be sought from the Legislative Lists and the Articles which specifically confer legislative power, and the Directives cannot confer competence on a Legislature in respect of any matter over which it has no competence,²³ though a Directive may warrant the liberalisation of a legislative power which it possesses.²⁰ Thus, Art. 45 cannot empower the Union to make a law for compulsory primary education, by reason of Entry 11 of List II.

Fundamental Rights and the Directive Principles.

It may be observed that the declarations made in Part IV of the Constitution under the head ‘Directive Principles of State Policy’ are in many cases of a wider import than the declarations made in Part III as ‘Fundamental Rights’. Hence, the question of priority in case of conflict between the two classes of provisions may easily arise. It is to be noted, however, that while the Fundamental Rights are enforceable by the Courts (Art. 32) and the Courts are bound to declare as void any law that is inconsistent with any of the ‘Fundamental Rights’, the Directives are not so enforceable by the Courts (Art. 37), nor can the Courts declare as void any law which is otherwise valid, on the ground that it contravenes any of the ‘Directives’. Hence, in case of any conflict between Parts III and IV of the Constitution, there is no doubt that the former will prevail in the Courts.²⁴ In the words of the Supreme Court—

“The directive principles of State policy which are expressly made unenforceable by a Court cannot override the provisions in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or Directions under Art. 32. The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate Article in Part III. The Directive Principles of State Policy have to conform to and run subsidiary to the Chapter on Fundamental Rights..... That is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the Legislative and Executive powers and limitation conferred on the State under different provisions of the Constitution.”²⁴

(21) *Ibid.*, p. 129.

(22) *Mangru v. Commissioners of Budget Municipality*, (1951) 87 C.L.J. 369.

(23) *Nuserwanji v. State of Bombay*, A. 1951 Bom. 210.

(24) *State of Madras v. Champakam*, (1951) S.C.R. 525 (531): (1950-51) C.C. 183 (185).

Though it is the duty of the State to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the State.²⁵ Thus, Art. 13(2) prohibits the State from making any law which takes away or abridges the fundamental rights conferred by Art. III. The Directive Principles cannot override this categorical limitation upon the legislative power of the State.¹⁻² Further, the directive principles, which are *not* enforceable by a court of law cannot override the fundamental rights which are expressly made enforceable by appropriate writs or orders under Art. 32.²⁴

But though the Directives cannot override the fundamental rights, in determining the scope and ambit of the fundamental rights the Court may not entirely ignore the Directive principles and should adopt the principle of harmonious construction so as to give effect to both as much as possible.¹⁻²

INDEX TO COMMENTS

ARTICLE 37.

Other Constitutions :

Eire, 310.

India :

Object of the Directives, 310 ; Utility of the Directives, 311 ; Until legislation, Directives are not binding, 313 ; Fundamental Rights and Directive Principles, 314.

38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

State to secure a social order for the promotion of welfare of the people.

OTHER CONSTITUTIONS

(A) *Eire*.—Cl. (1) of Art. 45 of the Constitution of Eire, 1937—

"The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life."

(B) *U.S.S.R.*—Art. 11 of the Soviet Constitution says—

"The economic life of the U.S.S.R. is determined and directed by the state national-economic plan, with the aim of increasing the public wealth, of steadily raising the material and cultural standards of the working people, of consolidating the independence of the U.S.S.R. and strengthening its defensive capacity."

INDIA

End of the State under our Constitution.

This Article and the succeeding ones show that the framers of *our* Constitution did not contemplate a purely 'Police State' but a 'Welfare State', the functions of which should, *within the bounds of the Constitution and subject to its limitations*, be commensurate with the public welfare.³ (See p. 303, *ante*).

Art. 43, for instance, discards the old doctrine of *laissez faire* or freedom of bargain between an individual employer and an individual worker and directs the State to secure, by legislation and other State agencies, minimum wages and a decent standard of life, irrespective of the terms of his employment.⁴

(25) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252 (Mahajan & Aiyar JJ.).

(1) *Hanif Quareshi v. State of Bihar*, A. 1958 S.C. 731.

(2) Reference on the Kerala Education Bill, 1957, A. 1958 S.C. 956.

(3) Cf. *Lokenath v. State of Orissa*, A. 1952 Orissa 42 (47).

(4) Cf. *Crown Aluminium Works v. Their Workmen*, A. 1958 S.C. 30 (34).

INDEX TO COMMENTS

ARTICLE 38.

Other Constitutions :

(A) Eire, 315 ; (B) U.S.S.R., 315.

India :

End of the State under the Constitution, 315.

Certain principles of
policy to be followed by
the State.

39. The State shall, in particular, direct its
policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood ;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;

(d) that there is equal pay for equal work for both men and women ;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

OTHER CONSTITUTIONS⁵

(A) *German Reich*.—The relevant provisions of the Weimar Constitution of 1919 were—

"Article 122.—Young persons shall be protected against exploitation as well as against moral, spiritual, or bodily neglect. Both the State and the local authorities must undertake the necessary arrangements.

Article 151.—The organization of economic life must correspond to the principles of justice, and be designed to ensure for all a life worthy of a human being. Within these limits the economic freedom of the individual must be guaranteed.

Article 155.—The distribution and use of land shall be supervised by the State in such a way as to prevent abuse and with a view to ensuring to every German a healthy dwelling... Landed property may be expropriated when required to meet the needs of housing, or for the purpose of land settlement, the bringing of land into cultivation or the improvement of husbandry.....

The cultivation and full utilization of the land is a duty the land owner owes to the community. Increment in the value of landed property, not accruing from any expenditure of labour and capital upon the land, shall be devoted to the uses of the community.

All riches in the soil and all natural sources of power of economic value shall be under the control of the State. Private royalties shall be transferred to the State by legislation."

(B) *Eire*.—Cls. (2)-(4) of Art. 45 of the Constitution of Eire, 1937—

(2) The State shall, in particular, direct its policy towards securing—

(i) that the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs ; (ii) that the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good ; (iii) that, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment ;....."

"(3) (i) The State shall favour and, where necessary, supplement private initiative in industry and commerce. (ii) The State shall endeavour to secure that private enterprise shall

(5) Cf. Art. 23 (2) of the Universal Declaration of Human Rights—"Everyone, with-

out discrimination, has the right to equal pay for equal work."

be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation."

"(4) (ii) The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength."

(C) *U.S.S.R.*—The relevant Articles of the Soviet Constitution are as follows—

"4. The economic foundation of the U.S.S.R. is the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of private ownership of the instruments and means of production, and the elimination of the exploitation of man by man.

5. Socialist property in the U.S.S.R. exists either in the form of state property (belonging to the whole people) or in the form of co-operative and collective-farm property (property of collective farms, property of co-operative societies).

6. The land, its mineral wealth, waters, forests, mills, factories, mines, rail, water and air transport, banks, communications, large state-organized agricultural enterprises (state farms, machine and tractor stations and the like), as well as municipal enterprises and the bulk of the dwelling houses in the cities and industrial localities, are state property, that is, belong to the whole people.

8. The land occupied by collective farms is secured to them for their use free of charge and for an unlimited time, that is, in perpetuity.

122. Women in the U.S.S.R. are accorded equal rights with men in all spheres of economic, state, cultural, social and political life. The possibility of exercising these rights is ensured to women by granting them an equal right with men to work, payment for work, rest and leisure, social insurance and education, and by state protection of the interests of mother and child, pre-maternity and maternity leave with full pay, and the provision of wide network of maternity homes, nurseries and kindergartens."

(D) *French Republic*.—The Preamble to the Constitution of 1946 declared—

"The law guarantees to women equal rights with men in all domains."

The Constitution of the Fifth Republic, 1958, reaffirms it.

"All property and all enterprises that now have or shall have the character of a national public service or a monopoly in fact must become the property of the community."

"The nation ensures to the individual and the family the conditions necessary to their development."

INDIA

Object of Art. 39.

This Article makes clear what has already been pointed out (p. 304, *ante*), viz., that the end of the State in India is not doctrinaire but practical. It does not seek to abolish private property or industry altogether; at the same time, it acknowledges that both must yield to social control whenever the common good so requires. It is interesting to note that within the first quinquennium of the Constitution it was found that owing to the individualistic interpretation given to Art. 31 by the Courts, it was not possible to carry out the objective envisaged by Art. 39 and, accordingly, Art. 31 has been twice amended, to pave the way for a more effective control of the material resources and means of production by the State, and for a transfer of ownership thereof to the State in a smoother process where mere control was inadequate to meet the evil.

CLAUSES (b)-(c).

Distribution of material resources.

The greatest progress in carrying out the Directives has taken place as regards the Directives embodied in cls. (b) and (c) of Art. 39.

In order to prevent the concentration of the material resources and means of production in the hands of the few, a large scale reform has been introduced both in the agricultural and industrial field, in pursuance of the recommendations of the Planning Commission.

(A) *Agrarian reform*.—In an agrarian country like India, the main item of material resources is no doubt agricultural. Since the time of the Permanent Settlement this important source of wealth was being largely appropriated by a

group of hereditary proprietors and other intermediaries known variously in different parts of the country, such as, zamindars, jagirdars, inamdars, etc., while the actual tillers of the soil were being impoverished by the operation of various economic forces, apart from high rents and exploitation by the intermediaries. The Planning Commission in its First Plan, therefore, recommended an abolition of these intermediaries so as to bring the tillers of the soil in direct relationship with the State. This reform has, by this time, been carried out almost completely throughout India. Side by side with this, legislation⁶ has been undertaken in many of the States for the improvement of the condition of the cultivators as regards security of tenure, fair rents and the like. In order to prevent a concentration of land holdings even in the hands of the actual cultivators, legislation has been enacted in many of the States, fixing a ceiling,⁷ that is to say, a maximum area of land which may be held by an individual owner.

In the agricultural sphere, the reform has proceeded on several lines:

(i) Abolition of intermediaries.—The most important of these reforms is the abolition of Zamindars and other intermediaries,⁸ who stood between the State and the tillers of the soil. The object has, however, been secured not by depriving these owners, but by acquiring their interests and, as has been already stated. Art. 31 (see p. 185, *ante*) of the Constitution had to be amended twice, to avoid legal controversies, as far as possible.

In upholding a law for the abolition of Zamindary, S. R. Das J. observed⁹—

“..... what I ask is the purpose of the State in adopting measures for the acquisition of Zamindaries and the interests of intermediaries. Surely, it is to subserve the common good by bringing the land which feeds and sustains the community and also produces wealth by its forest, mineral and other resources, under State ownership or control. This State ownership or control over land is a necessary step towards the implementation of Directive Principles of State Policy and it cannot but be a public purpose.”

(ii) Protection of tenants-at-will and sub-tenants.—Even in areas where the zamindari system does not prevail, the ryot used to sub-let parts of his holding to sub-tenants, who were usually tenants-at-will. Ejectment of such actual tillers of the soil has been controlled by various legislative measures and a maximum share of the produce has been fixed as the rent payable by such sub-tenants, in many of the States.

(iii) Ceiling on holdings.—Even though middlemen have been eliminated, the dangers of concentration of land in the hands of a few would still remain unless the maximum area which an individual may hold is fixed by legislation. This has been done in several States (*cf.*, Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961).

(B) Nationalisation of industry and business.

In the sphere of trade and business, nationalisation has been effected by taking over the existing private concerns and vesting business and assets in statutory corporations, owned or controlled by the State, e.g., life insurance¹⁰; road transport;¹¹ civil aviation.¹²

CLAUSE (f).

Legislation by Parliament.—The Orphanages and Other Charitable Homes (Supervision & Control) Act, 1960 (replacing the Women's and Children's Institutions (Licensing) Act, 1956) provides for the supervision and control of orphanages, homes for neglected women or children and other like institutions.

(6) See under Art. 31A (1), p. 246, *ante*.

(7) *Bhagirath v. State of Punjab*, A. 1957 Bom. 252; *Atma Ram v. State of Punjab*, A. 1959 S.C. 519.

(8) Vide items 1-13 of the Ninth Schedule, *post*, for some of these State Acts.

(9) *State of Bihar v. Kameshwar*, A. 1952 S.C. 252.

(10) Life Insurance Corporation Act, 1956.

(11) Road Transport Corporation Act, 1956.

(12) Air Corporations Act, 1953.

The Children Act, 1960 provides for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children.

INDEX TO COMMENTS

ARTICLE 39.

Other Constitutions :

(A) German Reich, 316 ; (B) Eire, 316 ; (C) U.S.S.R., 317 ; (D) French Republic, 317.

India :

Object of Art. 39, 317.

Cls. (b)-(c): Distribution of material resources, 317 ; Nationalisation of industry and business, 318.

Cl. (f): Legislation by Parliament, 318.

40. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

INDIA

Legislative power.—See Entry 5 of List II, 7th Sch.

Implementation.—Though owing to lack of proper education, narrow-mindedness and local politics, the system of panchayat administration is still under controversy, almost all the States have now enacted laws vesting various degrees of powers of self-government and of civil and criminal justice in the hands of panchayats, e.g., Rajasthan Panchayat Act, 1953 ; Andhra Pradesh (Telangana Area) Gram Panchayats Act, 1958 ; Andhra Pradesh Panchayat Samithis & Zilla Parishads Act, 1959 ; Bombay Village Panchayats Act, 1958 ; Punjab Gram Panchayat Act, 1952 ;^{12a} Madras Village Panchayats Act, 1950 ; Gujarat Village Panchayats Act, 1958 ; Punjab Panchayat Samithis & Zilla Parishads Act, 1961. In some States, the system was in vogue from before, e.g., C. P. and Berar Panchayats Act, 1946 ; Uttar Pradesh Panchayat Raj Act, 1947 ; Orissa Gram Panchayats Act, 1948.

INDEX TO COMMENTS

ARTICLE 40.

Legislative power, 319 ; Implementation, 319.

41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

OTHER CONSTITUTIONS¹³

(A) *French Republic.*—The Preamble to the French Constitution of 1946 says—

“Every one has the duty to work and the right to obtain employment Every human being who, because of his age, his physical or mental condition, or because of the economic situation, finds himself unable to work, has the right to obtain from the community the means to lead a decent existence The nation guarantees equal access of children and adults to education, professional training and culture”

(12a) *Gurdial Singh v. State*, A. 1957 Punj. 149.

(13) Art. 23 (1) of the Universal Declaration of Human Rights, 1948 says—

“Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

The Constitution of the Fifth Republic, 1958, reaffirms it.

(B) U.S.S.R.—Arts. 118, 120 and 121 of the Soviet Constitution, 1936, are as follows:

Art. 118.—Citizens of the U.S.S.R. have the right to work, that is, are guaranteed the right to employment and payment for their work in accordance with its quantity and quality. The right to work is ensured by the socialist organization of the national economy, the steady growth of the productive forces of Soviet Society, the elimination of the possibility of economic crisis, and the abolition of unemployment.

Art. 120.—Citizens of the U.S.S.R. have the right to maintenance in old age also in case of sickness or loss of capacity to work. This right is ensured by the extensive development of social insurance of workers and employees at state expense, free medical service for the working people and the provision of a wide network of health resorts for the use of the working people.

Art. 121.—Citizens of the U.S.S.R. have the right to education.

This right is ensured by universal, compulsory elementary education: by education, including higher education, being free of charge; by the system of State stipends for the overwhelming majority of students in the universities and colleges; by instruction in schools being conducted in the native language, and by the organization in the factories, state farms, machine and tractor stations and collective farms of free vocational, technical and agronomic training for the working people."

INDIA

Existing laws.—See the Employees' State Insurance Act (XXXIV of 1948) which provides for certain benefits to employees in factories and other establishments, in case of sickness, maternity and 'employment injury'. Also, the Workmen's Compensation Act (VIII of 1923); Mica Mines Labour Welfare Fund Act, 1946; Coal Mines Labour Welfare Fund Act, 1947; Employees' Provident Funds Act, 1952; Coal Mines Provident Fund and Bonus Schemes Act, 1948; Entries 23 and 24 of List III of the 7th Sch., *post*.

INDEX TO COMMENTS

ARTICLE 41.

Other Constitutions:

(A) French Republic, 319; (B) U.S.S.R., 326.

India:

Existing laws, 320.

42. The State shall make provision for securing just and humane conditions of work and for maternity relief.

Provision for just and humane conditions of work and maternity relief.

OTHER CONSTITUTIONS¹⁴

French Republic.—See under Art. 43, *below*.

INDIA

Existing law.—See the Factories Act (LXIII of 1948); Mines Maternity Benefit Act, 1941.

(14) Cf. Universal Declaration of Human Rights:

"23. (1). Everyone has the right to work,to just and favourable conditions of work and to protection against unemployment.

24. Everyone has the right to rest and leisure.

25. (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care, and necessary social services, and

the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Mother and childhood have the right to special care and assistance.

26. (1). Everyone has the right to education

27. (1). Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

43. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Living wages, etc., for workers.

OTHER CONSTITUTIONS¹⁴

(A) *French Republic*.—The Preamble to the French Constitution of 1946 says—
“The nation ensures to the individual and the family the conditions necessary to their development. It guarantees to all, and notably to the child, the mother and the aged worker, protection of health, material security, rest and leisure.”

The Constitution of the Fifth Republic, 1958, reaffirms it.

(B) *U. S. S. R.*—Art. 119 of the Soviet Constitution of 1936, says—

“Citizens of the U.S.S.R. have the right to rest and leisure. The right to rest and leisure is ensured by the reduction of the working day to seven hours for the overwhelming majority of the workers, the institution of annual vacations with full pay for workers and employees and the provision of a wide network of sanatoria, rest homes and clubs for the accommodation of the working people.”

INDIA

Existing laws.—The Minimum Wages Act (XI of 1948) empowers the Government to fix minimum rates of wages in certain employments, such as in mills, road construction, public motor transport, agriculture, and to fix the normal working hours for a day. Also see in this connection, the Factories Act (LXIII of 1948); the Payment of Wages Act (IV of 1936); and other Acts specified under Entry 24 of List III, 7th Sch. *post*.

Legislation by Parliament.—The Khadi and Village Industries Commission Act (61 of 1956) provides for the establishment of a Commission for the development of khadi and village industries.

INDEX TO COMMENTS

ARTICLE 43.

Other Constitutions :

(A) French Republic, 321 ; (B) U.S.S.R., 321.

India :

Existing laws, 321 ; Legislation by Parliament, 321.

44. The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Uniform civil code for the citizens.

INDIA

Scope and Object of Art. 44.

The object of this article is to introduce a uniform personal law for the purpose of national consolidation. It proceeds on the assumption that there is no necessary connection between religion and personal law in a civilized society. While the Constitution guarantees freedom of conscience and of religion (Art. 25), it seeks—“to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage”, just as it has been done even in Muslim countries like Turkey or Egypt. The object is not to encroach upon religious liberties. Cl. (2) (a) of Art. 25 already reserves such right of the State.

Implementation.—Notwithstanding the foregoing general consideration, however, the Government has, during the first decade of the working of the Constitution, failed to make any substantial progress towards unifying the personal law owing to apprehensions of meeting with Muslim resistance. The utmost that has been done is to codify the Hindu law, in the form of the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956; the Hindu Adoptions and Maintenance Act, 1956, which seek to unify the various schools of Hindu law and to replace them by one uniform Code for all Hindus of this country, regardless of the particular school of scriptural law by which he would have been otherwise governed.

A uniform civil code for the whole of the country will, however, never be fulfilled unless the Government succeeds in bringing the Muslims into the fold.

Legislative Power.—See Entry 5 of List III of Sch. VII.

45. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Provision for free and compulsory education for children.

OTHER CONSTITUTIONS¹⁵

(A) *Eire.*—Art. 42 (4) of the Constitution of 1937 provides—

“The State shall provide for free primary education

Subject to the above, the Irish Constitution guarantees the right of parents to educate their children, according to their means and choice, but at the same time imposes certain duties upon the State. The relevant provisions are in Art. 42—

“(1).—The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

(2) Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

(3) 1°.—The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2°.—The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

(4) The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

(5) In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardians of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child”.

What Art. 42 (3) 2° provides is that the State shall be entitled to require that all children should receive a minimum education, and, for this purpose, to lay down a *general* standard. But so long as parents conform to this general standard, the manner in which the education is given is exclusively a concern of the parents. The Supreme Court has thus declared invalid a Bill which sought to compel parents to educate children in a school certified to be ‘suitable’ by the Minister.¹⁶

(C) *U. S. S. R.*—See Art. 121 of the Soviet Constitution, reproduced at p. 320, ante.

(15) Cf. Art. 26 (1) of the Universal Declaration of Human Rights—“Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory . . .”

(16) *In re*, Art. 26 and the School Attendance Bill, (1943) Ir. R. 334.

(D) *French Republic*.—The Preamble to the French Constitution of 1946 declares—

"The establishment of free, secular, public education on all levels is a duty of the State."

INDIA

Compulsory Child education.

Civil liberty would be hollow unless it provides for education to the citizen according to his choice. But the State may also make education compulsory up to a certain minimum extent.

Scope of the Directive.

1. Not being justiciable, the present Article does not confer any legally enforceable right upon primary schools to receive grants-in-aid from the Government.¹⁸

2. A statute imposing compulsory education is no encroachment on any fundamental right, for no one has any right to remain ignorant.¹⁷

3. But this Directive does not empower the State to override the fundamental right of minority communities to establish educational institutions of their own choice under Art. 30 (1). It is possible for the State to discharge its obligation under the present Article through Government owned and aided schools.¹⁹

Implementation.—The State of Punjab has implemented this Directive by enacting the Punjab Primary Education Act, 1960; see also Andhra Pradesh Primary Education Act, 1961.

Legislative Power.—See Entry 11 of List II, 7th Sch.

INDEX TO COMMENTS

ARTICLE 45.

Other Constitutions :

(A) Eire, 322; (B) U.S.S.R., 322; (C) French Republic, 323.

India :

Compulsory child education, 323; Scope of the Directive, 323; Legislative power, 323.

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

OTHER CONSTITUTIONS

Eire—Cl. (4) of Art. 45 of the Constitution of 1937—

"The State pledges itself to safeguard with special care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged."

INDIA

Scope of Art. 46.

Under the present Article, the State is at liberty to do anything to promote the educational and economic interest of the weaker sections of the people but only so long as no fundamental right, which is justiciable, is infringed.²⁰

(17) Cf. Cooley, Constitutional Law, p. 295.

(19) Re. Kerala Education Bill, A. 1958 S.C. 956 (1986).

(18) *Joseph v. State of Kerala*, A. 1958 Ker. 290 (297).

(20) *State of Madras v. Champakam*, A. 1951 S.C. 226.

Two provisions relating fundamental rights, viz., Arts. 15 and 29 (2) [see Vol. I, pp. 453, 469] have, however, been amended by the Constitution (First Amendment) Act, 1951, in order to give effect to the present Article, notwithstanding the existence of those two fundamental rights, to the contrary. By virtue of this amendment, thus, it will now be possible to make a special provision, e.g., to build a State colony for the habitation of Harijans, notwithstanding the bar against discrimination on the ground only of caste, in Art. 15 (1).²¹

But since it does not confer any justiciable right, a member of a backward class cannot obtain relief from the Court when he is denied any concession in school fees.²²

INDEX TO COMMENTS

ARTICLE 46.

Other Constitutions :

(A) Eire, 323.

India :

Scope of Art. 46, 323.

47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

OTHER CONSTITUTIONS

U. S. A.—The 21st Amendment (1933) provides—

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited".

It is to be noted that this Amendment repealed the 18th Amendment (1919) which had placed an absolute prohibition upon the 'manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States. . . .'

INDIA

Prohibition.

The Supreme Court has held²³ that a State Legislature is competent to enact a law of prohibition, under Entry 8 of List II (corresponding to Entry 31 of List II of the Art. of 1935) relating to 'intoxicating liquors', even though it may affect the import of foreign liquor. It was observed that a State Legislature might also rely upon the Entry relating to 'public health'. [Entry 8 of List II of the Constitution and Entry 14 of the same List of the Government of India Act, 1935].

It was also held that the restrictions imposed upon the right conferred by Art. 19 (1) (f) are 'reasonable' restrictions, having regard to the Directive in Art. 47.²³

Implementation. —The improvement of health and nutrition on a national basis is aimed at by the Central Council of Health which was set up in 1952 (see under Art. 263, *post*).

(21) Cf. *Jagwant v. State of Bombay*, (1952) 54 Bom. L.R. 678 (680).

(22) *In re Thomas*, A. 1952 Mad. 21.

(23) *State of Bombay v. Balsara*, (1951) S.C.R. 682: (1950-51) C.C. 308 (319).

As regards 'Prohibition', Bombay enacted the Bombay Prohibition Act (XXV of 1949) shortly before the Constitution came into force, and many other States have followed, e.g., Travancore-Cochin Prohibition Act, 1950. Some of the States had laws relating to Prohibition from before, which have been amended after the Constitution, e.g., the Madhya Pradesh Prohibition (Amendment) Act, 1961.

INDEX TO COMMENTS

ARTICLE 47.

Other Constitutions :

(A) U.S.A., 324.

India :

Prohibition, 324 ; Implementation, 324.

48. The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, or cows and calves and other milch and draught cattle.

Organisation of agriculture and animal husbandry.

Prohibition of cow slaughter.

The directive contained in the latter part of the Article is quite specific and enjoins the prohibition of slaughter of any of the species of cattle mentioned, irrespective of their utility from the standpoint of agriculture or animal husbandry,²⁴ and such prohibition cannot be held to be an unreasonable restriction upon the right conferred by Art. 19 (1) (g).²⁵ But the protection recommended by this part of the directive is confined to cows and calves and to those other animals which are *presently* or *potentially* capable of yielding milk or doing work as draught cattle but does not extend to cattle which were at one time milch or draught cattle but which have ceased to be such.²⁵⁻¹

Legislative Power.—See Entries 14 and 15 of List II, 7th Sch., *post*.

Existing Law.—C.P. & Berar Animal Preservation Act, 1949.²⁴

Legislation by State.—U.P. Prevention of Cow Slaughter Act, 1955,¹ Bihar Preservation and Improvement of Animals Act, 1956.¹

49. It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by *or under law made by* Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

Protection of monuments and places and objects of national importance.

Amendment.

The words "or under law made by" have been inserted before the word 'Parliament' and the words 'by law' have been omitted, by the **Constitution (Seventh Amendment) Act, 1956.**

Object of Amendment.

The object has been thus explained in the Statement of Objects and Reasons: "Entry 67 of the Union List refers to "ancient and historical monu-

(24) *Hanif Quareshi v. State of Bihar*, (1959) S.C.R. 629.

(25) *Buddhu v. Allahabad Municipality*, A. 1952 All. 753.

(1) *Abdul Hakim v. State of Bihar*, A. 1961 S.C. 448.

ments, archaeological sites, etc., have been declared by Parliament by law to be of national importance". A large number of ancient monuments, archaeological sites, etc., have been declared to be of national importance by an Act of Parliament. It requires another Act of Parliament to make the slightest alteration in, or addition to, the lists in that Act, which seems to be an unduly cumbrous, procedure. It is, therefore, proposed to amend the entry substituting for the words "declared by Parliament by law", the words "declared by or under law made by Parliament". The same amendment is also proposed to be made in the connected provisions,—Entry 12 of the State List, Entry 40 of the Concurrent List and Article 49".

Legislative Power.—See Entries 67 of List I and 40 of List III of the 7th Sch., *post*.

Existing law.—Ancient Monuments Preservation Act (VII of 1904).

Legislation by Parliament.—Ancient and Historical Monuments & Archaeological Sites and Remains (Declaration of National Importance) Act (LXXI of 1951).

50. The State shall take steps to separate the judiciary from the executive in the public services of the State.

Separation of judiciary from executive.

OTHER CONSTITUTIONS

West Germany.—Art. 20 (2) of the West German Constitution (1948) says—

"All state authority . . . shall be exercise . . . by means of separate legislative, executive and judicial organs."

INDIA

Meaning of Separation of the Judiciary from the Executive.

"This general principle involves two consequences, first, that a judge or magistrate who tries a case must not be in any manner connected with the prosecution, or interested in the prosecution.² Second, that he must not be in direct administrative subordination to any one connected with the prosecution (or indeed the defence).

Quite clearly it is impossible for a judge to take a wholly impartial view of the case he is trying if he feels himself to any extent interested in or responsible for the success of one side or the other. That is the first aspect. It is equally impossible for him to take an impartial view of the case before him if he knows that his posting, promotion, and prospects generally depend on his pleasing the executive head of the district, the District Magistrate, who is also the head of the local police, who has frequent confidential conferences with them, and generally control the work of the Police Superintendent.

Thus the separation of functions means and involves the elimination of these two evils. That they are evils few will question".³

In the Draft Constitution, there was a time limit of three years within which this Directive was to be implemented but at the final stage, this was omitted. In the result, the Directive has lost much of its force and many of the States, such as Assam, Rajasthan, West Bengal and portions of Madhya Pradesh and Punjab, are still lacking in the reform and even in other States where it has been introduced the measure has not been carried to its logical conclusion.⁴

(2) Cf. Vol. I, p. 345.

(3) Speech of Meredith, J., quoted in (1949) 2 Indian Law Review, p. 102.

(4) Vide Ch. 41 of Vol. II of the 14th Report of the Law Commission (Reform of Judicial Administration).

History of the union of executive and magisterial functions and the movement for separation.

The East India Company, as is well-known, came to India as a trader, and when they received the grant of the Diwani in 1765, they became a trader-Sovereign. No wonder, therefore, that the servants of the Company, who were primarily concerned with the revenue collection, came to be entrusted with the functions of administration of justice also, aided by the indigenous personnel, in so far as they were allowed to continue. It is curious to note that the original judicial function of the Collectors of the Company was to preside over the *civil* courts, while criminal justice was allowed to be administered by the Muslim officers under the Muslim law, as before. It was only in 1781 that the Collectors were vested also with magisterial powers and the supervision of the criminal justice was taken over by the Criminal Courts established by the Company. It is no less curious to note that Warren Hastings was the first protagonist of the doctrine of separation of functions in India. In a Regulation of 1793, made at his instance, it was declared—

“The revenue officers must be deprived of their judicial powers”.

But a retrograde step was again taken in 1871, when the magisterial powers were transferred to the Collectors from the District Judges. The policy of conferring magisterial powers upon the Collector and executive officers subordinate to him, thus, embedded itself firmly since 1871, and the Collector came to combine in himself the functions of the administrator, prosecutor and Judge,—a combination which Montesquieu, the propounder of the Doctrine of Separation of Powers, would have regarded as the worst form of tyranny.

A picture of this combination was presented in the Memorandum submitted by the Government of India to the Indian Statutory Commission [(1930), Vol. V, p. 812, para. 10] as follows—

“As chief magistrate of his district he is responsible on the one hand for supervising on the administrative side the magisterial work of the subordinate magistrates, and on the other hand, through the executive powers conferred mainly by the Code of Criminal Procedure, for maintaining peace and good order throughout his district. For this latter purpose also he exercises a general control over the Police. As Collector he is the chief revenue authority responsible for the collection of the land revenue and other less important Government dues”.

A more illuminating passage is to be found in Vol. IV of the Imperial Gazetteer of India, 1907, at pp. 153-154, which throws a floodlight upon the origin of the executive-magistracy in India and its unjustifiability even according to English notions—

“Another controversial matter is the union of executive with judicial functions. The unit of British Indian administration is the District and the chief executive officer in each is the Collector-Magistrate or Deputy Commissioner. In his executive capacity this official is charged with the collection of the various branches of the revenue, and with a variety of other administrative functions. At the same time he is the chief local magistrate, and is, as such vested with extensive judicial authority. He is himself a magistrate of the first class, and can undertake such criminal work, original and appellate, as he chooses. He has the widest powers conferred by the Criminal Procedure Code for the prevention of crime, the suppression of disturbance, and the abatement of nuisances. He is competent to transfer cases for trial from one magistrate to another, or to himself. He can call for the records of any proceedings, and submit the case to the High Court for revision. He is empowered to order the commitment for trial of any accused person who has, in his opinion, been improperly discharged. Moreover, other magistrates of the first class are almost invariably also Assistant or Deputy Collectors, so that, although not subject to his appellate jurisdiction *qua* judicial officers, they are, in their executive capacity, his immediate subordinates. *But to the Western mind the arrangement may seem anomalous*; and it has been urged, not only that the Collector's judicial authority should be taken away, but that, in the subordinate ranks also, executive and judicial functions should be dissociated and assigned to different officers. On the other hand, the union is one to which the people of India are well accustomed, for it has existed from time immemorial in the East, and separation is the rule only of the most advanced Western communities. The matter has often been under consideration, and the question whether, or how far, the suggested separation is practicable is once more engaging the attention of the Government of India.”

Promotion of international peace and security.

51. The State shall endeavour to—

- (a) promote international peace and security ;
- (b) maintain just and honourable relations between nations ;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another ; and
- (d) encourage settlement of international disputes by arbitration.

OTHER CONSTITUTIONS

(A) *Eire*.—Art. 29 of the Constitution of Eire, 1937, says—

"(1) Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. (2) Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination. (3) Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

(B) *French Republic*.—The Preamble to the French Constitution of 1946, declares—

"The French Republic, faithful to its traditions, abides by the rules of international public law. It will not undertake wars of conquest and will never use its arms against the freedom of any people. On condition of reciprocity, France accepts the limitations of sovereignty necessary to the organization and defence of peace."

This Preamble is reaffirmed by the Constitution of the Fifth Republic, 1958.

(C) *West Germany*.—Arts. 24-26 of the West German Constitution (1948) provides—

"24. (1) The federation may by legislation transfer its sovereign powers to international institutions.

(2) In order to preserve peace the federation may join a system of mutual collective security: In so doing it will consent to those limitations of its sovereign powers which will bring about and secure peaceful and lasting order in Europe and among the nations of the world.

(3) For settlement of international disputes the federation will join the general comprehensive obligatory system of international arbitration.

25. The general rules of international law shall form a part of federal law. They shall take precedence over (federal) law and create rights and duties directly for the inhabitants of federal territory.

26. Activities tending to disturb, or undertaken with the intention of disturbing, peaceful relations between nations, and especially preparing for aggressive war shall be unconstitutional. They shall be made subject to punishment."

(D) *Japan*.—Art. 9 of the Japanese Constitution, 1946 declares—

"Aspiring sincerely to an international peace based on justice and order, the Japanese people for ever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international dispute."

INDIA

Cl. (c): Respect for International Law.

(A) *U.S.A.*—Rules of international law are applied by the municipal Courts in America on the theory of their implied adoption by the State, as a part of its own municipal law.⁵ It is, of course, open to Congress to supersede or modify international law in its application to the United States, or it may be controlled by treaties entered into by the United States. But "till an act (of Congress) be passed, the Court is bound by the law of nations, which is part of the law of the land".⁶ Again, the Court will be slow to interpret an Act of Congress to violate a rule of international law, "if any other possible construction remains".⁷

(5) The West German Constitution (Art. 25, quoted above), has also adopted this principle.

(6) *The Nereide*, 9 Cr. 388.

(7) *The Charming Betsy*, 2 Cr. 64.

Where principles of international law are applicable, they do not require to be proved as foreign municipal laws do. The Court must take judicial cognizance of the principles, and, if necessary, ascertain them by study of the proper sources of information,⁸ such as, works of jurists, commentators, judicial decisions and acts and usages of civilized nations.⁹

Apart from the above, a special feature of American Constitutional law is that it places treaties entered into by the U.S.A. at par with the Constitution itself. Art. VI, Cl. (2) of the Constitution says—

“ . . . all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law of the land*; and the judges in every State shall be bound thereby, *anything in the Constitution or laws of any State to the contrary notwithstanding*.”

(See under Art. 253, *post*).

(B) *England*.—English Courts will treat rules of international law as incorporated into the domestic law, *so far as they are not inconsistent* with rules enacted by States or finally declared by their tribunals.¹⁰ In interpreting statutes, the Courts act on the presumption that Parliament did not intend to violate the established principles of international law,¹¹ and may recoil, in case of *ambiguity*, from a construction which would involve a breach of the accepted rules of international law.¹² An English Court will not, thus readily assume that its jurisdiction extends to the High Seas^{12a} or to acts done by foreigners outside British territory.^{12b}

Illustrations.

It is an established principle of international law that a State has no jurisdiction over offences (excepting piracy *jure gentium*) committed by a foreigner beyond the territorial jurisdiction of the State. The Offences Against the Person Act enacted that “when any person feloniously injured abroad or at sea, died in England; or receiving the injury in England, died at sea or abroad, the offence should be dealt with in the country where the death or injury occurred”. *Held*, a foreigner who inflicted a wound at sea in a foreign ship, of which the sufferer afterwards died in England, could not be tried in England under the Act.¹³

But only such rules of international law are regarded by the English Courts as a part of English law (not being in conflict with any rule of municipal law) as (a) have been received and acted upon in English Courts, or (b) are of such a nature and have been so widely and generally accepted,¹⁴⁻¹⁵ that it could hardly be supposed that any civilised State would repudiate them. But mere opinion of jurists, however eminent, would not, in themselves, be binding.¹⁶

It is to be noted that even in regard to the rule of ‘freedom of the high seas’ the Privy Council has held that there is no generally accepted unqualified rule that a foreign ship would be entitled to this freedom even though she hovers just outside the territorial waters of a State with a view to committing an act which is prejudicial to or illegal in that State.¹⁷

The rule is one of construction, not *vires*. Hence, if an Act of Parliament is *clearly* in conflict with some rule of international law, the municipal Courts are bound to enforce that Act,¹⁸ and that rule of international law shall have no validity in England.¹⁹

But express language is required to induce a Court to hold that Parliament

(8) *The Scotia*, 14 Wall. 170.

(9) *Hilton v. Guyot*, (1896) 159 U.S. 113.

(10) *Chung Chi Cheung v. King*, (1939) A.C. 160.

(11) *Bloxam v. Favre*, (1884) 9 P.R. 130.

(12) Craies, Statute Law, p. 71.

(12a) *R. v. Keyn*, (1876) 2 Ex. D. 160.

(12b) *Lopez v. Burslem*, (1843) 4 Moo. P.C. 300.

(13) *R. v. Lewis*, (1857) 26 L.J.M.C. 104.

(14) *In re Piracy Jure Gentium*, (1934) A.C. 586.

(15) *Compania Naviera v. The Cristina*, (1938) 1 All E.R. 719 (725, 739).

(16) *West Rand Gold Mining Co. v. Rex*, (1905) 2 K.B. 391 (407).

(17) *Naim Molvan v. Att. Gen.*, A. 1948 P.C. 186.

(18) *Mortensen v. Peters*, (1906) 8 Fraser, 93; *Niboyet v. Niboyet*, (1879) 4 P.D. 1 (24); *The Zamora*, (1916) 2 A.C. 77 (93).

(19) *Chung Chi Cheung v. King*, (1939) A.C. 160; *Co-operative Committee v. A. G. of Canada*, (1947) A.C. 87.

intended, in the given case, to override the rule of international law relating to, the subject.²⁰ General terms will not be so construed.²⁰

(C) *India*.—Indian Courts, too, would apply rules of international law, unless they are overridden by clear rules of domestic law, and would act upon the general presumption just referred to. In this respect, Indian Courts have followed English precedents prior to the Constitution and the same practice is likely to be followed under the constitution.

'*Treaty obligations*'.—Cl. (c) of the present Article says that the State shall foster respect for 'treaty obligations'. This does not mean, however, that treaties to which India is a party shall become a part of the municipal law, as in the U.S.A.²¹ Specific provision is made in Art. 253, read with Entry 14 of List I of the Seventh Schedule for implementation of treaties by legislation. Hence, no treaty which has not been implemented by legislation shall be *binding* on the municipal Courts,²² and no such legislation can override Fundamental Rights.²³ Art. 253 (see *post*) only empowers the Union Parliament to legislate with respect to State subjects, if necessary, to implement treaties or other international agreements. Similarly, the Universal Declaration of Human Rights is of no avail in the Municipal Courts.²⁴

INDEX TO COMMENTS

ARTICLE 51.

Other Constitutions :

(A) Eire, 326 ; (B) French Republic, 327 ; (C) West Germany, 327 ; (D) Japan, 327.

India :

Cl. (c) : Respect for International Law, 328.

PART V

THE UNION

General

The Theory of Separation of Powers.

In a juridical Commentary, we are not concerned with the political implications of this doctrine, which may be found in any text-book on Political Science.¹ We shall discuss the question from the juristic standpoint. So far as the Courts are concerned, the application of the doctrine may involve two propositions:² viz. (a) that none of the three organs of government, legislative, executive and judicial, can exercise any power which *properly* belongs to either of the other two ; (b) that the Legislature cannot delegate its powers.

We shall discuss the question of delegated legislation more fully under Art. 245, *post*. Under the present caption we shall discuss the broader question (a) above, viz., whether any organ of government can, under a written Constitution like ours, assume to exercise any power properly belonging to any other organ, under the Constitution.

(20) Maxwell, 1946 Ed., pp. 152-3.

(21) Art. VI of the American Constitution ; see p. 322, *ante*.

(22) Cf. *Nanda v. State of Rajasthan*, A. 1951 Raj. 153.

(23) *Ajaib Singh v. State of Rajasthan*, A. 1952 Punj. 309.

(24) *Biswambhar v. State of Orissa*, A. 1957 Orissa 247.

(1) E.g., Garner, Introduction to Political Science, Ch. XIII ; Willoughby, Government of Modern States, Chs. XIV-XV ; Gilchrist, Political Science, Ch. XII.

(2) Cf. *Wishart v. Fraser*, (1941) 64 C.L.R. 470.

The theory of Separation of Powers, as it was originally enunciated, aimed at a *personal* separation of powers. This is the sense in which *Montesquieu*,³ the modern exponent of the doctrine, asserted—

"When the legislative and executive powers are united in the same *person*, or in the same body or magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive powers. Were it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Were it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man or the same body to exercise these three powers . . ."

So did *Blackstone*⁴ observe:

"Wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty."

Again, this is the sense in which the framers of the American Constitution imported the doctrine in framing that Constitution. Thus, *Madison*⁵ said—

"The accumulation of all powers, legislative, executive and judiciary, in the same hands whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

(A) U.S.A.—Upon the principle just discussed, the framers of the American Constitution vested the legislative, executive and judicial powers in three distinct authorities, by the express letters of the Constitution. Thus,

Art. I says—

"All legislative powers herein granted shall be vested in a Congress."

Art. II says—

"The executive power shall be vested in a President."

Art. III, similarly, states—

"The judicial power . . . shall be vested in one Supreme Court . . ."

The impossibility of having a rigid *personal* separation of powers has, however, been illustrated by the American Constitution itself, under which the President has got legislative powers in his right to send messages to Congress and the right to veto, while Congress has the judicial power of trying impeachments^{6a} and the Senate participates in the executive power of treaty-making and making appointments.

In modern practice, therefore, the theory of Separation of Powers has come to mean an *organic* separation or a separation of *functions*, viz., that one organ of government should not usurp functions belonging to another organ.

It is in this sense that the American Supreme Court observed in 1881—

"It is essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other . . ."

In the result,

"It may be stated . . . as a general rule inherent in the American constitutional system, that, *unless otherwise expressly provided or incidental to the powers conferred*, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power."^{6a}

But even there any rigid separation is impracticable⁷ under modern conditions when the problems of government are interdependent. As Woodrow Wilson realised it—

(3) Montesquieu, *De l'Esprit des Lois*, 1748.

(4) Blackstone, *Commentaries*, Vol. I, p. 269.

(5) Madison, the *Federalist* No. 47.

(5a) Schwartz, *Constitution of the United States*, 1963, Vol. I, p. 115.

(6) *Kilbourn v. Thompson*, (1881) 103 U.S. 168 (190).

(6a) *Springer v. Philippine Islands*, (1928) 103 U.S. 168 (192).

(7) Cf. *R. v. Federal Court of Bankruptcy*, (1938) 59 C.L.R. 555 (577).

"The trouble with the theory is that government is not a machine, but a living thing . . . No living thing can have its organs offset against each other as checks, and live. . . . Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialisation, but with a common task and purpose. Their co-operation is indispensable; their warfare fatal".⁸

Though it may still be possible to acknowledge that the functions of government are divisible into three categories,—deliberative, magisterial and judicial, as they were in the days of Aristotle, it is impossible, in a modern State, to assign these functions exclusively to the three organs—the Legislature, the Executive and the Judiciary. To put it conversely, it is not possible to define the functions of the three organs with such mathematical precision and say that the business of the Legislature is to make, of the Executive to execute, and of the Judiciary to interpret and apply, the law to particular cases. An eminent authority illustrated this interaction among the different organs with reference to modern conditions thus:

"Functions have been allowed to courts, as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts. By this means Congress has been able to move with freedom in modern fields of legislation, with their great complexity and shifting facts, calling for technical knowledge and skill in administration. Enforcement of a rigid conception of separation of powers would make modern government impossible."⁹

In order to function efficiently, each department must exercise some *incidental* powers which may be said to be strictly of a different character than its essential functions. For example, the Courts must, in order to function efficiently, possess the power of making rules for maintaining discipline or regulating procedure,¹⁰ even though that power may be of the nature of a legislative power. The power of making rules of procedure in the Courts is not regarded as of the *essence* of the functions of the Legislature.¹¹ Again, in interpreting laws and in formulating case law, the Courts do, in fact, perform a function analogous to law-making. In particular, in dealing with new problems where authority is lacking, the Courts have to create the law, even though under colour of interpretation of and deduction from the existing law.

Similarly, the ascertainment of a state of facts upon the testimony of witnesses may be incidental to some executive action and is not confined to the judicial powers.¹² In fact, the most glaring violation of the strict theory of separation of powers is to be found in the administrative agencies in the American system of government today. Most of these bodies combine in themselves the legislative function of subordinate legislation; the executive function of investigation and prevention of complaints against breaches of the statute which it has to administer as well as of the rules and regulations made by itself;¹³ and the judicial function of adjudicating disputes and complaints¹⁴ arising under such statute and subordinate legislation.¹⁴⁻¹⁵ Questions have indeed been raised from time to time whether such concentration of functions offends against the principle of Separation of Powers or even the more widely acknowledged common law principle that the functions of prosecutor and judge should not be combined in the same hands.¹⁶ Nevertheless, the American Supreme Court has upheld such concentration of functions, by resorting to some quibbles.

Firstly, it has said that the functions of subordinate legislation and adminis-

(8) Woodrow Wilson, *Constitutional Government in the U.S.*, (1908), p. 56.

(9) Frankfurter, *The Public and its Government*, quoted in Schwartz, *American Constitutional Law*, 1955, p. 286.

(10) See e.g., Art. 145 (1), *post*.

(11) *Wayman v. Southward*, (1825) 10 Wh. 1 (42).

(12) Willoughby, *Constitutional Law*, Vol. III, p. 1653.

(13) *Cf. Boyce Motor Lines v. U. S.*, (1952) 342 U.S. 337.

(14) *Fed. Trade Commn. v. Cement Institute*, (1948) 333 U.S. 683.

(15) *Marcello v. Bonds*, (1955) 349 U.S. 302.

(16) *Wong Yang Sang v. McGrath*, (1950) 339 U.S. 33 (45) Jackson J.

trative adjudication are not essentially legislative or judicial functions, but only *quasi-legislative* and *quasi-judicial*.¹⁷

Secondly, as to the concentration of the functions of the investigator, prosecutor and judge in the same administrative tribunal, the Court has said that it is necessary for effectuating the policy of the Legislature in a matter requiring administrative determination, the subject being not fit for determination by a court of law.¹⁴⁻¹⁵ Even the charge of bias against an administrative tribunal because of its having pre-conceived views on the subject-matter of adjudication has been brushed aside on the same ground. In *England*, it has been held that persons who had taken part in the promulgation of an order or regulation cannot afterwards sit for adjudication of a matter rising out of such order,¹⁸ because of the likelihood of their being biased [see Vol. I, p. 347]. In the United States, on the other hand, it has been held that members of the Federal Trade Commission, who in their testimony before congressional committees had expressed the opinion that the multiple basing point system was in the nature of a restraint of trade in violation of the Sherman Act, were not disqualified from deciding a complaint of violation of that Act by resorting to the multiple basing point system, because it was the policy of Congress that complaints against such trade practices should be heard by persons who had gained experience from their work as commissioners.¹⁴ No English case has gone so far.

The modern interpretation of the doctrine of Separation of Powers, therefore, is that one organ or department of government should not usurp the functions which *essentially* belong to another organ. Thus, the formulation of legislative policy or the general principles of law is an essential function of the Legislature and cannot be usurped by another organ, say, the Executive.¹⁹ The form of government has no final effect upon the application of the doctrine, though it may limit the extent²⁰ of its application. Hence, the fact that the Constitution of *India* adopts the Parliamentary form of government to the exclusion of the Presidential form of the American type should not be supposed as absolutely excluding a differentiation of functions. For, the doctrine has been largely applied in *Australia*, where also the Parliamentary system of the British type prevails.

(B) *England*.—Of course, in the Parliamentary system of government as it exists in *England*, there is a blending of the legislative and executive functions in the hands of the Executive organ, and, on the other hand, the Legislature has supreme power to determine its own powers and those of the other organs of government; but even there, the Legislature refrains from usurping what are *essentially* deemed to be functions belonging to another organ of government. Thus, by a self-denying ordinance, the English Parliament has provided that no measure relating to the raising of revenue or the expenditure of the public moneys shall even be considered by it, except on the recommendation of the Executive²¹ because financial administration has been regarded as an essential responsibility and function of the Executive. At the same time, it is an equally fundamental principle of the English system that the Executive shall have no power to impose taxes in any form without the concurrence of the Legislature,—taxation being regarded as an essentially legislative function.²²

(C) *Eire*.—Under the Irish Constitution, the principle of separation of powers has been deduced from several provisions.

Art. 6 says—

"All powers of government, legislative, executive and judicial, derive, under God, from the people and are exercisable only by or on the authority of the organs of the State established by the Constitution".

(17) *Humphrey's Executor v. U. S.*, (1935) 295 U.S. 602.

(18) *R. v. Sunderland Justices*, (1901) 2 K. B. 357.

(19) *Mutual Film Corporation v. Industrial Commission*, (1915) 236 U.S. 230; *Yakus v. U. S.*, (1943) 321 U.S. 414.

(20) *Victorian Stevedoring Co. v. Dignan*, (1931) 46 C.L.R. 73 (114).

(21) Cf. Willoughby, *Government of Modern States*, p. 239.

(22) *Attorney-General v. Wilt's United Dairies*, (1921) 91 L.J. K.B. 897; *Ferries v. Scottish Milk Board*, (1937) A.C. 126.

It has been held that

"the manifest object of this Article was to recognise and ordain that all powers of government should be exercised in accordance with the well-recognised principle of the distribution of powers between the legislative, executive and judicial organs of the State and to require that these powers *should not be exercised* otherwise. The subsequent articles are designed to carry into effect this distribution of powers".²³

Arts. 34-37, relating to the powers of the High Court and other Courts, have been interpreted to have the effect of vesting "in the Courts the exclusive right to determine justiciable controversies".²⁴

But the doctrine has not been pushed to the logical extreme of depriving authorities lawfully established under other provisions of the Constitution, of incidental and ancillary powers. Thus, it does not prevent the delegation of subordinate legislative powers to the Executive in respect of matters of detail requiring expert knowledge;²⁵ or to vest quasi-judicial powers in administrative bodies, e.g., a Land Commission for the acquisition of land.²⁶

(D) *Australia*.—The Commonwealth of Australia Constitution Act, 1900 purports to follow the doctrine of separation of powers by vesting the three branches of governmental power in three different bodies. Thus,

S. 1 says that—

"The legislative power of the Commonwealth shall be vested in a Federal Parliament . . ."

S. 61 provides—

"The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative . . ."

S. 71, on the other hand, provides—

"The judicial power of the Commonwealth shall be vested in a Federal Supreme Court . . . and in such other federal courts as the Parliament creates . . ."

It is evident, therefore, that in the absence of any contrary provision, the principle of separation of powers is embodied in the Constitution.¹ It was intended to confine to each of the three departments of government the exercise of the power with which it was invested by the Constitution.²

It has, accordingly, been held that under the Australian Constitution, judicial and non-judicial functions cannot be united in the same person or body of persons and that judicial functions can be vested only in a 'court'.³ Nor can it designate a non-judicial body (such as an industrial arbitrator) as a 'court' and then confer judicial functions upon it.⁴ Thus, though it is possible to create a 'tribunal' with 'the trappings of a court', such as a Board of Review to review the decisions of the Commissioner of taxation,⁵ to vest judicial powers, such as the power of fining or imprisoning a citizen, in any tribunal other than a 'court' would be violative of s. 71 of the Constitution Act.⁶

Conversely, non-judicial powers cannot be vested in a court except in so far as such powers are *incidental* to the 'judicial power', within the meaning of s. 51 (xxxix).

The theory also applies, broadly, as between the legislative and executive functions but in this sphere, it admits of an exception of the Executive being vested with the power to make subordinate legislation. But such delegation of the legislative power has been supported on the ground that in conferring subordinate power, the Legislature does not abdicate its legislative power and the delegatee always remains under the control of the Legislature.⁷

(E) *India*.—Though the executive power of the Union and of a State are vested by our Constitution in the President and the Governor, respectively, by Arts. 53 (1)

(23) *Buckley v. Att. General*, (1950) Ir. R. 67 (81).

(24) *Pigs Marketing Board v. Donnelly*, (1939) Ir. R. 413.

(25) *Fisher v. Irish Land Commission*, (1948) Ir. R. 3.

(1) *A. G. of Australia v. R. & The Boilermakers' Society*, (1957) 2 All E.R. 45 (51) P.C.

(2) *Victorian Stevedoring Co. v. Dignan*, (1931) 46 C.L.R. 73 (96).

(2a) *Shell Co. v. Fed. Commr. of Taxation*, (1931) A.C. 275.

and 154 (1), there is no corresponding provision in our Constitution, vesting the legislative and judicial powers in any particular organ. It has, accordingly, been held that there is no rigid separation of powers^{2b,3} under our Constitution as under the Australian Constitution. In the result, there is no bar against vesting the judicial powers of the State in a tribunal other than a 'court', strictly so-called. The very fact that Art. 136 (1) or 227 (1) mentions both courts and tribunals shows that the judicial power of the State may be vested in courts and tribunals, even though the two classes of judicial authorities may differ as to the nature of the questions referred to them, the procedure to be followed by them and the like.¹

But though the Supreme Court, in the *Delhi Laws Act case*^{2b} noticed that our Constitution does not vest the legislative and judicial powers in the Legislature and the Judiciary in so many words, the majority, in effect, imported the *essence* of the modern doctrine of Separation of powers, applying the doctrines of constitutional limitation and trust.^{2b} None of the organs of government under the Constitution can, therefore, usurp the function or powers which are assigned to another organ by the Constitution, expressly or by necessary implication. On the same principle, none of the organs can divest itself of the essential functions which belong to it under the Constitution.

It was pointed out that though the functions (other than the executive) were not vested in particular bodies, the Constitution, being a written one, the powers and functions of each must be found in the Constitution itself. Thus, subject to exceptional provisions like Arts. 123 and 213 (power to make ordinances during recess of Legislature) and Art. 357 (exercise of legislative powers by President in case of breakdown of constitutional machinery in the States), it is evident that the Constitution intends that powers of legislation shall be exercised exclusively by the Legislature created by the Constitution, i.e., by the Parliament in the case of the Union. As Kania C.J. observed—

"Although in the Constitution of India there is no express separation of powers, it is clear that a Legislature is created by the Constitution and detailed provisions are made for making that Legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making laws is primarily cast on the Legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies—executive or judicial, are not intended to discharge legislative functions?"^{2b}

Similarly, Mukherjea J. observed—

"Law-making undoubtedly is a task of the highest importance and responsibility and as our Constitution has entrusted this task to particular bodies of persons chosen in particular ways; and not only does it set up a machinery for law-making but regulates the methods by which it is to be exercised and makes specific provisions for cases where departure from the normal procedure has been sanctioned, the *prima facie* presumption must be that the intention of the constitution is that the duty of law-making is to be performed primarily by the legislative body itself."^{2b}

The same thing was expressed by Mahajan J. as regards the judicial power thus:

"... the Constitution trusts to the judgment of the body constituted in the manner indicated in the Constitution and to the exercise of its discretion by following the procedure prescribed therein. On the same principle the Judges are not allowed to surrender their judgment to others. It is they and they alone who are trusted with the decision of a case. They can, however, delegate *ancillary* powers to others, for instance, in a suit for accounts and in a dissolution of partnership, commissioners can be entrusted with powers authorising them to give decision on points of difference between parties as to items of account."^{2b}

The majority of the Supreme Court^{2b} proceeded to this conclusion upon the ordinary rule of statutory construction:

"If a statute directs certain acts to be done in a specified manner by certain persons, their performance in any other manner than that specified or by any other person than is there named is impliedly prohibited."⁴

(2b) In re Delhi Laws Act, 1912, (1951) S.C.R. 747; (1950-51) C.C. 328 (337, Kania C.J.; 342-4, Mahajan J.; 349-350, Mukherjea J.).

(3) *A. C. Companies v. Sharma*, (1965) 1 S.C. A. 723 (737).

(4) Crawford, Statutory Construction, p. 334. [See also Vol. I, p. 31].

Thus it is, that the view expressed by the Author at p. 210 of the First Edition of this Commentary, that notwithstanding the refusal of the framers of our Constitution to introduce a rigid separation of powers in the Constitution, there is a differentiation of functions between the Executive, Legislature and Judiciary and that no organ can constitutionally assume the powers that essentially⁵ belong to another organ, has come to be confirmed by the observations of the Supreme Court in the *Delhi Laws Act* case,^{2b} and also in the later case of *Ram Jawaya*.⁶

The matter becomes more interesting in view of the fact that Sastri C.J., who was himself a party in the *Delhi Laws Act* case,^{2b} later observed⁷ that that case^{2b} had laid down no principle which might be of assistance for future application:

"While undoubtedly certain definite conclusions were reached by the majority of the Judges who took part in the decision in regard to the constitutionality of certain specified enactments, the reasoning in each case was different and it is difficult to say that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases."

But, notwithstanding the above pronouncement of his Lordship, this Author ventured to submit, in his *Cases on the Constitution*,⁸ that the majority judgments in the *Delhi Laws Act*⁴ case had laid down two principles, as follows—

I. That the essential legislative functions cannot be delegated.

II. That conditional legislation and the conferment of the power of subordinate legislation, short of delegation of the essential legislative functions, are valid.

In *Rajnarin v. Patna Administration*⁹ and *Harishankar v. State of M.P.*,¹⁰ the Supreme Court has, by unanimous judgments, affirmed the foregoing two provisions as being established by the *Delhi Laws Act* case.^{2b} If the essential functions of the Legislature cannot be assumed by another body with the former's consent, it follows that it cannot be usurped by the latter without the former's consent.

So, whenever there is a complaint that an organ of government has unconstitutionally usurped powers not assigned to it or has abdicated the functions entrusted to it, the following two questions have to be examined under our Constitution, as under other Constitutions:

(a) Has the organ in question an unlimited power to determine its own powers and functions? (b) To what organ does the power in question essentially belong?

(a) On the first question, the fact of a Constitution being written offers a definite answer, namely, that all the three organs derive their powers from the same instrument and each exercises powers limited by the same.¹¹ So stated, the doctrine, in effect, means that an organ with limited powers must not exceed its powers as defined by the instrument by which powers have been conferred upon it, and the limitation is not necessarily dependent upon the federal or unitary character of the government.¹²

(b) But there is no clear agreement as to the precise scope of the three kinds of power or function. Shortly speaking,—

"The legislative power is the power to *make laws* and to alter them at discretion; the executive power is the power to see that the *laws are duly executed* and enforced; the judicial

(5) As distinguished from the exercise of 'incidental' or 'auxiliary' powers [see p. 325 ante] which rests upon the principle—"Everything necessary to the exercise of a power is implied in the grant of a power."

(6) *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (236).

(7) *Kathi Raning v. Saurashtra*, (1952) S.C.R. 435 (444).

(8) Author's *Cases on the Constitution* (1950-51), p. 377.

(9) *Rajnarin v. Chairman, Patna Administration Committee*, (1955) 1 S.C.R. 290.

(10) *Harishankar v. State of M. P.*, (1955) 1 S.C.R. 380.

(11) Cf. Cooley, *Constitutional Limitations*, 7th Ed., p. 126.

(12) Cf. *R. v. Burah*, (1878) 3 A.C. 889 (905).

power is the power to *construe and apply the law* when controversies arise concerning what has been done or omitted under it."¹²

In other words—

(i) *Legislative Function*.—The legislative function consists in the laying down of rules of conduct binding on the members of the State and includes the making of new law, and the alteration or repeal of existing law, or the application of existing law *with substantial modification*.^{9, 14-15}

In a modern State, however, the function of the Legislature does not consist simply of law-making. In formulating a policy, it has to determine *how* the policy shall be carried out, by *whom* and how *funds* shall be available for the purpose.¹⁶⁻¹⁷

(ii) *Executive Function*.—The executive function includes the direction of the policy and administration of the affairs of the State within the limits of the law of the land,^{18-18a} and the detailed carrying on of government according to law. In other words, the Executive is concerned with "the execution of the will of the State as . . . has been formulated and expressed in terms of law".¹⁹

As to 'executive' function, see further, under Art. 53 (1), *post*.

(iii) *Judicial Function*.—The primary function of the judicial organ is to interpret the law and to apply it in all cases and disputes brought before the Court for their decision. The judicial power is "the power which every sovereign authority must of necessity have to *decide controversies* between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property".²⁰ As to interpretation of the law, it is to be noted that the Courts have *no general power* to interpret the laws passed by the Legislature; they can only decide cases properly brought before them, and in the determination of those particular cases, they can interpret the will of the Legislature according to established canons of interpretation. As the American Supreme Court has observed—

"Judicial power is the power of a Court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."²¹

But though there is a general agreement as to the broad differentiation between the three functions, there is indeed no such definite demarcation at the margins, and different views are taken under different Constitutions as regards the extent of its application. Anyway, we may make an attempt to discover the generally accepted propositions indicating the boundaries between these different functions:

(a) *Executive and Legislative Functions*.—The essentials of the legislative function being the determination of the legislative *policy*²² and its formulation and promulgation as defined and binding rules of conduct, the Executive cannot, in the exercise of its administrative powers, assume the power to make laws.²³ The power to 'make law' means the power to determine what the law shall be, as distinguished from any question relating to execution of a law.²⁴ Similarly, *taxation and appropriation of public money* are regarded as legitimate functions of the Legislature in all countries which have adopted the English system of representative government.²⁵ The Executive would not be allowed to usurp these

(13) Cooley, Constitutional Law, p. 48.

(14) In re Delhi Laws Act, 1912, (1950-51) C.C. 328 (332, 340, 351, 358).

(15) *Vanarsi v. State of M. P.*, A. 1958 S.C. 909.

(16) *Yakus v. U. S.*, (1943) 321 U.S. 414.

(17) Our Constitution also vests in the Legislature the sole power of making grants [Arts. 114 (3); 204 (3)] and of imposing taxes [Art. 265].

(18) Keith, Introduction to Br. Constitutional Law, p. 2.

(18a) *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (236).

(19) Garner, Political Science and Government, p. 677.

(20) *Huddart Parker v. Moorehead*, (1908) 8 C.L.R. 330 (357), approved by the Privy Council in *Shell Co. v. Fed. Commissioners*, (1931) A.C. 275 (295).

(21) *Muskrat v. U. S.*, (1911) 219 U.S. 346 (356).

(22) *Yakus v. U. S.*, (1943) 321 U.S. 414.

(23) In re Delhi Laws Act, 1912, (1950-51) C.C. 328 (344-5).

As to how far the Legislature can delegate this function, see under 'Subordinate Legislation', under Art. 245, *post*.

(24) Cf. *Jatindra v. Province of Bihar*, (1949) F.L.J. 225 (239, 248).

(25) Cf. Arts. 110, 114-117, 265-266 of our Constitution.

functions even indirectly. Hence, the Executive cannot make an agreement involving expenditure of public money,¹ nor impose a financial burden on the subject without authority of the Legislature.²

Similarly, the setting up of Courts is a legislative power,³ and the Executive cannot, therefore, establish a tribunal without Parliamentary authority.⁴

(b) *Judicial and Legislative Functions*.—"The distinction between a judicial and a legislative act is well-defined. The one determines what the law is, and what rights the parties have with reference to transactions *already had*; the other prescribes what the law shall be in *future* cases arising under it".⁵ "A judicial enquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power".⁶ "To declare what the law *is or has been* is a judicial power; to declare what the law *shall be* is legislative".⁷ It is not for the Judges to *alter* the law, even though they have reasons to doubt the wisdom or justice of any provision or to find that the Legislature has made a mistake or was even deceived.⁸

A. Since it is the function of a court to ascertain the facts of a case presented before it and to apply to those facts the established principles of law, while it is the function of Parliament to determine questions of public interest on considerations of public policy⁹ courts will not intervene to prevent such matters being placed before Parliament, even where some private interest is involved. Thus, an injunction will not be issued to restrain a party from applying to Parliament or from opposing an application to Parliament even though he has entered into an agreement not to do so.⁹

Nor will the Judiciary encroach upon the proper sphere of the Legislature on other matters. Thus, the *levying of a tax*, that is to say, the determination that a given tax shall be imposed, assessed and collected in a certain manner, is a legislative function.¹⁰ The Legislature may prescribe the basis, fix the rate and require payment as it may deem proper.¹¹ The Courts cannot, therefore, question the validity of a tax on the mere ground of its excessiveness. "The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the Courts, but to the people by whom its members are elected".¹² It is no part of the function of the Court to enquire into the reasonableness of a tax, either in respect of the amount or of the property on which it is imposed.¹³ The Courts can interfere with the taxing power of the Legislature only when the Legislature violates some provision of the Constitution, e.g., the guarantee of equal protection of the laws.

For the same reason, the determination of rates⁶ or fees for the services of public bodies is a legislative act. Similarly, the *prescribing of penalties* for the violation of laws is a legislative act and the Courts have no power to add to the penalties prescribed by law.¹⁴

Nor would the Court in the exercise of its powers, go to the extent of controlling the Legislature as regards its internal matters, e.g.—(i) to pass upon the

(1) *Commonwealth v. Colonial Combing Co.*, (1922) 31 C.L.R. 421.

(2) *A. G. v. Commonwealth*, (1935) 52 C.L.R. 533.

(3) Cf. Entry 3 of List II of Sch. VII of our Constitution.

(4) *Waterside Workers' Federation v. Commonwealth*, (1920) 14 C.L.R. 276.

(5) *Field, J.* in *Sinking Fund Cases*, (1878) 99 U.S. 700.

(6) *Prentiss v. Atlantic Coast Co.*, (1908) 211 U.S. 210.

(7) *Ogden v. Blackledge*, 2 Cr. 276; *Dash v. Van Kleeck*, (1811) 7 Johns. 498.

(8) *Labrador v. The Queen*, (1893) A.C. 104.

(9) *Bilston Corp. v. Wolverhampton Corp.*, (1942) 2 All E.R. 447 (451).

(10) Willoughby, *Constitutional Law*. Vol. III, p. 667.

(11) *Pacific Insurance Co. v. Soule*, 7 Wall. 433.

(12) *Veazie Bank v. Fenno*, (1869) 8 Wall. 533; *Theat v. White*, (1901) 181 U.S. 264.

(13) *Patton v. Brady*, (1902) 184 U.S. 608.

(14) *Stewart & Bro. v. Bowles*, (1943) 322 U.S. 398.

credentials of a person claiming membership of a legislative body; (ii) to prescribe rules of procedure in the legislature.¹⁵

B. On the other hand, as has been already stated, *interpretation* of laws is the exclusive function of the Judiciary; the Legislature is not competent to say how its own laws should be interpreted or applied in *particular cases*.¹⁶⁻¹⁷ The function of the Legislature is to affect the rights of individuals in the abstract by laying down rules of *general* applicability, addressed to *unspecified* persons; it is the business of the courts to apply those rules in the determination of the rights of *particular* individuals who seek such adjudication from the courts.

Nor should the Legislature take up the function of adjudicating disputes between private parties as to their legal rights which is the function of duly constituted Courts in all civilised countries.¹⁶⁻²⁰ Such *ad hoc* legislation directed against particular named individuals relating to their legal rights is "not far removed from the notorious parliamentary procedure formerly employed in Britain of punishing individual delinquents by passing bills of attainder".¹⁸

The same thing is pronounced by the American Supreme Court in different words—

"The theory of our government, State and national, is opposed to the deposit of unlimited power anywhere. The executive, legislative and the judicial branches are all of limited and defined powers No Court would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D, or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B."²¹

(c) *Judicial and Executive Functions*.—Since it is the business of the Courts to apply the Constitution and the laws in cases properly brought before them, the Judiciary exercises control over Executive action in so far as it would refuse to uphold as valid any act of the government which is not supported by the Constitution²² or by some law.²³ The authority of the Courts as regards executive action arises when the Executive *exceeds* its authority, in which case the agents and instruments through which the action is carried out, are personally responsible to law and the Courts. Even under the unwritten Constitution of England, it is the duty of the Courts to see whether the Executive acts in *excess* of the law. [See Vol. I, pp. 250, 305, 332].

Judicial control over executive action is, however, limited by the principle that the Judiciary will not encroach upon what belongs properly to the executive sphere. From this it follows that—

(a) It is not the business of the Courts to pass judgment upon the *policy* of executive action, e.g., the acts of the department of foreign affairs.²⁴ The exercise of *political* power is not within the province of the judicial department.²⁵

"The Constitution has many commands that are not enforceable by Courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. The Constitution has left the performance of many duties in the governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."²⁶

(15) Willoughby, Constitutional Law, Vol. III, p. 1622.

(16) *Ram Prasad v. State of Bihar*, (1953) S.C.A. 578 (584).

(17) *Ameerunissa v. Mahboob*, (1953) S.C.A. 565.

(18) *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (891, Sastri, J.).

(19) In England, a Bill of Attainder is, at least, *obsolete* [Keith, Constitutional Law, 1939, p. 245]. In the U.S.A., it is expressly prohibited by the Constitution [Art. I, ss. 9-10].

(20) See also Rottschaffer, Constitutional Law, 1939, pp. 50-51.

(21) *Loan Association v. Topeka*, (1875) 87 U.S. 655.

(22) *Kendall v. United States*, (1838) 12 Pet. 524.

(23) *Eastern Trust Co. v. McKenzie Co.*, (1915) A.C. 750; *Eshugbayi v. Nigerian Government*, (1931) A.C. 662; *Liversidge v. Anderson*, (1942) A.C. 206.

(24) *Cherokee Nation v. Georgia*, (1831) 6 Wall. 50.

(25) *Williams v. Suffolk Ins. Co.*, (1839) 13 Pet. 415; *Quackenbush v. U. S.*, (1900) 177 U.S. 25.

(1) *Colegrove v. Green*, (1945) 328 U.S. 549 (556).

It is on the above principle that the *American* Judiciary has refused to determine the following questions as 'political' and belonging to the exclusive province of the Executive authority: (i) The correctness of the decision of the President, acting under authority of a law, as to the necessity of calling out the militia to repel an invasion or to suppress an insurrection.² (ii) How long it would be lawful for the government to continue military occupation of a territory affected with disorder.³ (iii) To determine whether a foreign State is at peace or in a state of war or neutrality with the United States.⁴ (iv) To determine which of two or more contending foreign States shall be recognized by the American Government.⁵⁻⁶ (v) The question whether a given person is to be recognized as the sovereign⁵ or accredited agent of a foreign government.⁷ (vi) Whether a treaty or agreement entered into by the United States has been sufficiently ratified by the foreign State concerned.⁸ (vii) The title or sovereignty of the United States over a foreign territory.⁹ (viii) Anything which touches upon foreign policy has been held to be *political* and, accordingly, outside the pale of judicial review, e.g., whether a foreign air carrier should be granted permission to operate in the United States, even though the exercise of the Presidential power in this behalf be regulated by legislation;¹⁰ (ix) Implementation of the obligations under a treaty or international agreement.¹¹

(b) Another self-imposed limitation is that Courts will not interfere with matters which are by the Legislature committed to the *discretion* of administrative authorities.¹² Of course, where the administrative authority refuses to exercise the discretion which it is his duty to exercise under the law, the Court may compel him to exercise it, but the Court will never direct *how* the discretion is to be exercised.¹³

On the other hand, the Executive has no authority to pass upon the validity of a judgment and it is bound to assist in enforcing it even though the Executive may believe it to be erroneous.¹⁴ It is the duty of the Executive to carry out the decisions of Courts of competent jurisdiction and not to avoid or circumvent them. Thus, in *The King v. Speyer*,¹⁵ Lord Reading (L.C.J.) observed—

"This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority, it will be followed by the Crown."¹⁶

In another case,¹⁶ where a person was restrained by Court from receiving certain monies from the Government, but Government nevertheless paid him the monies, contending that Government had, under the statute, the discretion to pay and that the Court had no ground to interfere with the discretion, the Privy Council, negating the contention, observed—

"If it was a case of a private individual, he would be clearly bound to make good the wrongful payment and purge his contempt. In the case of the Crown there is no ground for the proposition that the Government were given such power by the Legislature over the subject-matter and that the Courts have no ground for interfering at all, directly or indirectly, with the exercise of such a discretion. There is nothing on which to found the existence of the alleged discretion or to support a decision which pronounced the Executive Government free to dispose of money the right to which is sub-judice inter partes and held in medio by the order of the Court

(2) *Martin v. Mott*, (1827) 12 Wh. 19.

(3) *Neeley v. Henkel*, (1901) 180 U.S. 109.

(4) *Williams v. Suffolk Insurance Co.*, (1839) 13 Pet. 415.

(5) *Jones v. U. S.*, (1890) 137 U.S. 20.

(6) In England also, it is the business of the Executive to determine the status of a foreign Government and the Courts will take as conclusive the information received from the Secretary of State in case of any uncertainty [*Duff Development v. Govt. of Kelantan*, (1924) A.C. 797 (H.L.)].

(7) *Ex parte Baid*, (1890) 135 U.S. 403.

(8) *Terlinden v. Ames*, (1902) 184 U.S. 270.

(9) *Wilson v. Shaw*, (1906) 204 U.S. 24.

(10) *C. & S. Airlines v. W. S. Corp.*, (1948) 333 U.S. 103 (109).

(11) *U. S. v. Pink*, (1942) 315 U.S. 203; *U. S. v. Pink*, (1942) 331 U.S. 503 (514).

(12) *F. C. C. v. Pottsville Broadcasting Co.*, (1940) 309 U.S. 134.

(13) On this point, see further under *Mandamus*, Art. 226, *post*.

(14) Cooley, *Constitutional Law*, p. 203.

(15) *The King v. Speyer*, (1916) 1 K.B. 596.

(16) *Eastern Trust Co. v. McKenzie Mann & Co.*, (1915) A.C. 750.

The non-existence of any right to bring the Crown into Court does not authorise the interference by the Crown with private right at its own mere will.....

It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it."¹⁶

On the same principle, it has been held, in *India*, that Government may in proper cases be bound by an injunction issued in a proceeding to which it is not a party.¹⁷

"But then it was asked—What would happen if the Collector ignored the order of the Court? What remedy would the appellant have if it had omitted to ask for specific relief against the Collector? It is highly improbable that any officer of the Government would set the Court in defiance. It is impossible to suppose that Government would countenance such conduct at that."¹⁷

Nor can the Government anticipate the judgment of the Court in an application for *habeas corpus*, and issue a fresh order of arrest during the pendency of the proceeding and without communicating it to the Court, with the object of flouting the judgment of the Court.¹⁸

Our Constitution, of course, differs from the American¹⁹ and Australian²⁰ Constitutions in so far as there is no attempt at any express introduction of the doctrine of Separation of Powers, by 'vesting' the executive, legislative and judicial powers in different organs. Our Constitution vests the 'executive power' in the President [Art. 53 (1)], but there is no corresponding 'vesting' provision as regards the legislative and judicial powers. From this, it is evident that the framers did not intend to introduce any rigid application of the doctrine of Separation of Powers into our Constitution as would tend to divide them into water-tight compartments. As we shall see just now, at least as between the Legislature and the Judiciary there is no such rigid separation of powers under our Constitution, as debars the American Legislature to "set aside judgements of Courts, compel them to grant new trials, order the discharge of offenders or direct what steps shall be taken in the progress of a judicial enquiry".²¹

Power of the Legislature to override judicial decisions.

(A) U.S.A.—The fundamental principle followed in the *United States* is that the Legislature cannot pass judgments or decrees.²² Hence,—

(a) The Legislature cannot override, annul or modify judicial decisions by retrospective legislation.^{21a}

"Legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Court in the exercise of their undoubted authority have made this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a Court of review to which parties might appeal when dissatisfied with the rulings of the Courts."²³

"A Legislature has no power to reverse a judgment rendered by a Court. Neither can it modify a judgment, nor impair the remedies by which it may be enforced. The Legislature cannot directly adjudicate controversies."²⁴

Hence, nothing short of an amendment of the Constitution itself can avoid the undesirable effects of an unpopular decision.

(17) *Fischer v. Secretary of State*, (1808) 22 Mad. 270 P.C.

(18) *In re Gopalan*, (1952) II M.L.J. 690.

(19) Cf. Art. 1, Sec. 1; Art. 2, Sec. 1 (1); Art. 3, Sec. 1 of the Constitution of the U.S.A.

(20) Cf. Secs. 1, 61 and 71 of the Commonwealth of Australia Constitution Act.

(21) *Stephens v. Cherokee Nation*, (1899) 174 U.S. 445.

(21a) *Mc Culloch v. Virginia*, (1898) 172 U.S. 102.

(22) Cooley, *Constitutional Law*, pp. 395, 401.

(23) Cooley's *Constitutional Limitations*, 8th Ed., p. 190.

(24) Willis, *Constitutional Law*, 1st Ed., p. 159.

(b) Similarly, a resolution of the Legislature whereby a decree of a Court is set aside and a retrial is directed, purports to do a 'judicial' and not a legislative act.²³

(c) It would be equally incompetent for the Legislature, by retrospective legislation, to make valid any *proceedings* which have been had in the Courts but which were void for want of jurisdiction between the parties, for, a proceeding without jurisdiction being void, the curative Act must be in the nature of a judgment.²²

(d) Again, the Legislature cannot determine what shall be the rights of parties in respect of *past* transactions, i.e., to make declaratory statutes with retrospective effect.²⁵

"Wherever an act undertakes to *determine* a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is, to that extent, a judicial one, and not the proper exercise of legislative functions."²⁴

(B) *England*.—The theory of sovereignty of Parliament admits of no limitations upon the power of Parliament to change the law in any way it pleases, and the theory of Separation of Powers does not stand in the way of legislative interference with judicial decisions.

Under the *English* system, therefore, the Legislature may validly *annul* judicial decisions by directing that they be reopened and retried on a different view of the law.¹ It may also directly pass declaratory Acts laying down propositions which in effect set aside decisions of the Courts.² For example, the decision in *Priestly v. Fowler*³ was superseded by the Employers' Liability Act, 1880; similarly, *Taff Vale Ry. v. Amalgamated Society*⁴ was superseded by the Trades Disputes Act, 1906. Again, in *Bowles v. Bank of England*,⁵ it was decided, following *Stockdale v. Hansard*,⁶ that it was unlawful for the Government to collect taxes under the authority of the Resolutions of the Committee of Ways and Means (resolution of either House of Parliament is not law). But the Provisional Collection of Taxes Act, 1913, nullified this decision by giving statutory force, for a limited period, to resolutions of the Committee of Ways and Means. Similarly, the Indian Divorce Validating Act, 1921, validated with retrospective effect, divorces made by Indian Courts which had been declared invalid in *Keyes v. Keyes*.⁷

The Legislature, under the *English* system, may also enact, *retrospectively*, that decisions which were *ultra vires* owing to want of jurisdiction, should be treated as decisions of duly constituted and competent tribunals.⁸

(C) *Australia*.—Following *English* jurisprudence, it has been held in *Australia* that a legislation, either overriding judicial decisions or validating⁹ them, with retrospective effect, does not constitute an exercise of the 'judicial' power.

But where a change in the law is made, the Legislature cannot interfere with the judicial function by laying down that a particular pending proceeding should be decided this way or that. Thus, in an *Australian* case,¹⁰ it was held that a regulation made to defeat a possible High Court decision in a case standing for judgment is incapable of retrospective effect with respect to a liability already

(25) *The Sinking Fund Cases*, (1878) 99 U.S. 700; Willoughby, *Constitutional Law*, Vol. III, p. 1620.

(1) *Piars Dusadh v. Emperor*, A. 1944 F.C. 1 (8).

(2) *Craies on Statute Law*, 4th Ed., 61.

(3) *Priestly v. Fowler*, (1857) 3 M. & W. 1.

(4) *Taff Vale Ry. v. Amalgamated Society*, (1901) A.C. 426.

(5) *Bowles v. Bank of England*, (1913) 1 Ch. 57.

(6) *Stockdale v. Hansard*, (1839) 9 A. & E. 1.

(7) *Keyes v. Keyes*, L.R. 1921 P. 204.

(8) *Tilonko v. Attorney-General*, (1907) A.C. 93; *Piars Dusadh v. Emperor*, A. 1944 F.C. 1 (9).

(9) *Federal Commissioner v. Munro*, (1931) 38 C.L.R. 153.

(10) *Sendall v. Fed. Commissioner*, (1911) 12 C.L.R. 604.

accrued. Similarly, it would not be competent for the Commonwealth Parliament to place a meaning upon an Act of Parliament for the purpose of determining a proceeding pending in the Court,—for, the interpretation of the law is for the Court.¹¹

(D) *India*.—Owing to the avoidance of a full importation of the doctrine of Separation of Powers, the contrary rules of English jurisprudence, relating to the foregoing matters, will prevail under *our* Constitution (subject, of course, to the limitations imposed by the Constitution upon the powers of the Legislature to legislate in any case).

Thus, an alteration by the Legislature of the law as settled by the decisions of the Courts does not raise any inference that those decisions were wrong or even that those who had proposed the alteration were of that opinion.¹²

Similarly, where the Legislature changes a law, it may give it a retrospective effect, so as to affect pending proceedings also, by enacting that pending proceedings relating to the matter 'shall be dismissed and be void'.¹³

But where *no amendment of the law is made*, and the Legislature directly says that some particular pending proceedings shall be discharged, it is a judicial act,—a direct disposal of the cases by the Legislature itself,—which it cannot do.¹⁴ Thus, s. 3 of the West Bengal Land Development and Planning (Amendment) Act, 1951, which declared all pending proceedings to have 'abated', was declared invalid on the ground that it was a direct disposal by the Legislature of the pending cases instead of by the Court.¹⁵

As under the English system, it will be open to the Legislature under *our* Constitution, to override the effect of a judicial decision by legislation.¹⁶ The only limitation under the Constitution upon retrospective legislation is that contained in Art. 20 (1) which we have already discussed (p. 3, *ante*). Prior to the commencement of the Constitution, there were many instances where the Legislature had enacted laws providing that suits which had been dismissed on a particular view of the law must be restored or retried, or providing for the reopening of decrees for the purpose of affording relief to the judgment-debtors, and so on, and such legislation had been upheld by the Courts as valid.¹⁷ It does not appear that the Constitution has introduced any change in this respect.

It should be carefully remembered, however, that when a law is declared invalid for contravening some constitutional provision (e.g., Art. 14 or Art. 19), the Legislature cannot amend or re-enact the law so as to reproduce those offending provisions, for, then the Court would be at liberty to declare the fresh legislation also as void. Hence, in such cases, though the Legislature can amend the law so as to remove the constitutional objection and also reopen the case adversely decided for a retrial under the fresh legislation, it cannot override the judicial decision, by merely affirming its unconstitutional legislation. In other words,—

(a) When a statute is declared unconstitutional by a Court, the Legislature cannot directly override that decision and pronounce the statute to have been valid or anything done under that statute to have been valid on the date of that judgment.¹⁸

(11) *Federated Engine Drivers' Association v. Broken Hill Co.*, (1913) 16 C.L.R. 245.

(12) *Bharat Insurance Co. v. Income-tax Commissioner*, A. 1934 P.C. 45.

(13) *Abeyesekara v. Jayatilaka*, (1932) A.C. 260.

(14) *Basanta v. Emp.*, A. 1944 F.C. 86 (91).

(15) *Debar Bux v. State of West Bengal*, (1952) C.R. 345 of 1951 (Cal.), unreported.

(16) Cf. *Jnan Prosanna v. Province of Bengal*, (1948) 53 C.W.N. 27 (70, 81) (F.B.);

In re *Valyudam*, A. 1950 Mad. 324 (332); *Bhaskar v. Adimulla Khan*, A. 1953 Nag. 40.

[The contrary view taken by the Patna High Court in *Bankey v. Jhingan*, A. 1952 Pat. 166 (172) is not tenable in view of the opinion of the Supreme Court in *Re Delhi Laws Act case*, (1951) S.C.R. 747].

(17) *Piari Dusadh v. Emp.*, (1944) 6 F.C.R. 61 (101-102).

(18) *Sabisib v. State of Orissa*, (1956) S.C.R. 43 (58).

(b) It is, however, competent for the Legislature to pass a new law or amend the existing law, removing the unconstitutionality and then provide that anything done under the offending law shall be deemed to have been done under the new law and subject to its provisions.¹⁹

The Executive has no dispensing power.

The function of the Executive being to administer and execute the laws made by the Legislature, the Executive has no power to dispense with the operation of a law in any particular case. This principle has been established in *England* since the Bill of Rights, 1688 and is bound to follow from the general principle that the function of legislation belongs to the Legislature while that of the Executive is to apply them to all cases coming within the scope of their operation. Even though the Executive head has got the power to *pardon* a person adjudged guilty of an offence, it cannot grant a license to a person to commit an act which is an offence under the law²⁰⁻²¹ or exempt a person from a legal obligation or direct that a person who has violated a law shall not be tried for the offence.

This is equally established in the *U.S.A.*^{21a} even though the executive power is 'vested in the President by the Constitution [Art. II, s. 1 (1)]

This principle is applicable to all kinds of legislation. Thus, a local authority has no power to dispense with the operation of its own bye-laws which have the force of law, if properly made.²² It has also been seen (Vol. I, pp. 243-6) that when the Executive makes rules in exercise of a statutory power, the Executive is bound to apply them in the same manner as the statute itself and has no power to dispense with such rules in particular cases. *Mandamus* would issue to enforce the observance of the rules against the rule-making authority itself.²³

In modern times, however, dispensing power is sometimes conferred upon the Executive *by the Legislature itself*,—the power to exempt particular persons or property from a general law in emergent or exceptional cases. The *American* Supreme Court has upheld the reservation of such power in the Executive by the law or statutory regulation on the ground of 'the practical impossibility of anticipating and providing in specific terms for every exceptional case which may arise', having regard to the nature of the subject-matter of the regulation, e.g., in regulations relating to the construction and location of buildings.^{23a}

But, as *our* Supreme Court has held,²⁴ legislative power to grant exemption may be valid only if the law lays down the standards according to which the power of exemption is to be exercised. If it does not, there is likelihood of the law being challenged as an unreasonable restriction on some of the fundamental rights guaranteed by Art. 19, for, if the executive authority arbitrarily exercises the power there is no check over it and no way of obtaining redress if the law has left it to his unfettered discretion.

The power to grant exemption should also be distinguished from the power to act according to *discretion*, when conferred by the statute itself, having regard to emergent circumstances.²⁵

(19) *Jagannath v. State of Orissa* (1954) S.C.R. 1046.

(20) *Thomas v. Sorrell*, (1673) 124 E.R. 1098

(21) *Ex parte Wells*, (1856) 18 How. 307. (1100, 1102).

(21a) *Kendall v. U. S.*, (1838) 12 Pet. 524 (613).

(22) *Yabbiom v. King*, (1899) 1 Q.B. 444; *William v. Flaxton Rural Council*, (1929) 1 K.B. 450.

(23) *Gorieb v. Fox*, (1927) 274 U.S. 603.

(23a) *Guruswami v. State of Mysore*, A. 1954 S.C. 592; *State of Assam v. Keshab*, (1953) S.C.R. 865.

((24) *Dwarka Prasad v. State of Uttar Pradesh*, (1954) S.C.A. 204 (212); *Harishankar v. State of M. P.*, A. 1954 S.C. 465.

(25) *Ganga Ram v. Tezpur Fishery Society*, (1957) S.C.R. 479.

CHAPTER I.—THE EXECUTIVE

The President and Vice-President

The President of India.

52. There shall be a President of India.

OTHER CONSTITUTIONS

(A) U.S.A.—The Constitution simply vests the 'executive power' in the President [Art. II, s. 1 (1)]. But the American President is not only the head of the political system, but also of the national life; not a mere party chief but "the majesty of the people incarnate".¹ He combines in himself the two English offices of the Crown and the Prime Minister,—in the words of *Bagehot*,—the 'dignified' as well as the 'efficient' functions.

The position of the American President in the political life of the nation may be best summarised in the words of *Woodrow Wilson*—

"The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs He is the representative of no constituency but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist on it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for united action, and it craves a single leader."

The pre-eminent position of the President in the American polity is thus due to the fact that he is the only authority who is elected on a nation-wide basis and can claim to represent the nation as a whole. While the Senate represents the States and the members of the House of the Representatives represent territorial constituencies within the States, the President represents the interests of all sections of the people of the United States.

The powers of the President are even widening just as the Federal Government is gaining in strength as against the States, owing to the influence of external events such as war, national economic crisis and the like. While the framers of the Constitution conceived of Congress as the most important organ in the body politic, the President has in fact come to be the most important authority in the United States, uncontrolled by little save a remote fear of impeachment. Thus, the American President has come to be 'the foremost ruler of the world',² but the principles of American Government have prevented him from becoming a despot.³

Though "the President of the United States governs but does not reign" (*Sir Henry Maine*), yet, as *Laski* observes,—“The President of the United States is both more or less than a King; he is, also, both more or less than a Prime Minister”.⁴ On the one hand, the American President is the ceremonial head of the State and has to attend functions which, in England, are performed by the King; on the other hand, the President is the 'final source of all executive decision', a 'vital source of legislative suggestion' and 'the authoritative exponent of the nation's foreign policy'. Since the Cabinet is nothing more than the President's advisory council, all the above powers are to be exercised by the President on his sole responsibility and so *Laski* observes,—“the only person responsibly charged with thinking and planning in terms of the whole Union is the President”.⁴

On the other hand, the President's position is more difficult than that of the English Prime Minister in so far as the latter has not, in normal circumstances, to face a recalcitrant House of Commons and it is the policy of the Prime Minister which is the policy followed by Parliament so long as the Prime Minister is in

(1) Brogan, *Government of the People*, pp. 118-9.

(3) Haskin, *American Government*, p. 56.

(2) W. Wilson, *Constitutional Government in the United States*, p. 68.

(4) *Laski*, *American Presidency*, 1943, pp. 23, 31.

office. But the American President is 'at no point the master of the Legislature'. Even when his party has a majority in the Congress, he must win the good-will of that party in the Congress and the Congress is never, 'a rubber stamp' for presidential policy.¹ The President may thus initiate policy but cannot control it, and when his opposition party dominates in the Congress, or either House of it, he can proceed with no certainty. In England, the House of Commons cannot refuse to follow the lead of the Prime Minister without overthrowing him. But the American Congress can enforce its will against the President without any penalty, for, the President is not responsible to Congress.

The only means available to the President to have a measure carried through a recalcitrant Congress are—(a) to persuade the Congress by holding informal meetings with the leaders of the two Houses, and (b) to inform the people of the merits of his proposals so as to bring the pressure of public opinion upon the Houses.

But though the power of the American President to secure the passage of his legislative proposals is weaker than that of the English Prime Minister, the negative power of the former to withhold the enactment of a measure he does not like is much more real and effective. An English Prime Minister can hardly have any occasion to advise the Crown to veto a Bill which has been initiated by the Government itself. The case with the American President is different; neither he nor any of his representatives sits in Congress to initiate or pilot any legislative measure and the substance or form of any Bill presented before him for his assent cannot be said to be his own. His power to veto (see under Art. 111, *post*) a Bill with which he does not agree is almost formidable, and even where he exercises a 'qualified veto' by returning a Bill to the House which originated it, it is difficult to secure a two-thirds majority in each House to override the President's veto. The veto power is thus a potential instrument in the hands of the President to control the Legislature which is otherwise a co-ordinate organ of the State.

It is in foreign affairs, more than in internal administration, that the President's position as the pre-eminent representative of the Nation is felt. Even though the power to declare war is vested by the Constitution in Congress, the President may, by his conduct of foreign affairs and use of the armed forces, so shape the nation's foreign policy as to leave Congress no choice but to declare war. Again, though the consent of the Senate is required for the ratification of treaties, and Congressional power over appropriation acts as a legislative check on the foreign policy pursued by the President, nevertheless, the President acts as "the sole organ of the federal government in the field of international relations".² It is he who gives recognition to foreign governments, acts as the channel of communication between the United States and foreign governments, negotiates treaties and 'agreements' which do not require the consent of the Senate, controls the armed forces as the Commander-in-Chief. Both the Congress as well as the Court³ concede that in the conduct of foreign affairs the President should have a larger degree of freedom from legislative interference than in the internal sphere. In *U. S. v. Curtiss-Wright*,⁴ the Supreme Court explained it thus—

"It is quite apparent that if, in the maintenance of our international relations, embarrassment is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved....."

(B) *Fifth French Republic*.—The new Constitution gives to the President some additional powers over those possessed under the Third and Fourth Republics. Though the President cannot act, as before, without the counter-signature of the Premier (*i.e.*, Prime Minister) and, if the circumstances so require, of another Minister as well (Art. 19), he has now a greater freedom in the matter of appointment of the Premier himself. Above all, the most important of the functions of

(5) *U. S. v. Curtiss-Wright Corp.*, (1936)
299 U.S. 304.

the President, namely, to submit a bill to referendum (Art. 11); to order a dissolution (Art. 12) as well as the emergency powers (Art. 16); submission of organic laws to the Constitutional Council (Art. 61) are exempted from the requirement of counter-signature of Ministers. Evidently, in these important matters, the President can act without the concurrence of the Ministry. While under the Fourth Republic, the President could not appoint a person as Premier unless and until he obtained an *express* vote of confidence from the lower House of the Legislature, under the new Constitution, the President's power of appointment of the Premier is not fettered by any such condition (Art. 12).

While his ordinary power of veto over legislation is not enlarged, and he still possesses only the power to return a bill for reconsideration of Parliament within the specified period of 15 days (Art. 10), he has a discretionary power to submit (or to refuse it) a bill to referendum when it is so requested by the Government or by a joint motion of the two Chambers of the Legislature (Art. 11).

Again, though in the matter of dissolution, the President is to *consult* the Premier and the Presidents of the Assemblies, he is not bound to act according to their advice (Art. 12). No such power was possessed by the President before.

The President shall preside over the Council of Ministers (Art. 9). No distinction is made, as under the previous Constitutions, between formal and informal meetings of the Council of Ministers. Under the Constitution of 1958, no decision can be taken by the Council of Ministers without the knowledge of the President. The chairmanship of the President over the Cabinet obviously detracts from the power and prestige of the Premier.

More important are the functions of the President as the head of the State, according to which he is supposed to act as an 'arbiter' between the different organs of the State, and his powers during an emergency.

(a) Art. 5 of the Constitution of 1958 says—

"The President of the Republic shall see that the Constitution is respected. He shall ensure, by his arbitration, the regular functioning of the public powers, as the continuity of the State.

He shall be the guarantor of national independence, of the integrity of the territory, and of respect for Community agreements and for treaties".

(b) By far the greatest importance must be attributed to the new powers of the President in an emergency. Whenever 'the regular functioning of the constitutional public powers is interrupted', the President may take *any* measures 'required by the circumstances'. Of course, he has, in the exercise of this function, to *consult* the Premier, the Presidents of the Assemblies and the Constitutional Council (Art. 16), but he is *not bound* to act according to the advice of any of these persons. While under the Fourth Republic, the Premier had the power to declare a 'state of seige', independently of the President, under the Constitution of the Fifth Republic, the Premier has lost that power and the emergency powers have been transferred to the President. Evidently, it shifts the centre of gravity in the constitutional system from the Premier to the President.

(c) *Eire*.—Art. 12 (1) of the Constitution of Eire, 1937 says—

"There shall be a President of Ireland (*Uachtaran nath Eireann*) hereinafter called "the President," who shall take precedence over all other persons in the State . . ."

The President of Eire is to take precedence over all the persons in the State, but is not designated as its head.⁶⁻⁸ His powers and functions are largely, but *not wholly*, formal. The Constitution expressly provides [Art. 13 (9)], that the powers and functions of the President must be exercised only with the advice of the 'Government' (which corresponds to the English Cabinet). But he has the power to act 'in his absolute discretion' in two matters [Art. 13 (2)]: He may refuse a dissolution to a Prime Minister who has ceased to command a majority in the Dail, and thus bring about a fall of the Ministry [Art. 28 (10)]. On the other hand, the Irish President has the power of referring Bills to a *referendum*, in

(6-8) Cf. O'Sullivan, Irish Free State and its Senate.

certain circumstances [Arts. 27, 47 (2)], in order to secure that the Legislature shall not override the wishes of the political sovereign—the people themselves. Being elected by the people directly, and possessing the above powers, the position of the Irish President is far better than that of the French President though it is inferior to that of the American President.

(D) *Japan*.—Prior to the Constitution of 1946, the Emperor was an absolute monarch, ruling by divine right. The authority of the Emperor was patriarchal, rather than political.

The Constitution of 1946 revolutionises this basic feature by declaring, in Art. 1, that

"The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power."

The Emperor is, thus, no longer, the source of all authority. He has certain ceremonial functions (Art. 7) but the real authority is vested in the Cabinet responsible to the Legislature (Art. 3), without whose advice the Emperor cannot exercise even the ceremonial functions vested in him by the Constitution. Over and above this, the Constitution explicitly provides that the Emperor "shall not have powers related to government" (Art. 4).

The Emperor is thus reduced to the position of a symbolic and ceremonial head,—more nominal than the English Crown. [See, further, under Art. 74, *post*].

INDIA

Parliamentary and Presidential forms of Government.

Barring the solitary instance of a 'collegiate executive' in Switzerland, it may be said that the Executive organisations of the better known States of the world fall under two main types, the Presidential and the Parliamentary forms.

In a Parliamentary Government, the tenure of office of the virtual executive is dependent on the will of the Legislature; in a Presidential Government the tenure of office of the executive is independent of the will of the Legislature (*Leacock*). Thus, in the Presidential forms of which the model is the *United States*,—the President is the *real* head of the Executive, who is elected by the people for a fixed term. He is independent of the Legislature as regards his tenure and is not responsible to the Legislature for his acts. He may, of course, act with the advice of ministers, but they are appointed by him as his *counsellors* and are responsible to him and not to the Legislature. Under the Parliamentary system represented by *England*, on the other hand, the head of the Executive (the Crown) is a mere titular head, and the virtual executive power is wielded by the Cabinet, a body formed of the members of the Legislature and responsible to the popular House of the Legislature for their office and actions.

The difference between the two systems cannot be more clearly explained than in the illuminating words of the Earl of Balfour⁹—

"Under the Presidential system the effective head of the national government is elected for a fixed term. He is (practically¹⁰) irremovable. Even if he proved inefficient, even if he becomes unpopular, even if his policy is unacceptable to the majority of his countrymen, he and his methods must be endured till the moment comes for a new election. He is aided by ministers, who, however able or distinguished, have no independent political status, have probably had no congressional training, and are by law precluded from obtaining any during their term of office.

Under the Cabinet system everything is different. The head of the administration, commonly called the Prime Minister, is selected for the place on the ground that he is the statesman best qualified to secure the support of a majority in the House of Commons. He retains it only so long as that support is forthcoming. He is the head of his Party. He must be a member of one or other of the two Houses of Parliament; and he must be competent to 'lead' the House to which he belongs."

(9) Introduction to Bagehot's English Constitution.

(10) Because the mode of removal by im-

peachment is practically obsolete and can hardly be used for mere inefficiency or misgovernment.

The framers of *our* Constitution adopted the best features from the Constitutions of the leading countries of the world, and on the present point, therefore, they set up a curious *combination* of the Presidential and Parliamentary systems. Being a Republic, India cannot have a hereditary King. So, an elected President is at the head of the Executive power in India. The tenure of his office is for a fixed term of years as of the American President. He also resembles the American President inasmuch as he will be removable by the Legislature under the special quasi-judicial procedure of impeachment. But, on the other hand, he is more akin to the English King than the American President inasmuch as the Constitution entrusts to him no 'functions' to discharge, on his own authority. All the powers that are vested by the Constitution in the President, are expected to be exercised on the advice of the Ministers responsible to the Legislature as in England, though there is no express provision in the Constitution itself, to this effect. [See, further, under Art. 74, *post*].

The reason why the framers of *our* Constitution discarded the American model after providing for the election of the President of the Republic by an electoral college formed of members of the Legislatures not only of the Union but also of the States, was thus explained by Dr. Ambedkar:¹¹ In combining stability with responsibility, they have given more importance to the latter and have preferred the system of 'daily assessment of responsibility' to the theory of 'periodic assessment' upon which the American system is founded. Under the American system, conflicts are bound to occur between the Executive, Legislature and Judiciary;¹² and, on the other hand, according to many modern American writers the absence of co-ordination between the Legislature and the Executive is a source of weakness of the American political system. What is wanted in India on her attaining freedom from one and a half century of bondage is a *smooth* form of Government which would be conducive to the manifold development of the country without the least friction,—and to this end, the Cabinet or Parliamentary system of Government of which India has already had some experience, is better suited than the Presidential.

The case for the Cabinet system of government was best represented in the Constituent Assembly by Sri Munshi^{12a}—

"The strongest government and the most elastic executive has been found to be in England and that is because the executive powers vest in the Cabinet supported by a majority in the Lower House which has financial powers under the Constitution. As a result, it is the rule of the majority in the legislature; for it supports its leaders in the Cabinet, which advises the head of the State, namely, the King. The King is thus placed above party. He is made really the symbol of the impartial dignity of the Constitution. . . ."

We must not forget a very important fact that, during the last hundred years, Indian public life has largely drawn upon the traditions of British constitutional law. Most of us have looked up to the British model as the best. For the last thirty or forty years, some kind of responsibility has been introduced in the governance of the country. *Our constitutional traditions have become parliamentary* and we have now all our Provinces functioning more or less on the British model. . . . After this experience, why should we go back upon the tradition that has been built for over a hundred years and try a novel experiment . . . ?"

Thus, though at the beginning there were advocates of the Presidential system^{12b} as a 'stable' form of government, ultimately the Constituent Assembly decided in favour of the Parliamentary system, and that is how the leading members explained the implications of the provisions which were ultimately adopted. In the words of Alladi Krishnaswami Aiyar^{12c}—

"The object of the present constitutional structure is to prevent a conflict between the Executive and the Legislature and to promote harmony between the different parts of the governmental system After weighing the *pros* and *cons* of the Parliamentary executive as they obtain in Great Britain, the Dominions and in some of the Continental Constitutions, and the Presidential type of government as it obtains in the United States of America, the Indian Constitution has adopted the institution of *Parliamentary Executive*."

(11) Constituent Assembly Debates. Vol. VII, pp. 32-33.

(12) Cf. Alladi Krishnaswami Aiyar in C.A.D., Vol. VII, pp. 985-6.

(12a) C.A.D., Vol. VII, p. 984.

(12b) C.A.D., Vol. VII, pp. 284, 296, 975-80.

(12c) *Ibid.*, pp. 985-6.

Another member of the Drafting Committee, T. T. Krishnamachari, observed^{12d}—

"So far as the relationship of the President with the Cabinet is concerned, I must say that we have, so to say, *completely copied the system of responsible government that is functioning in Britain today; we have made no deviation from it* and the deviations that we have made are only such as are necessary because our Constitution is federal in structure".

The President of the Constituent Assembly, Dr. Rajendra Prasad summed up thus:^{12e}

"We have had to reconcile the position of an elected President with an elected Legislature, and in doing so, *we have adopted more or less, the position of the British monarch for the President* His position is that of a constitutional President. Then we come to the Ministers. They are, of course, responsible to the Legislature and tender advice to the President *who is bound to act according to that advice.* Although there are no specific provisions, so far as I know, in the Constitution itself making it binding on the President to accept the advice of his Ministers, it is hoped that the convention under which in England *the King acts always on the advice of his Ministers will be established in this country also* and the President, not so much on account of the written word in the Constitution, but as a result of this very healthy convention, will become a constitutional President in all matters".

So, India has a constitutional President superimposed on the Parliamentary system of the British type.

Our Supreme Court has authoritatively explained the position thus:

"Under Article 53 (1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. *The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.* The same provisions obtain in regard to the Government of States; the Governor occupies the position of the head of the executive in the State but it is virtually the council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part'."

Position of the President under the Constitution.

The framers of our Constitution explained that they had outlined the position of the President of India on the *Irish* model, viz., that of an elected President, acting on the advice of Ministers responsible to the Legislature. But as we shall see, the Indian President is not an exact replica of the Irish model. Of course, there are obvious similarities. Like the President of *Eire*, the President of India, too, is not named in the Constitution as the 'Head of the State'. Again, the Indian President is neither the repository of all powers of the State as the English King is, nor would he be the head of the political system like the American President who has been styled as "the majesty of the people incarnate".¹³

Though our Constitution says that the executive power "shall be vested" in the President, just as it is said in the Constitution of the United States of America [Art. II, Sec. 1 (1)], the Indian President is not going to be the Chief Executive or the *real* head of the Executive like the American President. He will have to exercise the powers vested by the Constitution "in accordance with the Constitution". One of these provisions of the Constitution is that "there shall be a Council of Ministers to aid and advise the President in the exercise of his functions" [Art. 74 (1)]. Thus, the constitutional position of the English King, which has grown up around the legal theory of absolutism by conventions and the 'unwritten law', has been reduced to writing in the Indian Constitution, following the Irish precedent. [Cf. Art. 13 (9) of *Eire*; p. 347, *ante*].

The Irish President is not, however, required to act with the advice of his Cabinet in two matters, in respect of which he has "an absolute discretion" to act, according to the Constitution itself. The more important of these two functions is the right to refuse a dissolution of the Legislature to a defeated

(12d) C.A.D., Vol. X, p. 956.
(12e) C.A.D., Vol. X, p. 988.

(13) Brogan. Government of the People.

Ministry¹⁴ [Art. 13 (2), Eire]. But the *Indian* President (unlike the Governor-General under the Government of India Act, 1935) is not vested with any 'discretionary' power by the Constitution.

There is another material point upon which the Indian President will differ from the President of Eire and resemble the English Crown,—*viz.*, the right of the President *to be informed* of the decisions of the Council of Ministers and also to call for any other information relating to the administration of the affairs of the Union and proposals for legislation [Art. 78 (b)]. The Irish Ministers have no such obligation and the President has no right to call for any 'information' from the Government, nor to give them any suggestion or advice of his own. But though the English Crown takes no part in the formal deliberations of his Ministers, he is constitutionally entitled to criticise the conduct of the Executive, and for this purpose, he has a right to be informed on all important matters and deliberations of the Cabinet, which may not be disclosed to anybody else.¹⁵ And for this purpose, Cabinet decisions are now recorded in formal minutes. So, though the Crown cannot exercise any of its powers except on the responsibility of some Minister and though the Crown has the constitutional obligation not to do anything which may conflict with the fundamental principle of ministerial responsibility, the Crown can still act as an impartial mediator in political issues, and can meet with opposition leaders (as it did in 1931 and 1936)¹⁶ and give the Cabinet its views; but it rests with the Cabinet finally, whether they would act upon such advice of the Crown. Much would, of course, depend upon the personality of the Crown, and an example as late as that of George V illustrates that though the Crown has no function, it still retains the three important political rights of which *Bagehot* spoke: "The right to be consulted, the right to encourage and the right to warn", which are nonetheless indispensable even for a highly developed system of ministerial responsibility.

It is in view of the above experience in England that *our* Constitution has adopted the right of the President to be informed. He has still another very important power, *viz.*, to direct the Prime Minister to place before the Council of Ministers for a joint consideration, any decision which has been taken by a Minister, *individually*, without a joint deliberation by the Council of Ministers [Art. 78 (c)]. This power will enable the President to exercise an effective supervision of the Cabinet without having a seat therein and will enhance the utility of the President as the constitutional head,—by way of pointing out and arresting the defects and shortcomings of the actions of individual Ministers.

On the other hand, so far as the text of *our* Constitution itself is concerned, there is no mandatory provision to compel the President to act according to the advice of the Ministers, and there is no provision, corresponding to the English rule,¹⁵ requiring the President to act only under the counter-signature of a Minister. The President himself is authorised to make rules [Art. 77 (2)], as to how his orders and instruments are to be authenticated. So, if any President ventures to act against the wishes of the Ministers¹⁷ in any matter, there is nothing in the Constitution to bring him to task save impeachment. It is also to be noted that while the Ministers shall owe their power to only one of the Houses of the Union Parliament, *viz.*, the House of the People [Art. 75 (3)], the President shall be elected not only by the elected members of both Houses of Parliament, but also the elected members of the Legislative Assemblies of the States.

From the above, it is clear that the Indian President will not be an *exact replica* of the head of the Executive of any other country, but will combine some features drawn from many sources.

(14) As to how the President of India will exercise the power of dissolution, see under Art. 74, *post*.

(15) Keith, Constitutional Law, p. 157; Chalmers & Hood Phillips, pp. 197-9.

(16) Keith, Constitutional Law, p. 159.

(17) He can, however, succeed in having his way only if he can dismiss the Ministers or compel them to resign, for no Secretary would dare to authenticate an order of the President contrary to the wishes of a ministry in power.

It should be added, however, that during the first decade and a half of the working of the Constitution, *our* President has acted as a constitutional head of the English type, though he is elected. (See, further, under Art. 74, *post*).

Analogous Provision.—Art. 153 deals with the heads of the States.

INDEX TO COMMENTS.

ARTICLE 52.

Other Constitutions :

(A) U.S.A., 345 ; (B) Fifth French Republic, 346 ; (C) Eire, 347 ; (D) Japan, 348.

India :

Parliamentary and Presidential forms of Government, 348 ; Position of the President under the Constitution, 350.

53. (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall—

(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority ; or

(b) prevent Parliament from conferring by law functions on authorities other than the President.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) U.S.A.—I. Art. II, Sec. 1 (1) of the Constitution of the United States says—

“The executive power shall be vested in a President of the United States of America.”

It has already been explained [*see* p. 345, *ante*] that the American President is a *real* head of the Executive inasmuch as barring the shadow possibility of impeachment,¹⁸ he is not accountable to any organ under the Constitution ; nor is he bound to act according to anybody's advice, except in those matters in which the Constitution requires him to act with the concurrence of the Senate (*e.g.*, in the matter of appointments and treaties).

Apart from the fact that he is under no obligation to act according to the advice of Ministers responsible to the Legislature,¹⁹ he has a huge power of appointment and removal as regards officers whose appointment or removal is not regulated by statute and, further, he may, at any time, require—

“the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices” [Art. II, s. 2 (1)].

(a) The executive power of the President includes *the power to appoint* officials with the advice and *consent* of the Senate, and also to remove them [Art. II, s. 2 (2)].

He thus appoints the Federal Judges and the heads of the Executive Departments and all political offices which are not manned by the Federal Civil Service.

While the confirmation of the Senate is necessary for these appointments, Congress has a sphere of control over the appointing power of the President and is competent—

(18) *See* p. 385, *post*.

(19) *See*, further, under Art. 74 (1), *post*.

- (a) To create an 'office'.
- (b) To regulate the conduct in office of all federal officers and employees.²⁰
- (c) To lay down the qualifications for appointment to any office.
- (d) To vest the appointment of 'inferior officers' in the President alone, the courts of law, or in the heads of departments".
- (e) To impose additional duties upon persons already in office.²¹
- (f) To create administrative bodies exercising quasi-judicial or quasi-legislative powers, independent of executive control.²²
- (g) Conversely, to create an administrative body to recommend an administrative decision to the President, vesting the final power in the President.^{23 24}

The President's power of *removal* cannot be fettered by any legislation²⁵ except where the person holds office in an administrative body having quasi-judicial or quasi-legislative functions and created by statute, to be held under statutory conditions and for a statutory term.¹ Whether an administrative body is intended by Congress to be so independent of the President's power is to be determined from the nature of the functions;² hence, where a body was created by Congress to 'adjudicate' claims under a statute 'according to law', the President could not remove a member of such tribunal before the expiry of the term of the tribunal itself, even though the statute was silent about the term or removal of the members of the tribunal.³

Nor can the President remove the Federal Judges who hold 'during good behaviour' [Art. III, s. 1].

The consent of the Senate is required for 'appointment' and not 'removal' and the Senate has no part in the exercise of the power of removal of the President. It has, accordingly, been held that once the Senate gives its consent to an appointment, the Senate cannot, after the appointee has taken office, withdraw its consent, for, that would amount to an exercise of the power of removal.⁴

(b) In no sphere is the President's power greater than in foreign affairs. The Constitution gives him power to appoint ambassadors, and other representatives of the United States, subject to the approval of the Senate [Art. II, s. 2 (2)] and has an unfettered power to receive foreign ambassadors and other representatives of foreign States. Through this power, it is possible for him to recognize or refuse to recognise foreign States or foreign Governments, newly formed, and to sever diplomatic relations with foreign Governments.

Though his power to negotiate 'treaties' is subject to approval by a two-thirds vote of the Senate [Art. II, s. 2 (2)], his power to make 'executive agreements' is not so fettered, and he frequently by-passes the Senate by entering into 'agreements' with other countries, instead of formal treaties.

The President's powers as *Commander-in-Chief*, *legislative* and *pardoning* powers shall be dealt with separately, in their proper places.⁴

II. Art. II, sec. 3, further, says—

"... he shall take care that the laws be faithfully executed."

The word 'laws' has, in this context, been widely interpreted to include not only statute law, but also common law as well as the rights and obligations arising out of the Constitution itself.⁵

It has been deduced from the foregoing powers that for the purpose of securing a uniform execution of the laws, the President has the power to supervise and guide the executive officers in their construction of the statutes under which

(20) *Ex parte Curtis*, (1882) 106 U.S. 371.

(21) *Shoemaker v. U. S.*, (1893) 147 U.S. 282 (301).

(22) *U. S. v. Perkins*, (1896) 116 U.S. 483.

(23) *U. S. v. George Bush & Co.*, (1940) 310 U.S. 371.

(24) *Chicago & Southern Airlines v. W. S. Corp.*, (1948) 333 U.S. 103 (109).

(25) *Myers v. U. S.*, (1926) 272 U.S. 52.

(1) *Humphrey's Executor v. U. S.*, (1935) 295 U.S. 602.

(2) *Wiener v. U. S.*, (1957) 357 U.S. 349 (355).

(3) *U. S. v. Smith*, (1932) 286 U.S. 6.

(4) See under Arts. 53 (2); 72; 85-87; 111, *post*.

(5) *In re Neagle*, (1890) 135 U.S. 1 (64).

they act, except as to specific statutory duties which require the officers to exercise their discretion or to exercise quasi-judicial duties,⁶ to be exercised independent of executive control.⁷

The source of the executive power of the President is two-fold—

(a) The provisions of Art. II of the Constitution, mentioned above.

(b) Laws passed by Congress in the exercise of its enumerated powers which confer specific executive power upon the President.

It has been held by the Supreme Court that—

"the President can exercise no power which cannot be fairly and reasonably traced to some *specific grant* (from the Constitution or the Legislature) of power or justly implied and included within such express grant as proper and necessary to its exercise."⁸

According to the Supreme Court, the 'faithful execution of laws' clause [Art. II, s. 3, see above] does not vest in the President any residuum of inherent power to take any steps which would be necessary for carrying into execution the laws, except those which were in conformity with the Constitution or the laws.⁹

Again, the President cannot derive any law-making power from the 'faithful execution clause'. He can make rules only if the Legislature delegates such power to him.

"... The President's power to see that the laws are faithfully executed refutes the idea that he is to be a law-maker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute . . . This is a job for the nation's law-makers, not for its military authorities."¹⁰

"The power to *execute* the laws" cannot include the power to "*make*" laws.¹¹

As to the mode of exercise of the executive powers by the President, a distinction is made between powers vested in him by the Constitution and those vested in him by laws.

(a) So far as the constitutional powers are concerned, where it appears that the Constitution has vested certain functions to be exercised by the President in his discretion, *e.g.*, his power to grant reprieves and pardons or his power (under Article's of War) to confirm the sentence of a court martial, the function cannot be delegated by the President.¹²

But barring such functions, which are few, it is acknowledged that

"the President, in the exercise of his executive powers under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorised assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts."¹³

(b) So far as functions vested in the President by statute are concerned, the principle that the President acts through the various departments is more freely acknowledged, for,

"It is manifestly impossible for the President to execute every duty, and every detail thereof, imposed upon him by Congress."¹⁴

As to discretionary functions vested in the President by statute, the general rule was that the President could not relieve himself wholly of such functions by delegating them to another person.¹⁵ But this has now become permissible by the Presidential Subdelegation Act, 1950, by which Congress has empowered the President with a general power of sub-delegation of *any* statutory functions, without the obligation of his previous approval or ratification of the acts of the delegatee, except only where an Act specifically prohibits delegation of the functions of the President.

(6) *Myers v. U. S.*, (1926) 272 U.S. 52.

(7) *Humphrey's Executor v. U. S.*, (1935) 295 U.S. 602.

(8) *Youngstown Co. v. Sawyer*, (1952) 343 U.S. 579 (587, 633), affirming *Youngstown Co. v. Sawyer*, (1952) 103 F. Supp. 569 (D.C.).

(9) *Runkle v. U. S.*, (1887) 122 U.S. 543.

(10) *Wilcox v. Jackson*, (1839) 13 Pet. 498 (513).

(11) *Williams v. U. S.*, 1 How. 290 (297).

(B) *Australia*.—Sec. 61 of the Australian Constitution Act says—

"The executive power of the Commonwealth . . . is exercisable by the Governor-General . . . and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth."

S. 62 next provides—

"There shall be a Federal Executive to *advise* the Governor-General . . ."

'Laws' of the Commonwealth mean Acts of the Commonwealth Parliament.¹²
The Governor-General acts, in all matters, on the advice of his ministers.¹³

(C) *Canada*.—S. 9 of the Br. North America Act says—

"The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

The Governor-General carries on the Government of Canada on behalf of and in the name of the Queen (s. 10).

S. 11 next says—

"There shall be a Council to *aid and advise* in the Government of Canada . . ."

The expression 'aid and advise' has been utilised in Canada to import the British system of Cabinet Government, so as to transform the Governor-General into a mere constitutional head, acting on the advice of the Cabinet.¹⁴

(D) *Eire*.—Art. 12 (1) of the Constitution of Eire, 1937, says—

"There shall be a President . . . who shall exercise and perform the power and functions conferred on the President by the Constitution and *by law*."

(E) *Switzerland*.—Art. 95 of the Swiss Constitution, 1874 says—

"The supreme directing and executive power in the Confederation is exercised by a Federal Council of seven members."

Switzerland has a collegiate form of Executive,—the executive authority being vested not in one person as the head of the State, but in a body of seven, known as the Federal Council. There is, of course, a 'President of the Confederation', but his position is little more than that of the Chairman of the Federal Council. Every year, the Federal Assembly elects one of the Federal Councillors to be the President of the Confederation. The functions of the President are mostly ceremonial. Whatever real power he has belongs to him as a member of the Federal Council and as the head of one of the seven Departments, usually the Department of Foreign Affairs. He presides over the deliberations of the Council, but he has no power of control over the Council, which is a body of equals, acting collectively. The President, however, represents the country in foreign affairs and to that extent acts as the formal head of the State.

(F) *Fifth French Republic*.—The Constitution of 1958 shifts the centre of power from the Premier to the President, and makes his position similar to that of the American President. The factors leading to the pre-eminent position of the President under the new Constitution are—

(a) He is to be elected by a broad-based electoral college, consisting of members of Parliament, representatives of local authorities and of overseas members of the Community. (b) The Ministers appointed by him are, like the members of the American Cabinet, precluded from membership of the Legislature, though they may attend its meetings and address it. (c) He shall preside over all meetings of the Cabinet. (d) Though ordinarily he has to act with the advice of Ministers and under their counter-signature, the most important acts may be done by him without such counter-signature,—e.g., submission of a bill to referendum; dissolu-

(12) *Commonwealth v. Colonial Co.* (Wooltops Case). (1922) 31 C.L.R. 421 (431).

(13) Nicholas, *Australian Constitution* 1948, p. 49.

(14) Dawson, *Government of Canada*, 1949, pp. 71, 171, 178, 189.

tion of the National Assembly; reference to the Constitutional Council of measures to meet a national emergency.¹⁵

(C) *West Germany*.—The West German Constitution, 1949, does not vest the executive power of the federation in the President by any express provision. But Art. 59 (1) says—

“The federal President shall represent the federation in matters of international law.....”

The President is, therefore, the head of the State. He represents the State in international affairs, concludes treaties with foreign powers on behalf of the federation, accredits and receives envoys. He also appoints Ministers, federal judges and officials and exercises the right of pardon (Art. 60).

But the German President is not, like the French President, a *real* Executive. The system of government is parliamentary, modelled on the British system. Upon his election, the President may not remain a member of the Cabinet or of the Legislature. Every act of his, excepting two, requires the counter-signature of the Prime Minister (called the federal Chancellor) or a competent federal Minister.

The two exceptional acts are—(a) appointment and dismissal of the Chancellor; and (b) dissolution of the Bundestag. But even in these two matters, his discretionary powers are controlled by the popular House of the Legislature (the Bundestag).

Thus,—

(a) He cannot appoint a person as the federal Chancellor without the concurrence of the Bundestag. He has to propose his nominee before the Bundestag and is bound to appoint the person who secures the majority vote in the Bundestag (Art. 63).

(b) As regards dissolution, of course, he has the discretion to dissolve the Bundestag if they fail to elect a Chancellor by majority vote (Art. 63 (4)), hoping that a new Bundestag may be able to reach a majority decision.

Apart from this, where a Chancellor seeks a vote of confidence from the Bundestag and fails to get it, he may advise the President to dissolve the Bundestag and the President should dissolve the Bundestag, unless the Bundestag, within the prescribed period, elects another Chancellor (Art. 68).

The President is also bound to dismiss the Chancellor, if the Bundestag passes a vote of no-confidence and submits the President the name of a duly elected successor to the office of Chancellor.

The President of the German Federal Republic is thus a constitutional ruler, who acts on the advice of a Council of Ministers responsible to the lower House of the Legislature and the British conventions as to such responsibility are codified, in an accentuated form.

(H) *Ceylon*.—Sec. 45 of the Ceylon (Constitution) Order in Council, 1946, provides—

“The executive power of the Island shall continue to be vested in His Majesty and may be exercised, on behalf of his Majesty, by the Governor-General in accordance with the provisions of this Order and of any other law for the time being in force.”

(I) *Government of India Act, 1935*.—Sec. 7 (1) of the Act provided—

“(1) Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him

INDIA

Scope of Cl. (1) : Executive Power of President.

This clause has a threefold function:

(a) It vests the executive power of the Union in the President. (b) It enables him to exercise this power either directly, i.e., personally, or through officers sub-

(15) In April 1961, President de Gaulle invoked the emergency provision in Art. 16 and assumed ‘full powers’ to meet the Algerian situation which was a “serious threat...

over the institutions of the Republic, over the independence of the nation ...” (Statesman. 22-9-61, p. 12).

ordinate to him. (c) It delimits the scope of his power by declaring that it must be exercised in accordance with the Constitution.

Extent of executive power of the Union.—See Art. 73, *post*, as to the extent of the executive power of the Union.

'Executive Power'.

The executive power, according to political scientists, means the power which is concerned with the 'execution of the will of the State' (*Garner*). Now, in a democratic State, the will of the State is expressed through the Legislature. The primary function of the Executive, thus, is not deliberation, but the carrying out or administration of the laws enacted by the Legislature. Locke, thus, defined executive power as "the power to execute laws."

In a modern State, however, the business of the Executive is not so simple as it was in the days of Aristotle or even of Locke. In fact, owing to the manifold extension of the functions of the State, the business of government, in a wider sense, has necessarily passed into the hands of the Executive and it can no longer be said that the executive power simply consists of the power to execute the laws.

A more comprehensive idea of the Executive powers is thus given by modern writers. Thus, according to *Wynes*.¹—

"The Executive may be defined as the authority within the State which administers the law, carries on the business of government and maintains order within, and security from without the State."

The various powers which are thus included within the comprehensive expression "executive power" in a modern State, have been grouped by political writers under the following heads: (a) Administrative power, *i.e.*, the execution of the laws and the administration of the Government. (b) Diplomatic power, *i.e.*, the conduct of foreign affairs. (c) Military power, *i.e.*, the organisation of the armed forces and the conduct of war. (d) Legislative power, *i.e.*, the summoning, prorogation, etc., of the Legislature, initiation of and assent to legislation and the like. (e) Judicial power, *i.e.*, the granting of pardons, reprieves, etc., to persons convicted of crime.

In addition to the above, social and economic functions have entered into the list, in recent times, and the position is thus summed up in *Halsbury*²:

"Executive functions are incapable of comprehensive definition, for they are merely the residue of the functions of Government after legislative and judicial functions have been taken away. They include in addition to the execution of laws, the maintenance of public order, the management of Crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations and the provision or supervision of such services as education, public health, transport and state insurance."

It is in view of the above position that *our* Supreme Court³⁻⁴ has observed—

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. subject, of course, to the provisions of the Constitution or of any law....."

The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State."⁵

By reason of Art. 298, *post*, it also includes—(a) the carrying on of trading operations; (b) the acquisition, holding and disposing of property; (c) the making of contract for any purpose.³⁻⁴

(1) Wynes, Legislative and Executive Powers in Australia, p. 318.

(2) Halsbury's Laws of England, 3rd Ed., Vol. 7, p. 187.

(3) *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (235-6).

Whether exercise of executive power is dependent on prior legislation.

1. It is one of the functions of the Executive to execute the laws.

But, as observed by our Supreme Court, in *Ram Jawaya v. State of Punjab*,⁴ this does not mean, however, that the executive function is confined to the execution of laws or that in order to enable the executive to function in respect of any subject there must be a law already in existence. Specific legislation, may, of course, be necessary to incur expenditure of the public funds or to encroach upon private rights,⁵ which cannot, under the Constitution, be done without legislation. But, apart from this, it cannot be held that in order to undertake any function, such as entering into any trade or business, the Executive must obtain prior legislative sanction.⁵⁻⁶ The power of the Executive, independent of legislation, to enter into any trade or business or to acquire or dispose of any property, has since been made clear by amending Art. 298 by the Constitution (Seventh Amendment) Act, 1956.

2. In the exercise of its executive power, therefore, a Government may do any act provided—

(i) It is not an act assigned by the Constitution to any other authority or body such as the Legislature or the Judiciary or the Public Service Commission (e.g., matters specified in Art. 3).⁵⁻⁶

(ii) It is not contrary to the provisions of any law.

(iii) It does not encroach upon or otherwise infringe the legal rights of an individual.^{5, 7}

3. On the same principle, it has been held⁷ that the making of a treaty is an executive act and the municipal courts cannot question the validity of a treaty entered into by the Government of India, in exercise of its power Art. 53, on the ground that there was no legislation to support it. Implementation of a treaty is also an 'executive power' of the Union [Art. 73 (1) (b)].

Legislation may, however, be required to give effect to a treaty—

(a) Where it provides for payment of money to a foreign power,⁷ which must be withdrawn from the Consolidated Fund of India.

(b) Where the treaty affects the private rights of a citizen of India.⁶

(c) An amendment of the Constitution itself would be necessary to cede Indian territory to a foreign State, by reason of Art. 1.⁸

(d) Where it requires the taking of private property [Art. 3 (1)]; life or liberty [Art. 21] or the imposition of a tax [Art. 265], which can be done only by legislation.

4. Subject to Art. 73, *post*, the executive power of the Union or a State extends to matters upon which the respective Legislature is competent to legislate and is not confined to matters over which legislation has been made *already*.⁵

Has the Executive any residuary power?

(A) U.S.A.—It has already been pointed out that while under the French system [Art. 47 of the Constitution of 1946 and Art. 21 of the Constitution of 1958, *p. ante*] the Executive has drawn a residuary authority under its constitutional power to ensure the execution of laws, any such residuary executive power has been denied by the American Supreme Court (*p. 347, ante*), so that under the American Constitution, the Executive has got only such powers as follow either expressly or by *necessary implication* from some grant of power either by the Constitution or by some law.⁹

In order to appreciate the present position, it is necessary to refer to the different theories which have been asserted, from time to time, regarding Presi-

(4) *Jayantilal v. Rana*, A. 1964 S.C. 648 (655).

(5) *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (232, 238-239).

(6) *Jayantilal v. Rana*, A. 1964 S.C. 648.

(7) *Moti Lal v. Uttar Pradesh Govt.*, A. 1951 All. 257 (F.B.).

(8) *Re Berubari Union*, A. 1960 S.C. 845 (859).

(9) *Youngstown Co. v. Sawyer*, (1952) 343 U.S. 579.

dential powers. Art. II, sec. (1) merely says that "the executive power shall be vested in a President of the United States", but the boundaries of this executive power are not specified in the Constitution.

I. The *Stewardship* or *Prerogative Theory* was advanced by President Roosevelt in 1913. According to this theory, the President being the 'steward of the nation' is under the duty to do "anything that needs of the nation demanded *unless such action was forbidden by the Constitution and the laws*". He "declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some *specific* authorisation to do it".¹⁰

The theory rests upon the difference in wording between Art. I, sec. 1 and Art. II, sec. 1 of the Constitution. While the former vests in Congress "all legislative powers *herein granted*", the latter simply says "the executive power shall be vested in the President", without any limitation. From this, it was argued, in the *Steel Seizure Case*,¹¹ that whatever power is executive in nature and which is not specifically prohibited by the Constitution, inherently belongs to the President, though not specifically authorized.

II. The *Constitutional Theory*, on the other hand, was set forth by President Taft in 1916. According to him, Art. II, s. 1 was a mere general declaration and that

"the President can exercise no power which cannot be fairly and reasonably traced to some *specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise*. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is *no undefined residuum* of power which he can exercise because it seems to him in the public interest".

III. The Supreme Court has wavered as between the two theories aforesaid.

(i) In *In re Neagle*,¹² the Supreme Court assigned to the President a power which was not specifically granted either by the Constitution or by any law made by Congress. Apprehending danger to the life of a Judge of the Supreme Court itself, a marshal was appointed by the President to act as the bodyguard of the Judge and the marshal killed a person who attempted to attack the Judge. In a prosecution of the marshal by State authorities for murder, it was contended that there was no 'law' authorising the appointment of the marshal to act as bodyguard of the Judge and to use force in that capacity, because the federal statute under which *habeas corpus* was sought to be issued enabled the writ to be issued where a person was "in custody for an act done or omitted in pursuance of a *law of the United States*". The Supreme Court held that though Congress had *not already enacted* a law to protect the Judges, it was a duty of the President inferrible from the Constitution and that was a 'law' of the United States. It was also observed that the President's duty to see that "the laws are faithfully executed" is not limited "to the enforcement of acts of Congress . . . according to their express terms" but includes also

"the rights, duties and obligations *growing out of the Constitution itself*, our international relations and all the protection implied by the *nature of the Government under the Constitution*".

Thus, the duty assigned to the marshal was considered to arise under the authority of the 'law of the United States' even though there was no Congressional law to authorise it.

(ii) The theory of stewardship or of inherent powers was also applied by the Supreme Court in *In re Debs*,¹³ in granting an injunction, sought by the President against a railway strike, though there was no statutory basis for such injunction against the strikers. The Supreme Court granted the injunction on the following ground—

"Every government, entrusted, by the very terms of its being, with powers and duties

(10) Theodore Roosevelt, *Autobiography*, pp. 388-9.

Sawyer, (1952) 343 U.S. 579 (known as the *Steel Seizure case*).

(11) *Youngstown Sheet & Tube Co. v.*

(12) *In re Neagle*, (1890) 135 U.S. 1.

to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other."

(iii) But while in the *Neagle*¹² and *Debs*¹³ cases, the Court had supported the theory of inherent powers even though the life and liberty of citizens were in jeopardy, in the *Steel Seizure* case,¹⁴ the Court refused to apply that doctrine though it was only 'property' which was affected by the impugned Presidential act. There was no specific grant in the Constitution authorising such seizure without legislative authority. The question was whether the President, in the absence of Congressional legislation empowering him, may, by an executive order take possession of the steel mills of the country in order to protect the defence preparations against a strike.¹⁴

Chief Justice Vinson, speaking for the three dissenting Justices, advocated the theory of inherent or residual powers by supporting the President's order with reference to his duty

"to faithfully execute the laws in an emergency to maintain the *status quo*, thereby preventing collapse of the legislative programs¹⁵ until Congress could act".

Though the majority of six Judges nullified the President's order, it is a difficult task to formulate the agreed principle underlying the majority decision inasmuch as each of the six Judges wrote a separate judgment.

Though Justice Black, who spoke for the majority, observed—

"The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself",

meaning *express* provision (according to the 'Constitutional Theory', p. 353, *ante*), and Douglas J. agreed with him, the other four Judges do not appear to have gone so far. The common point of agreement appears to be that Congress had, in fact, legislated on the subject, namely, the Labour Management Relations Act, 1947 (known as the Taft-Hartley Act), for dealing with a national emergency arising out of a breakdown in peaceful industrial relations, but that it did not vest in the President the power to seize property. The law, in laying down the procedure as to how the emergency was to be met, had "reserved to itself the right to determine where and when to authorise the seizure of property in meeting such an emergency" (Burton J.). In other words, the anticipatory power of the President to act in this specific matter had *impliedly* been taken away by law made by Congress.

Nevertheless, Jackson J. opined that where there was no express or implied prohibition by the Constitution or a law, the President had an 'independent' power to take anticipatory action, pending legislation, the ambit of which, of course, depends upon the gravity of the situation:

"Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, an actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law".

Justice Clark concurred with this view:

".....where Congress has laid down *specific procedures* to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's *independent power* to act depends upon the *gravity of the situation* confronting the nation".

Frankfurter J. also appears to subscribe to the forgoing view when he said—

"We must therefore put to one side consideration of what powers the President would have had if there had been *no legislation* whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, *explicitly temporary period*, to be terminated automatically unless Congressional approval was given.....

The body of enactments.....demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested

(13) In re Debs, (1895) 158 U.S. 564.

(14) *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) 343 U.S. 579.

(15) Military procurement and prevention of inflation.

with this extra-ordinary authority.....it expressed its will to withhold this power from the President as though it had said so in so many words".

Burton J. also relied on statutory construction when he said—

"The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President *specific procedures*, exclusive of seizure, for his use in meeting the present type of emergency".¹⁴

It may, therefore, be asserted that the majority of four who concurred in the decision of the Court¹⁶ did not rule out the theory that the President had the inherent power to take anticipatory action to meet national emergencies, but held that such power could be barred not only by the express provisions of a law, but also by its *implied prohibition* which was, of course, a question of statutory interpretation.

Such 'independent' or 'inherent' executive power of the President to take anticipatory action, it should be noted, is not asserted either *against* legislation or the provisions of the Constitution. It is *inferred* or *implied*, having regard to the exigencies, from the general provisions of the *Constitution*, such as Art. II, sec. 1 or some specific grant of the Constitution, *e.g.*, relating to defence¹⁷ or the military power or the like. It does not mean that whatever power has not been specifically vested by the Constitution in the Legislature or the Judiciary, belongs residually to the Executive, or that there is a residuum of 'prerogative' or 'inherent' power in the American President as was claimed by James I in England.

(B) *England*.—Under the *English Constitution*, the Executive, of course, still possesses some discretionary power, independent of legislation, known as the 'Prerogative'; but the extent of the Prerogative is not defined, and if the Legislature so wills, it may abrogate any portion of the Prerogative,¹⁸⁻¹⁹ and to that extent the Prerogative ceases to exist. In short, the Prerogative exists so far as the law recognises and allows it. As *Dicey*, *Jennings* and other exponents of the principle of 'Rule of Law' have explained it, even the English Executive has no power save which is derived from the authority of law. As *Jennings* puts it—

"There are many facets to free government and it is easier to recognise it than to define it. It is clear, however, that it involves the notion that all Governmental powers, save those of the representative Legislature, shall be distributed and determined by reasonably precise laws. Accordingly, a King or any other person acting on behalf of the State cannot exercise a power unless he can point to some specific rule of law which authorises his act. The State as a whole is regulated by law."¹⁸

As another English writer puts it—

"The Executive is concerned with the defence of the realm against external or internal enemies, with the maintenance of law and order, and with the performance of such other functions as may be claimed for the State by the Legislature."²⁰

(C) *France*.—The most conspicuous example of the residuary powers being vested in the Executive is to be found in the French Constitution. Art. 334 of the Constitution of the Fifth Republic vests certain enumerated subjects in Parliament to be regulated by legislation, *e.g.*, civil rights, nationality, crimes, taxation.

In matters outside these enumerated subjects, the Government is empowered to issue decrees of a regulatory character without Parliamentary sanction and even to modify laws made by Parliament (Art. 37).

In short, within this sphere, the Executive has an inherent power to make rules having the force of law, without any delegation of legislative power from the Legislature. Such autonomous rule-making power is also claimed from the duty "to ensure the execution of the laws" (Art. 21).

Even as regards the enumerated subjects which are directed to be regulated by legislation, the Government is authorised to ask for permission of Parliament

(16) *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) 343 U.S. 579.

(17) Cf. *Woods v. Miller Co.*, (1948) 333 U.S. 138 (146).

(18) *Jennings, Law and the Constitution*, 5th Ed., p. 48.

(19) *Att. Gen. v. De Keyser's Royal Hotel*, (1920) A.C. 508.

(20) *Marriott, Mechanism of the Modern State*, Vol. II, p. 2.

to rule by 'ordinances', during a 'limited period'. No maximum limit to this period is set forth in the Constitution and it is left in the hands of Parliament, and a provision has been made for the ratification of the ordinances by Parliament. Art. 38 says—

".....The ordinances shall be enacted in meetings of Ministers after consultation with the Council of State. They shall come into force upon their publication but shall become null and void if the bill for their ratification is not submitted to Parliament before the date set by the enabling act.

At the expiration of the time limit referred to in the first paragraph of this article, the ordinances can be modified only by the law in those matters which are within the legislative domain".

(D) *India*.—Under our Constitution, the Supreme Court²¹ has held that the federal distribution of executive powers (under Arts. 73 and 162) is co-extensive with that of legislative powers so that the Executive of the Union or of a State can, broadly speaking, act in respect of matters over which the respective Legislature has the power to make laws. It does not, however, follow from this that in order to enable the Executive to function there must be a law already in existence and that the powers of the Executive are limited merely to the carrying out of these laws. Within the limits of the federal distribution of powers, the Executive can carry on the general administration of the State without any legislative sanction to do each act except where (a) expenditure of public funds is involved, or (b) the Executive requires powers which it does not already possess under the existing law, e.g., to encroach upon private rights, or where legislation is required by some specific provision of the Constitution.

The Supreme Court has also adhered to the residuary theory of executive function in holding that in a welfare State, the executive function is not confined to the execution of the laws passed by the Legislature²¹⁻²² but includes a number of other acts for the promotion of the social and economic welfare. So viewed, the Executive possesses the residuary power to do any act necessary for the general administration of the State and which it can do without violating any provision of the Constitution or encroaching upon any of the powers which essentially belong to the other organs of the State, under a proper construction of the Constitution.²¹

The Supreme Court appears to have confirmed the view taken by the majority of the Allahabad High Court in *Motilal v. Government of U.P.*,²³ namely, that an act would be within the executive power if it is not an act which has been assigned by the Constitution to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public.

In both the cases of *Motilal*²³ and *Ram Jawaya*,²¹ the immediate point for decision was whether the State should enter into a trade or business without prior legislative authority. It is to be noted that the specific provision in Art. 298 of the Constitution, as it then stood, included within the executive power the power to grant property and to make contracts but not the power to carry on a trade or business. Hence, the question arose whether such power could not be assumed by the Government, under its executive power, in the absence of a competent legislation empowering it to carry on a trade or business. So far as this immediate point is concerned, it is no longer necessary to arrive at the conclusion by any judicial interpretation or reliance upon the theory of residuary executive power as in the *Ram Jawaya* decision.²¹ For, Art. 298 has been substituted by the Constitution (Seventh Amendment) Act, 1956 (see Vol. IV, *post*). "Carrying on of any trade or business" has been added to the list of 'executive power' with the rider that if the trade or business relates to a matter which is within the legislative jurisdiction of Parliament, then the executive power of the Union or a State to enter into a particular business shall be "subject to legislation by Parliament".

(21) *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (232-8).

(22) *Joyantilal v. Rana*, A. 1964 S.C. 648.

(23) *Motilal v. Govt. of U. P.*, A. 1951 All. 257 (vide C3, Vol. I, p. 426).

Similarly, it would be subject to legislation by the State Legislature if the trade or business relates to an item within the legislative competence of the State Legislature. From the standpoint of our present discussion, since the function of entering into a trade or business is expressly declared as included in the executive power, it is clear that no legislative sanction shall be necessary for the exercise of the functions and that it will be possible for either the Union or the State Government to enter into the business of publication,²¹ or banking²⁴ or exploitation of mineral resources.²⁵ If, however, by such entry the State seeks to exclude from the trade citizens who had been carrying on the trade or intend to carry on the trade, then prior legislation would be required by Art. 19 (6) (ii) [see Vol. I, pp. 484, 684]. The executive power vested by Art. 298 is in fact of an "anticipatory" nature because the exercise of this power may either be nullified or regulated by subsequent legislation by the competent Legislature.

Though the immediate effect of the decision in *Ram Jawaya's* case²¹ has thus been obviated by the amendment of the Constitution, the principle laid down by the Supreme Court in this case is of far-reaching importance so far as the President's executive power is concerned, particularly in view of the fact that under *our* Constitution the residuary legislative power in the federal distribution of powers has been vested in the Union Parliament by Entry 97, List I. The net result of this entry is that the President will have the executive power to take action, subject to the limitations mentioned before, in the absence of legislation by the competent Legislature, with respect to any subject which is not included in List II, as belonging to the State Legislature exclusively. This power is wider than that conceded by some of the Judges of the majority in the *American Steel Seizure* case (p. 361, *ante*) because it is not dependent upon emergencies or other extraordinary circumstances. And this power of the President will comprise any function which is not vested by the Constitution in any other body.¹

Heads of power vested in the President.

As would appear from Arts. 73 (1) and 162 of *our* Constitution, the 'executive power' of the Union or of a State is broadly co-extensive with its legislative power,—the heads of which are enumerated in the relevant Legislative Lists in the 7th Schedule. The ambit of the 'executive power' under *our* Constitution can, accordingly, be realised from the Entries in these Lists together with certain substantive provisions.

The Constitution being federal, this power is divided between the Union and the State and the respective executive powers of the Union and the State are vested in the President and the Governor, by Arts. 53 (1) and 154 (1). Since the 'executive power of the Union' is vested in the President [Art. 53 (1)], it matters little whether any particular provision of the Constitution has referred to a power as belonging to the 'Union' or to the 'President'.

The principal heads of the executive power of the Union may, accordingly, be ascertained from the following summary of the powers vested by the Constitution in the President:

I. *The Administrative Power.*—In the matter of administration, not being a *real* head of the Executive like the American President, the Indian President shall not have any administrative function to discharge nor shall he have that power of control and supervision over the Departments of the Government as the American President possesses. But though the various Departments of the Government of the Union will be carried on under the control and responsibility of the respective Ministers in charge, the President will remain the *formal* head of the administration, and as such all executive action of the Union must be expressed to be taken in the *name* of the President.²

(24) *Tilak Ram v. Bank of Patiala*, A. 1959 Punj. 440 (446).

(25) *Kotiah v. State of A. P.*, A. 1959 A.P. 485.

(1) *Jayantilal v. Rana*, A. 1964 S.C. 648 (655). [In a sense, thus, we have thus arrived at a 'prerogative' power of the President].

(2) Art. 77.

For the same reason, all contracts and assurances of property made on behalf of the Government of India, must be expressed to be made by the President and executed in such manner as the President may direct or authorise.³

Again though, he may not be the 'real' head of the administration, all officers of the Union shall be his 'subordinates'⁴ and he shall have a right to be informed of the affairs of the Union.⁵

The administrative power also includes the power to *appoint and remove* the high dignitaries of the State and other administrative commissions. Under *our* Constitution, the President shall have the power to appoint—(i) The Prime Minister of India.⁶ (ii) Other Ministers of the Union.⁶ (iii) The Attorney-General for India.⁷ (iv) The Comptroller and Auditor-General of India.⁸ (v) The Judges of the Supreme Court.⁹ (vi) Judges of the High Courts of the States,¹⁰ including Additional and Acting Judges.¹¹ (vii) The Governor of a State.¹² (viii) An Inter-State Council.¹³ (ix) The Union Public Service Commission and Joint Commission for a group of States.¹⁴ (x) The Finance Commission.¹⁵ (xi) Election Commissioners.¹⁶ (xii) Special Officer for Scheduled Castes and Scheduled Tribes.¹⁷ (xiii) A Commission to report on the administration of Scheduled Areas, the welfare of the Scheduled Tribes;¹⁸ and a Commission to investigate into the conditions of backward classes.¹⁹ (xiv) A commission on languages.²⁰ (xv) A Special Officer for linguistic minorities.²¹

The President shall also have the power to *remove* (i) his Ministers, individually;²² (ii) the Attorney-General for India;²³ (iii) the Governor of a State;²⁴ (iv) Chairman or Member of a Public Service Commission of the Union or of a State, on the report of the Supreme Court,²⁵ or on the happening of certain contingencies;¹ (v) Judge of the Supreme Court,² or Election Commissioner,³ on an address by Parliament; (vi) Officers of the Union, subject to the provisions of Art. 311.

As regards other officers of the Government, *our Constitution seeks* to avoid the vice of the American 'spoils' system, by withholding from the President any general power of appointment or removal besides the few cases specified in the Constitution itself; and by making the "Union Public Services, All-India Services and Union Public Service Commission",—an exclusive legislative subject for the Union Parliament, and by making it obligatory on the part of the President to consult the Public Service Commission in matters relating to appointment [Art. 320 (3)], except in certain specified cases.

As has been pointed at the outset (p. 354, *ante*) the 'executive' power primarily means the power of execution of the laws which function logically comes under the present head, though, in *our* Constitution there is no provision specifically requiring the President to take care that 'the laws are faithfully executed'.⁴ Again, though there is no separation of authority as between the Union and the States in the matter of execution of the Union and the State laws,—inasmuch as it will be the duty of the States to execute both the State laws and the Union laws as are applicable in that State,⁵—the executive power of the Union shall extend to the giving of *directions*⁶ to the States to ensure due compliance with the Union laws.

II. *The Military Power.*—The military powers of the Indian President shall

- (3) Art. 299 (1).
- (4) Art. 53 (1).
- (5) Art. 78 (b).
- (6) Art. 75 (1).
- (7) Art. 76 (1).
- (8) Art. 148.
- (9) Arts. 124, 126.
- (10) Arts. 217, 223.
- (11) Art. 224.
- (12) Art. 155.
- (13) Art. 263.
- (14) Art. 316.
- (15) Art. 280.
- (16) Art. 324 (2).
- (17) Art. 338 (1).

- (18) Art. 339 (1).
- (19) Art. 340 (1).
- (20) Art. 344 (1).
- (21) Art. 350B (1).
- (22) Art. 75 (2).
- (23) Art. 76 (4).
- (24) Art. 156 (1).
- (25) Art. 317 (1).
- (1) Art. 317 (3).
- (2) Art. 124 (4).
- (3) Art. 324 (5), Prov.
- (4) Cf. Art. II, Sec. 3, of the Constitution of the U.S.A.
- (5) Art. 256.

be lesser than those of either the American President (see p. 371, *post*) or of the English Crown. The *supreme command* of the Defence Forces is, of course, vested in the President of India, but the Constitution expressly lays down that the exercise of this power shall be regulated by law.⁶ Parliament has exclusive legislative power relating to the *Defence Forces*,⁷ war and peace.⁸ So, it will not be possible for the Indian President to assume emergency powers such as the American President did during the World Wars, in the independent exercise of his powers as Commander-in-Chief [see, further, p. 363, *post*].

III. *The Diplomatic Power*.—The diplomatic power is a very wide subject and is sometimes spoken of as identical with the power over foreign or external affairs, which comprise "all matters which bring the Union into relation with any foreign country". The legislative power as regards these matters as well as the power of making treaties and implementing them, of course, belongs to Parliament.⁹ But though the *final* power as regards these things is vested in Parliament, the Legislature cannot take the initiative in such matters. The task of *negotiating* treaties and agreements with other countries, subject to ratification by Parliament, will thus belong to the President and Ministers. Again, though diplomatic representation as a subject of legislation belongs to Parliament, like the heads of other States, the President of India will represent India in international affairs and will have the power of appointing Indian representatives to other countries and of receiving diplomatic representatives of other States.

IV. *Legislative Power*.—Like the Crown in England, the President of India is a component part of the Union Parliament. The powers which the President is vested with in relation to legislation may be summarised as follows:

(a) The power to summon, prorogue and dissolve Parliament.⁹ (b) The right of opening address.¹⁰ (c) The right to address and to send messages.¹¹ (d) The power to cause certain reports and statements to be laid before Parliament, so that Parliament may have the opportunity to take its action upon them, such as (i) the Annual Financial Statement¹² and Supplementary Budget, if any;¹³ (ii) the report of the Comptroller and Auditor-General of India relating to the accounts of the Government of India;¹⁴ (iii) the recommendations made by the Finance Commission, together with explanatory memorandum of the action taken thereon;¹⁵ (iv) the annual report of the Union Public Commission, explaining the reasons where any advice of the Commission has not been accepted;¹⁶ (v) the report of the Special Officer for Scheduled Castes and Tribes;¹⁷ (vi) the report of the Commission to investigate into the conditions of the backward classes, with a memorandum explaining the action taken thereon;¹⁸ (vii) Reports of Special Officer for linguistic minorities.¹⁹ (e) The power of sanctioning introduction of certain legislative measures, such as, for alteration of State boundaries;^{19a} Money Bills;²⁰ Bills involving expenditure;²¹ Bills affecting taxation in which the States are interested;²² State Bills imposing restrictions on freedom of trade.²³ (f) Assent to legislation and the power to veto Union Bills,²⁴ and reserved State Bills.²⁵ (g) The power to legislate by Ordinances during recess of Parliament.¹ (h) The power to make regulations for Union Territories.² (i) Application of laws to major ports and aerodromes.³ (j) Giving instructions to a Governor to promulgate an Ordinance if it requires the previous sanction, etc. of the President under the Constitution.⁴

(6) Art. 53 (2).

(7) Entries 1, 2, 15 of List I, Sch. VII.

(8) Entries 10-14, List I, Sch. VII.

(9) Arts. 85 (2); 108.

(10) Art. 87 (1).

(11) Art. 86.

(12) Art. 112 (1).

(13) Art. 115 (1).

(14) Art. 151 (1).

(15) Art. 281.

(16) Art. 323 (1).

(17) Art. 338 (1).

(18) Art. 340 (3).

(19) Art. 350B.

(19a) Art. 3.

(20) Art. 117.

(21) Art. 117 (3).

(22) Art. 274 (1).

(23) Proviso to Art. 304.

(24) Art. 111.

(25) Art. 201.

(1) Art. 123.

(2) Art. 240.

(3) Art. 364 (1).

(4) Art. 213 (1), Proviso.

V. *Rule-making Power*.—Apart from the above powers relating to legislation proper, the President is vested with the power to make rules and orders relating to specific matters, which shall have the force of law, in so far as they are authorised by the Constitution:

(a) Relating to the manner in which orders and other instruments made and executed in the name of the President shall be authenticated;⁵ (b) Relating to the transaction of business of the Government of India and allocation thereof among Ministers; (c) Relating to recruitment and conditions of service of secretarial staff of Parliament; (d) Relating to the prohibition of simultaneous membership of Parliament and a House of Legislature of a State;⁷ (e) Relating to the procedure with respect to the joint sittings in consultation with the Chairman and the Speaker of the two Houses;⁸ (f) Prescribing the manner of enforcement of orders, etc. of Supreme Court;⁹ (g) Giving approval to rules relating to Supreme Court;¹⁰ (h) Providing for consultation with the U.P.S.C. regarding appointment of officials of Supreme Court;¹¹ (i) Prescribing conditions of service, etc. of Chairman and Members of Union and Joint Public Service Commissions;¹² (j) Allocating among States of emoluments payable to a Governor appointed for two or more States;¹³ (k) Providing for the discharge of the functions of the Governor of a State in any contingency not provided for in the Constitution;¹⁴ (l) Prescribing the percentage of taxes on income for distribution among States;¹⁵ (m) Providing for continuance of existing State taxes on water or electricity involving inter-State river valley projects;¹⁶ (n) Regulating recruitment and conditions of service of persons serving under the Union;¹⁷ (o) Providing for payment of compensation for premature termination of contractual service requiring special qualifications;¹⁸ (p) Determining the number of members of the Union Public Service Commission or a Joint Public Service Commission, their conditions of service, etc.;¹⁹ (q) Specifying the matters in which it shall not be necessary to consult the Union Public Service Commission;²⁰ (r) Relating to conditions of service and tenure of office of the Election Commissioners;²¹ (s) Specifying Scheduled Castes and Scheduled Tribes.²²

On some other matters, the President's rule-making power is made subject to any law that may be made by Parliament relating thereto.²³

VI. *The Pardoning Power*.—See under Art. 72, *post*.

VII. *Emergency Powers*.—The above is an account of the powers of the President in normal times. Besides, he shall have *extraordinary* powers to deal with an emergency, *viz.*, external aggression or internal disturbance by reason of which the security of India or any part thereof is threatened,²⁴ or, the failure of the constitutional machinery in a State owing to some other cause;²⁵ or, a financial crisis.¹ [See Vol. I, pp. 19-20].

VIII. *Miscellaneous Powers*.—As the head of the Executive power, the President has been vested by the Constitution with certain powers which may be said to be residuary in nature, and which are required to be vested in some authority, in order to let the machinery of Government set up by the Constitution go on and to avoid a deadlock for want of specific provisions.

Naturally, therefore, powers coming under this head relate to various matters,—

(i) Giving consent to use of foreign title to a person holding office of trust under the State;² (ii) Declining questions as to disqualifications of members after

(5) Art. 77 (2), (3).
 (6) Art. 98 (3).
 (7) Art. 101 (3).
 (8) Art. 118 (3).
 (9) Art. 142 (1).
 (10) Art. 145 (1).
 (11) Art. 146 (1), Prov.
 (12) Art. 148 (5).
 (13) Art. 158 (3A).
 (14) Art. 160.
 (15) Art. 270 (4) (b).
 (16) Art. 288 (1).

(17) Art. 309, Proviso.
 (18) Art. 310 (2).
 (19) Art. 318.
 (20) Art. 320 (3), Proviso.
 (21) Art. 324 (5).
 (22) Arts. 341-2.
 (23) *E.g.*, Art. 324(5).
 (24) Art. 352.
 (25) Arts. 356, 365.
 (1) Art. 360.
 (2) Art. 18 (4).

consulting the Election Commission³; (iii) Giving consent to appointment of *ad hoc* Judges and retired Judges for Supreme Court⁴; (iv) Giving approval to the sitting of Supreme Court in a place other than Delhi⁵; (v) Referring a question of law or fact of public importance for the opinion of Supreme Court⁶; (vi) Giving approval to rules made by the Chief Justice relating to conditions of service of staff of Supreme Court⁷; (vii) Determining number of Judges of a High Court⁸; (viii) Transferring a Judge from one High Court to another⁹; (ix) Determining that, in the interest of the security of the State, it will not be expedient to give an opportunity of showing cause to a Union civil servant¹⁰; (x) Making reference to the Supreme Court for inquiry and report whether the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President¹¹; (xi) Referring additional matters to the Union Public Service Commission for advice¹²; (xii) Issuing directions implementing the report of a Parliamentary Committee which examines the recommendations of the Official Language Commission¹³; (xiii) Directing the official use of a language spoken by a substantial section of the population of a State¹⁴; (xiv) Giving consent to the use of Hindi or any other language for any official purposes of a State¹⁵; (xv) Issuing directions to a State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups¹⁶; (xvi) Appointment of a Special Officer for linguistic minorities¹⁷; (xvii) Declaring a State (outside India) not to be a 'foreign State' for the purposes of this Constitution¹⁸; (xviii) Providing for the constitution of regional committees of the Legislative Assemblies of the States of Andhra Pradesh and Punjab¹⁹; (xix) Providing for a special responsibility of the Governor of Bombay for the establishment of development boards in certain areas and incidental matters²⁰; (xx) Requiring the Governor of a State to make a report regarding the administration of the Scheduled Areas in that State and to give directions as to the administration of the said areas²¹; (xxi) Making an order declaring certain areas to be Scheduled Areas or that they will cease to be Scheduled Areas²²; (xxii) Giving previous approval to a notification of the Governor to apply the provisions of the Schedule to any tribal area or to exclude any area from such notification²³; (xxiii) Until a notification under para. 1 is made, the administration of a tribal area is to be carried on by the President through the Governor of Assam as his Agent²⁴; (xxiv) To assent to regulation made under sub-para. 1(b) by the Governor²⁵; (xxv) Giving previous approval to the notification of the Government of Assam to include the areas in the plains in the Table in Part B of the Schedule.¹ (xxvi) The Constitution confers upon the President certain 'interim' powers, to be exercised by him so long as Parliament does not elect to 'occupy' those fields. Thus,—

(a) Grants-in-aid to the State which are in need of assistance, shall be sanctioned by the President, until Parliament makes the necessary provision.²

(b) Until Parliament legislates, the President shall make rules regulating the recruitment and conditions of service of persons serving the Union.³

"Or through officers subordinate to him".

This expression is taken from ss. 7 (1) and 49 (1) of the Government of India Act, 1935, and enables the President to delegate powers to officers subordinate to

(3) Art. 103 (1).

(4) Art. 126.

(5) Art. 130.

(6) Art. 143 (1).

(7) Art. 146 (2), Proviso.

(8) Art. 216.

(9) Art. 222.

(10) Art. 311 (2) (c).

(11) Art. 317 (1).

(12) Art. 320 (3).

(13) Art. 344 (6).

(14) Art. 347.

(15) Art. 348 (2).

(16) Art. 350A.

(17) Art. 350B.

(18) Art. 367 (3), Proviso.

(19) Art. 371 (1).

(20) Art. 371 (2).

(21) Fifth Sch., Para. 3.

(22) Fifth Sch., Para. 6.

(23) Sixth Sch., Para. 18 (1).

(24) Sixth Sch., Para. 18 (2).

(25) Sixth Sch., Para. 19 (3).

(1) Sixth Sch., Para. 20 (3), Proviso.

(2) Art. 275 (2).

(3) Art. 309, Proviso.

him. It is neither possible nor desirable that the President shall do all his acts personally.

A question arose under the Government of India Act, 1935, as to whether the Ministers were officers subordinate to the Governor, in view of the above expression. It was held by the Privy Council⁴ that they were so, and when the Constitution adopts the same expression, the same interpretation would be put upon the expression under the Constitution as well,⁵ because the Constitution reproduces the language in ss. 7 (1) and 49 (1) of the Government of India Act, 1935, on this point. It is to be noted that under the Constitution the 'executive power' of the Union and the State is vested in the President [Art. 53 (1)], and the Governor [Art. 154 (1)], respectively. So, no other person can exercise an executive power unless he is an 'officer subordinate to' [Art. 53 (1)] the President or the Governor, as the case may be. Again, as under the Act of 1935, though the Ministers are responsible to the Legislature, they shall be appointed by the President [Art. 75] or the Governor [Art. 163] and shall hold office during the pleasure of the President or the Governor respectively. Hence, the Ministers shall in fact be officers 'subordinate to' the President or the Governor in relation to the executive power, notwithstanding their responsibility to the Legislature.

This seems rather anomalous, but it merely expresses in statutory language what is the unwritten law in the *English Constitution*. In the English Constitution, though the Cabinet is the real executive authority, the Ministers have no legal status as such and in legal theory, they are mere servants of the Crown in whom the executive authority is vested, and they are accountable to Parliament only as servants of the Crown, and are also liable to be dismissed by the Crown at his pleasure [See also under Art. 154 (1), *post*].

"In accordance with this Constitution".

These words are intended to make the President a constitutional ruler. His oath [Art. 60] also emphasises his moral duty to 'preserve, protect and defend the Constitution'. If he seeks to exercise any function otherwise than in accordance with the Constitution, he will render himself liable to impeachment [Art. 61].

It is to be noted that the words 'and the law', which occurred in the Draft Constitution after the words 'in accordance with the Constitution', have been omitted by the Constituent Assembly from Art. 53 (1). The result is that the only limitation to the President's powers is the Constitution. As in the *United States*, the Indian President's constitutional powers cannot be regulated or restricted by legislation. There is thus a departure from the Australian Constitution⁶ where the *extent* of the 'executive powers' is left to the operation of the law.

The word 'law' is, however, retained in Art. 60 of *our* Constitution so that it shall be the *moral* duty of the President to 'preserve, protect and defend' the law enacted by Parliament.

The only power which *our* Parliament shall have in relation to the 'executive power' of the President is that given by Art. 53 (3) (b), *viz.*, the power of vesting *subordinate* functions on other persons. Of course, certain provisions of the Constitution itself empower Parliament to regulate the 'exercise' of the President's powers, *e.g.*, Arts. 52 (2); 324 (2), (5); 354 (2); 356 (3); 359 (3).

Whether powers vested in the President can be delegated.

The Supreme Court has held that though Art. 258 (1) empowers the President to delegate to a State Government or to its officers "functions in relation to any matter to which the executive power of the Union extends", the functions which have been vested expressly in the *President* by various provisions of the Constitu-

(4) *Emperor v. Sibnath*, A. 1954 P.C. 156 (162-3); reversing *Emperor v. Hemendra*, A. 1939 Cal. 529.

(5) *Shiv Bahadur v. State of U. P.*, (1953) S.C.R. 1188 (1210).

(6) Wynes, *Legislative & Executive Powers*, p. 321.

tion cannot be delegated either under Art. 258 or any other provision of the Constitution to *any other person or body*.^{6a} The result is that though all the executive power of the Union is also vested in the President by Art. 53 (1), a distinction is to be maintained which are vested in the President by Art. 53 (1), generally, and the other provisions of the Constitution, such as Arts. 123, 124, 217, 268-279; 309, 310, Proviso (c) to Art. 311 (2), 338, 340, 344, 356, 360, which specifically vest particular functions in the President. The latter powers cannot, according to the Supreme Court,^{6a} be delegated by the President to any other person or authority, but must be exercised by the President personally.

This does not, however, mean that the President would be entitled to exercise the latter powers in his individual judgment, for, Art. 74 (1) relates to *all* the functions of the President.

CLAUSE (2).

OTHER CONSTITUTIONS

(A) U.S.A.—Art. II, S. 2 (1) of the Constitution says—

"The President shall be Commander-in-Chief of the Army and Navy of the United States."

Owing to the application of the doctrine of Separation of Powers, the above power of the President is placed on an independent footing, as an 'executive' power, and there is no provision in the Constitution, subjecting it to Congressional regulation. In the result, it has been held that the President, as the Commander-in-Chief, is competent to take much action,^{6b} without legislative sanction, and even against the wishes of Congress, though the power to declare war belongs to Congress.

Congress has, under its power to "raise and support armies" [Art. I, S. 8 (12)], and "to provide and maintain a navy" [Art. I, S. 8 (13)], the exclusive authority to lay down the rules governing the organization and maintenance of the military forces, the establishment of forts, arsenals and other military equipments. On the other hand, the President has the exclusive authority in the matter of disposition of troops, direction of vessels of war, the planning and execution of campaigns and all orders issued by the President, as the Commander-in-Chief (which are not otherwise unconstitutional) have the force of laws.^{6c} Each of the two organs of government is thus supreme in its own sphere. This distinction was explained by the Supreme Court, in *Ex parte Milligan*,⁷ in these words:

"Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigour and success, *except such as interferes* with the command of forces and conduct of campaign. The power and duty belongs to the President."

Thus, the American President possesses the constitutional power to send troops outside the United States, without interference by the Congress, at least in time of war.⁸ This power was exercised by President Wilson on several occasions, even though war was not declared by Congress, e.g., between United States and China or Mexico.⁸ Again, under this power, President Wilson armed merchant vessels with defensive guns, even against the refusal of Congress to give the necessary authorisation.⁸

The Constitution does not specify what acts the President may or may not do, as Commander-in-Chief, nor restrict their exercise to the time when the country is actually at war. Hence, an American writer observes—

"Authority as Commander-in-Chief of the armed forces has rendered our President a ruler more powerful than any monarch of a modern western country."

(6a) *Jayantilal v. Rana*, A. 1964 S.C. 648 (656).

(6b) *Neagle*, in re, (1890) 135 U.S. 1.

(6c) *United States v. Freeman*, 3 How. 556; *Fleming v. Page*, (1850) 9 How. 603 (615).

(7) *Ex parte Milligan*, (1866) 4 Wall. 2.

(8) Willoughby, *Constitutional Law of the United States*, Vol. III, p. 1567; Pritchett, *American Constitution*, 1959, p. 350.

(9) *Parker*, *Administrative Law*, 1952, p. 89.

In the words of *Brogan*,¹⁰—"The 'war power' is a vague and undefinable residuum of power on which the President can draw." Thus, during World War II, apart from Congressional authority, the President assumed the following powers, *inter alia*, under his position as Commander-in-Chief: (i) to intervene in labour disputes and strikes in war industries (creating the National War Labour Board); (ii) to utilise domestic transportation facilities for the prosecution of war; (iii) to requisition merchant vessels for war use; (iv) to channel labour into essential war industries [by setting up the War Manpower Commission]; (v) to establish military tribunals in territory occupied by the Armed Forces of the United States and this power may continue, even after the cessation of hostilities, long enough to permit the occupying power to discharge its responsibilities.¹¹

Read with Art. IV, s. 4, the present power authorises the President to use the armed forces to protect the States against external 'invasion' and 'domestic violence' and the propriety of such action is not open to judicial review.^{11a}

But, as has been pointed out (p. 360, *ante*), the Supreme Court has held that in the exercise of his power as Commander-in-Chief, the President cannot take possession of private property *without legislation*, even though it may be necessary, in the interests of national defence, to regulate the relationship between employers and employees by prescribing rules designed to settle labour disputes and the like.¹²

"The founders of this Nation entrusted the law-making power to the Congress alone in both good and bad times."¹²

"The Constitution did not contemplate that the title Commander-in-Chief of the *Army and Navy* will constitute him also Commander-in-Chief of the country, its industries and its inhabitants.

"Even though 'theatre of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed forces has the ultimate power as such to take possession of private property in order to keep labour disputes from stopping production."¹²

"His command power is not such an absolute as might be implied in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress."¹²

It is also to be noted that the military function of the President is subordinate to his civil office^{12a} and the office of Commander-in-chief does not make himself a member of the Armed Forces.

(B) *Eire*.—Art. 13 (4) of the Constitution of 1937 provides—

"(4) The supreme command of the defence forces is hereby vested in the President.

(5) (i) The exercise of the supreme command of the defence forces shall be regulated by law. (ii) All commissioned officers of the defence forces shall hold their commissions from the President."

(C) *Australia*.—S. 68 of the Constitution Act says—

"The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General"

The power is, however, exercised on ministerial advice and to the extent as defined by the Legislature.

INDIA

Scope of Cl. (2) : Supreme Command of the Defence Forces.

Like the head of the Executive of other free countries, the President of India shall have the *supreme command of the Defence Forces*. As in the *United States*,¹³ the above power would not necessarily empower the President to take a personal command in the field.

(10) *Brogan*. Government of the People, 1943, p. xix.

(11) *Madsen v. Kinsella*, (1952) 343 U.S. 341.

(11a) *Martin v. Mott*, (1827) 12 Wh. 19; *Luther v. Borden*, (1849) 7 How. 1.

(12) *Youngstown Sheet Co. v. Sawyer*, (1952) 343 U.S. 579 (587-9; 643, 645).

(12a) Cf. *Duncan v. Kahanamaku*, (1946) 327 U.S. 304 (322).

(13) *United States v. Eliason*, 16 Pet. 291.

An important point of difference between the American and Indian provisions is that unlike the Constitution of the U.S.A., *our Constitution* expressly provides that the exercise of this power of supreme command 'shall be regulated by law'.¹⁴ In the U.S.A., it has been held that both Congress and the President are supreme in their respective jurisdictions. Thus, the 'war power' of Congress extends to all legislation essential to the prosecution of war with vigour and success, except such as interferes with the command of the forces and the conduct of the campaigns. Hence, Congress cannot direct the conduct of campaigns.¹⁵ By inserting the words 'shall be regulated by law', the framers of *our Constitution* must be supposed to have intended otherwise.

It does not appear, however, that the Indian President shall have no power to act in anticipation of Parliamentary sanction, to deal with an emergency like an actual invasion.¹⁶ In such a case, the Indian President, acting as the Commander of the Defence Forces, and with the advice of responsible Ministers, should have the power to employ the forces in advance to repel invasion, pending a formal declaration of war by Parliament.¹⁶ In fact, the Constitution vests in the President (Art. 352) the power to determine, in anticipation of Parliamentary decision, whether such an emergency has arisen.

In some countries, the military power of the Executive includes the power to declare War and Peace. Thus, in England, "the Sovereign alone has the power of declaring war and peace."¹⁷ Not only has the Crown the prerogative to declare war, it has also the final authority to determine whether a state of war exists with any country.¹⁸

The American Constitution, on the other hand, vests the power 'to declare war' exclusively in the Congress [Art. I, Sec. 8 (1)]. No other authority can involve the United States in a war,—though, of course, the President, as Commander-in-Chief, may act in such a way that war becomes inevitable.¹⁹

In India, though the declaration of war and conclusion of peace are matters of legislation by Parliament [Entry 15, List I, 7th Sch.], the English convention, according to which the Executive head has the final power of determining whether a state of war exists with any foreign country, seems to have been adopted. Thus, by a Notification, the President declared that the state of war between India and Germany (owing to World War II) had ceased to exist on January 1, 1951.²⁰ In view of the decision in *Ram Jawaya's case*,^{20a} it seems that the President can declare war without prior legislative sanction but if the Parliament resolves otherwise, the President would be bound to act accordingly.

"*Shall be regulated by law*".—"Law" in this context obviously refers to Acts of Parliament.^{20b}

CLAUSE (3).

Sub-Cl. (a) : Saving of existing laws.

Sec. 124 of the Government of India Act, 1935, authorised the delegation of any functions relating to the executive authority of the Federation to the Govern-

(14) In England, the supreme command and direction of the armed forces belongs to the Crown free of Parliamentary control unless Parliament expressly seeks to control the Prerogative [*China Navigation v. A. G.*, (1932) 2 K.B. 197].

(15) Ex parte Milligan, (1866) 4 Wall. 2.

(16) The Irish Constitution, 1937, vests such a power in the Executive by Art. 28, Sec. 3 of which says—"War shall not be declared and the State shall not participate in any war save with the assent of the Dail Eireann."

In the case of actual invasion, however, the Government may take whatever steps they consider necessary for the protection of the State, and Dail Eireann if not sitting shall

be summoned to meet at the earliest practicable date."

(17) *The Hoop*, (1799) 1 C. Rob. 196.

(18) *Janson v. Driefontein Mines*, (1902) A.C. 484; *Kawasaki v. Bantham Co. Ltd.*, (1939) 2 K.B. 544.

(19) Munro, Government of the United States, (1944), p. 454.

(20) Not. No. D7104—Eur. II/50/1-1-51 [Gaz. of India, Extraordinary, d. 1-1-51, Pt. I, s. 1].

(20a) *Ram Jawaya v. State of Punjab*, (1951) 2 S.C.R. 225; see p. 362, ante.

(20b) Cf. *The Commonwealth v. Colonial Combing Co.*, (1922) 31 C.L.R. 421 (431).

ment of any Province, by Acts of the Federal Legislature. The present clause saves those laws and explains that the vesting of the executive power of the Union in the President does not mean an automatic resumption of those delegated functions by the President.

Sub-Cl. (b):

OTHER CONSTITUTIONS

(A) *U.S.A.*—In the United States it has been held²¹⁻²² that the fact that the executive power is vested in the President by the Constitution does not mean that every officer in every branch of the administration can act only under the sole direction of the President and that Congress cannot pass any law directing an executive officer to do anything.

(B) *Government of India Act, 1935*.—Sec. 7 (1) of the Act provided—

“... but nothing in this section shall prevent the Federal Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing law on any Court, judge or officer, or on any local or other authority.”

INDIA

Cl. (3) (b) : Power of Parliament as regards President's functions.

This clause means that though the executive power is vested in the President by the Constitution it will not prevent Parliament from delegating the discharge of *subordinate* or *ministerial* functions to any other person or authority, without disturbing the constitutional powers of the President.

Thus, though Parliament may not transfer the supreme command of the Defence Forces to any person other than the President, it would be competent for Parliament to provide that particular subordinate functions in relation to the command of the Forces shall be exercised by other person or persons, subject to the supreme command of the President. This is an essential provision, simply because it would not be physically possible for the President to exercise all powers personally nor to provide how each particular function shall be exercised. But powers which are expressly vested by the Constitution in the President cannot be transferred by Parliament to any other authority. This sub-clause reminds one of the observations of the Supreme Court in *Kendall v. U. S.*²¹⁻²² (see above).

“It by no means follows that every officer in every branch of that (the executive) department is under the exclusive direction of the President. . . . It would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured protected by the Constitution, and in such cases the duty and responsibility grow out of and are subject to the control of the law and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.”²³

When Parliament thus confers executive functions on authorities other than the President, the President is to that extent relieved of his responsibility which he has for the acts of his ‘subordinates’ under cl. (1) of this Article. In such a case, the responsibility is transferred to the authority to which the function is transferred by the Legislature.²³

(21-22) *Kendall v. U. S.*, (1838) 12 Pet 524 (613).

(23) Cf. *Emp. v. Sibnath*, A. 1945 P.C. 156 (162).

INDEX TO COMMENTS.

ARTICLE 53.

Clause (1).

Other Constitutions :

(A) U.S.A., 345; (B) Australia, 348; (C) Canada, 348; (D) Eire, 348; (E) Switzerland, 348; (F) Fourth French Republic, 349; (G) Fifth French Republic, 349; (H) West Germany, 349; (I) Ceylon, 350; (J) Government of India Act, 1935, 350.

India :

Scope of Cl. (1): Executive power of President, 350; 'Executive power of the Union,' 351; 'Executive power', 351.

Whether exercise of executive power is dependent on prior legislation, 351.

Has the Executive any residuary power: (A) U.S.A., 352; (B) England, 355; (C) France, 355; (D) India, 356; Heads of power vested in the President, 363.

'Or through officers subordinate to him', 367; 'In accordance with the Constitution', 368.

Clause (2).

Other Constitutions :

(A) U.S.A., 369; (B) Eire, 370; (C) Australia, 370.

India :

Scope of Cl. (2): Supreme Command of the Defence Forces, 370.

Clause (3).

Sub-cl.(a): Saving of existing laws, 371.

Sub-cl.(b):

Other Constitutions :

(A) U.S.A., 372; (B) Government of India Act, 1935, 372.

India :

Cl. (3) (b): Power of Parliament as regards President's functions, 372.

54. The President shall be elected by the members of an electoral college consisting of—
Election of President.

- (a) the elected members of both Houses of Parliament; and
- (b) the elected members of the Legislative Assemblies of the States.

OTHER CONSTITUTIONS

(A) U.S.A.—The original mode of election prescribed by Art. II, sec. (1) has been superseded by the 12th Amendment of 1804. Under the amended provision, the election is held as follows.²⁵ The election of the President is made indirectly, by an electoral college. The number of electors chosen from each State is equal to its representation in the Congress, *i.e.*, equal to the number of its representatives in the House of Representatives and the Senate. The electors meet in their respective States and vote by ballot. The person having the greatest number of votes by such ballot shall be the President, if such number be a majority of the whole number of electors appointed. But if no person has such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose, by ballot, the President.¹ The Constitution itself does not say how the electors are to be chosen. But in practice, the electors have come to be chosen by *popular election*, which has become complicated owing to the growth and strength of party organisations. Long before the Presidential elections, the various parties hold their national conventions and select their own candidates for the President. Hence, when the primary voters vote for the electoral college, they also know for which Presidential candidate they are voting and, as soon as the popular vote is counted, not only the electors are known but also, in effect, the President, and the meeting of the electoral college, afterwards, has become superfluous and a matter of form. By the operation of the party system, the election of the President has thus come to be practically direct. Again, owing to the growth of the party system in the U.S.A., the object of the framers of the Constitution that the best man

(25) Pritchett, *American Constitution* (1959), pp. 287 *et seq.*

(1) This happened only once,—in 1824.

should be chosen by the people, judged only by the test of merit, has been perverted by a system by which only the strength of the different parties is fought out and the President who is elected is a mere nominee of the successful party.

The system of election by States has also led to the curious result that the man who receives the largest number of votes is not necessarily elected President. This is because the voters do not ballot directly for the Presidential candidates themselves. The election is not a plebiscite. They vote for electors in each State to cast the electoral votes of the State. Each State has as many electors as it has Senators and members of the House of Representatives. There are 100 Senators and 435 Representatives, which makes a total of 535 electoral votes of which 268 are needed for a Presidential candidate to be elected. A candidate who receives a majority of the votes of the citizens in an individual State is thus given the entire electoral votes of the State. But as between the States the number of electoral votes varies, according to population. Hence, candidates for the Presidency tend to concentrate their election campaigns in certain key States with larger number of electoral votes, such as New York, which controls 47.

This is because the contest is usually close in the struggle for the votes of these populous States, and by just tipping the scales with a 51 per cent. majority, candidates can win a large number of electoral votes.

(B) *Eire*.—Art. 12 (2) of the Constitution of 1937 says—

"(2) (i) The President shall be elected by direct vote of the people. (ii) Every citizen who has the right to vote at an election for members of Dail Eireann shall have the right to vote at an election for President. (iii) The voting shall be by secret ballot and on the system of proportional representation by means of the single transferable vote."

Art. 12 (4) and (5) again, provide—

"(4) 2. Every candidate for elections, not a former or retiring President, must be nominated either by—(i) not less than twenty persons, each of whom is at the time a member of one of the Houses of the Oireachtas; or, (ii) by the Council of not less than four administrative counties (including county boroughs) as defined by law.

3. No person and no such Council shall be entitled to subscribe to the nomination of more than one candidate in respect of the same election.

4. Former or retiring Presidents may become candidates on their own nomination.

5. Where only one candidate is nominated for the office of President it shall not be necessary to proceed to a ballot for election.

(5) Subject to the provisions of the article, elections for the office of Parliament shall be regulated by law."

(C) *Fourth French Republic*.—Art. 29 of the French Constitution of 1946 provided that "the President of the Republic shall be elected by the Parliament."

He was therefore elected by the two Houses of Parliament in joint session.

(D) *Fifth French Republic*.—Art. 5 of the Constitution of 1958 contains elaborate provisions relating to the election of the President. The principle underlying it is—

"The President of the Republic shall be elected by an electoral college comprising the members of Parliament, of the General Councils and of the Assemblies of the Overseas Territories, as well as the elected representatives of the municipal councils....."

It is evident that the electorate for the election of the President is far more broad-based than that of the Prime Minister or of Parliament itself. As stated before, this is one of the factor leading to the pre-eminence of the President under the new Constitution.

(E) *West Germany*.—Art. 54 of the West German Constitution of 1949 provides—

"(1) The Federal President is elected, without debate, by the Federal Convention....."

(3) The Federal Convention consists of the members of the *Bundestag* and an equal number of members elected by the representative assemblies of the *Länder* according to the rules of proportional representation....."

(6) The person receiving the votes of the majority of the members of the Federal Convention is elected. If such majority is not obtained by any candidate in two ballots, the candidate who receives the largest number of votes in a further ballot is elected....."

The German President is thus elected by an electoral college consisting of the members of the popular House of the Federal Legislature and an equal number of persons elected by the popular Houses of the State Legislature, according to the system of proportional representation.

The German system, thus, has elements of similarity to the system prescribed by Art. 54 of *our* Constitution.

INDIA

Art. 54 : Indirect Election of the President.

The system of election provided by *our* Constitution differs from the several precedents just cited. It prescribes indirect election, but the mode is different from that under the *American* Constitution inasmuch as the electoral college under *our* Constitution consists of members of the Legislatures instead of electors chosen in the States by *popular* election.

Though the *Burmese* President is also chosen by members of the Legislature, only the members of the Union Parliament take part in that election; but under *our* Constitution, the electoral college consists of the members not only of the Union Parliament but also of the elected members of the Legislative Assemblies of the States.

Our system also differs from either of the foregoing two systems in adopting voting by proportional representation which obtains under the *Irish* Constitution.

Reasons for adopting Indirect Election for election of President.

Pandit Nehru gave the following reasons in the Constituent Assembly why a direct election of the President on the adult suffrage was discarded—

(i) The framers of the Indian Constitution wanted to emphasise that the power really vested in the Ministry and the Legislature and not in the President as such. "If we had the President elected on adult franchise and it did not give him any real powers, it might become a little anomalous." (ii) A tremendous loss of time, energy and money would be involved in a Presidential election on adult suffrage. We shall have elections to the Federal Parliament. An enormous Presidential election added to this would be a tremendous affair—some of which we might not even be able to carry out. (iii) It would be impossible to provide an electoral machinery for an election in which at least 176 millions of people would have to participate.²

Reasons why Members of State Assemblies have been included in the Electoral College.

The Union Legislature would ordinarily be dominated by one party, which would form the Ministry. If this group elected the President, inevitably they would choose their own man; the President and the Ministry would thus represent exactly the same thing. The framers of the Constitution have, therefore, adopted a middle course and asked members of legislatures in all the Units to take part in the election.^{1a} By Art. 55 (2), however, the votes of members of Parliament have been *weighted* so as to secure that the total voting strength of the members of Parliament equals that of the Assemblies of all the States taken together.

INDEX TO COMMENTS.

ARTICLE 54.

Other Constitutions :

(A) U.S.A., 373; (B) Eire, 374; (C) Fourth French Republic, 374; (D) Fifth French Republic, 374; (E) West Germany, 374.

(2) Const. Assembly Debates, Vol. IV, No. 6, p. 734; Vol. VII, p. 998.

India :

Art. 54: Indirect election of President, 375 ; Reasons for adopting indirect election for election of President, 375 ; Reasons why members of State Assemblies have been included in the Electoral College, 375.

55. (1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

Manner of election of President.

(2) For the purpose of securing such uniformity among the States *inter se* as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner:—

(a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly ;

(b) if, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one ;

(c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of both Houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

Explanation.—In this article, the expression “population” means the population as ascertained at the last preceding census of which the relevant figures have been published.

OTHER CONSTITUTIONS

Eire.—See under Art. 53, *ante*.

INDIA

Cls. (1)-(2) : Uniformity and weightage.

The object of these two clauses is two-fold, *viz.*—(a) to secure uniformity among the States *inter se* in the matter of representation of the States for election of the President ; (b) to secure parity between the States as a whole and the Union, by providing for weightage.

The above two objects are carried out by the system prescribed by cl. (2) which is based on two broad principles:

(i) The number of votes given to the Houses of Parliament should be equal to the total number of votes given to *all* the Legislative Assemblies in India.

(ii) The voting strength of each voter in the State Assembly must be proportionate to the population he represents.

The system of weightage has been necessary because the number of members in the Legislative Assembly in each State is not uniformly proportionate to its population. Thus, with a population of 63 millions, Uttar Pradesh Legislative

Assembly has 430 members while Assam Legislative Assembly has 108 members for 9 millions. In the result, a member of the Assam Assembly does not represent so many people as does a member of the Uttar Pradesh Assembly. Consequently, members of these two State Assemblies cannot be placed on an equal footing in the matter of an all-India representation to elect the President.

According to Art. 54, it is only an *elected* member who is a voter, in the cases of the Houses of Parliament or of a State Legislative Assembly.

The result of sub-clauses (a) and (c) of cl. (2) is as follows—

$$\begin{aligned}
 & (a) \text{ The number of votes of each elected member} \\
 & \quad \text{of a State Legislative Assembly} = \frac{\text{State Population}}{\text{Total number of elected members of the Assembly} \times 1000.} \\
 & \quad \text{of either House of Parliament} \\
 & (c) \text{ The number of votes of each elected member} = \frac{\text{Total number of votes of the elected members of all State Legislative Assemblies.}}{\text{Total number of elected members of both Houses of Parliament.}}
 \end{aligned}$$

Sub-cl. (b) only deals with the remainder, if any, obtained by the calculation made under sub-cl. (a). The working of all the sub-clauses may be illustrated thus—

(i) The population of Bombay is 20,849,840. Let us take the total number of elected members in the Legislative Assembly of Bombay to be 208 (*i.e.*, one member representing one lakh of the population). To obtain the number of votes which each such elected member will be entitled to cast at the election of the President, we have first to divide 20,849,840 (which is the population) by 208 (which is the total number of elected members), and then to divide the quotient by 1,000. In this case the quotient is 1,00,239. The number of votes which each such member will be entitled to cast would be 100,239/1000 *i.e.*, 100 (disregarding the remainder 239 which is less than five hundred).

(ii) Again, suppose the population of Mysore is 1,292,938. Let us take the total number of elected members of the Legislative Assembly of Mysore to be 130 (*i.e.*, one member representing roughly ten thousand of the population). Now, applying the aforesaid process, if we divide 1,292,938 (*i.e.*, the population) by 130 (*i.e.*, the total number of elected members), the quotient is 9,945. Therefore, the number of votes which each elected member of the Mysore Legislative Assembly would be entitled to cast is 9,945/1,000, that is 9+1 (because the remainder 945 is greater than 500)=10.

(iii) If the total number of votes assigned to the members of the Legislative Assemblies of the States in accordance with the above calculation be 74,940 and the total number of elected members of both the Houses of Parliament be 750 then to obtain the number of votes which each member of either House of Parliament will be entitled to cast at the election of the President, we should have to divide 74,940 by 750. Thus the number of votes which each such member will be entitled to cast in the case would be $\frac{74,940}{750} = 99 \frac{23}{25}$ *i.e.*,

100 (the fraction $\frac{23}{25}$ which exceeds one-half being counted as one).

Cl. (3) : Proportional Representation by the Single Transferable Vote.

The system of voting by secret ballot on the system of proportional representation by means of the single transferable vote is adopted from the Constitution of Eire [Art. 12 (2)]. It is the method advocated by Thomas Hare.³ In our Constitution, this device is adopted not only for the election of the President but also for election of representatives of the States in the Council of States [Art. 30 (4)], and for election of members of the Legislative Council of a State [Art. 171 (4)].

The general object of introducing proportional representation at these elections is to give each minority group an effective share in the political life.⁴ The advan-

(3) Thomas Hare, *Treatise on the Election of Representatives—Parliamentary and Municipal* (1859). For a detailed working of this system, see also App. I to Horwill, *Proportional Representation*; Hoog and Hallet, *Proportional Representation*, (1926); Gosnell,

Article on Proportional Representation in the *Encyclopaedia of Social Sciences*, Vol. XII.

(4) The arguments for and against proportional representation are very clearly summarised in Keith, *Cabinet System*, 1952, pp. 253-5.

tages claimed for the Single Transferable System, further, are—(i) All currents of political opinion can be truly reflected under this system, and any group can elect one representative if it can muster sufficient votes to reach the 'quota'. (ii) The power and interest of each voter is increased by giving him successive choices.

In India, the system was introduced in order to afford the minorities a better opportunity of influencing the election of the head of the State. As Dr. Ambedkar explained⁵—

".....Obviously no member of the House would like the President to be elected by a bare majority or by a system of election in which the minorities had no part to play. That being so, the election of the President by a bare majority has to be eliminated and we have to provide a system whereby the minorities will have some voice in the election of the President. The only method, therefore, that remained was to have a system of election in which the minorities will have some hand and some play and that is undoubtedly the system of proportional representation."

How the Single Transferable Vote system works.

(A) Multi-member constituencies.

In a multi-member constituency, the system works as follows:

The election is held by multi-member constituencies. All the candidates who compete for the seats allotted to a constituency, have their names printed on one ballot paper. Each elector has only one vote in the sense that it will be capable of electing one candidate only. But that vote will not be wasted in case the candidate whom he wishes to elect has got more than the required number of votes, called the 'quota'. The elector is required to indicate his first, second and third preferences and so on, by placing the figures 1, 2, 3, etc., against each candidate.

At the time of counting the votes, a quota is fixed. Any member who gets this quota of votes, is declared elected. This quota is fixed thus⁶—

$$\frac{\text{Total number of valid ballot papers}}{\text{Number of members to be elected} + 1} = 1$$

Supposing the total number of ballot papers to be 18,000 and the number of candidates to be elected to be 6, the quota will be—

$$\frac{18,000}{6 + 1} + 1 = 2,572.$$

In the first count, the first preferences alone are counted and any candidate (A) who receives the above quota of first preferences is declared elected. These 2,572 ballot papers are then put aside and are not to be of any further use.

Now, A has a surplus of first preferences in his favour which are of no use to him. These excess ballot papers giving the first preference to A are then recounted, according to the second preferences, and these surplus votes are then transferred to the other candidates, and are added to the first preference votes obtained by each, until some of them also reaches the quota and so on, until 6 candidates reach the quota.⁷

The system of proportional representation by means of the single transferable vote, thus, works on the following essential principles:

(a) *Fixation of the quota.*—Under the ordinary system of representation by single member constituencies (which obtains in the case of election to our House of the People or the Legislative Assembly of a State), there is no question of fixing any quota; the candidate who gets the highest number of votes amongst all the candidates gets elected even though he has a majority of only one vote over the

(5) C. A. D. Vol. VII, p. 1017.

(6) This method of determining the quota is known as the 'simple quota' method, because the quota is fixed at just the absolute majority of the valid votes cast.

(7) Cf. r. 76 of the Conduct of Election Rules. 1961.

next candidate and even though all the other candidates representing different other parties secure a much larger number of votes in the aggregate than the highest candidate who secures a bare numerical majority. The result is that the elected candidate cannot be said to represent the opinion of the majority of the voters of the country as a whole. Thus, if there are three parties and A, B and C represent each one of them, and the candidates secure the votes as follows:

A	40
B	39
C	21,

under the ordinary system of representation, A would be elected even though 60% of the voters of the constituency have voted against him.

The system of proportional representation seeks to avoid this state of affairs and its aim is to secure that all the parties or shades of political opinion amongst the electorate should be represented according to their respective strength amongst the electorate. Under this system, therefore, a candidate who secures the bare numerical majority (as in the case of A above) cannot be returned; only he will be elected who gets the vote from the majority of the electors in the constituency. Thus, in the given case, in order to be elected A must secure at least 51 votes, i.e., an absolute majority of the total votes cast (which is 100 in the given case). It is only then that it can be said that he represents the majority of the people in the country. This minimum number required for election under a system of proportional representation is called the *quota*. Where there is a multi-member constituency, the quota is found out by dividing the total number of valid votes cast by the total number of seats in a constituency plus one; if one is added again to the quotient, the result is the quota.

(b) *Voting by indicating preferences.*—But what should happen if no candidate has secured the number of votes required by the quota, as in the given case? Since one voter has got only one vote, it would be impossible to get the candidate with the required quota unless fresh elections were to be held until such a candidate were available and it might be that such a candidate would never have been found.

The solution is furnished by the device of indicating 'preferences' under the system of proportional representation. Every voter is required to mark against the name of all the candidates printed on his ballot paper his preferences as amongst the candidates. He would mark his first preference against that candidate for whom he would vote if he were asked to select one man only. If he were asked to select two men, he would naturally have to select the second best man according to his opinion and this man would get the second preference and the voter would then mark his second preference against this 'second best' man, and so on. If there is no candidate who secures the quota by the first preference vote, that candidate would be elected who secures the quota by the first preference vote together with his second preference votes. This is how the elected candidate will be the representative of all sections of the electorate in the 'greatest common measure', if we may say so.

(c) *Distribution of surplus.*—The method by means of which the subsequent preferences are tacked to the first preferences in order to get the required number of members, each securing the quota, is the system of distribution or transfer of what are called the 'surplus votes'.

We have already seen that any candidate who has got the minimum number of votes forming the *quota* is entitled to be elected. Hence, he is not in need of any of the votes he has received in excess of the quota. These surplus votes are accordingly transferred to the other candidates in the manner we have already explained. In this manner, though each voter has got only one vote, that vote is transferred from a candidate who does not require it to be returned to another candidate who requires more votes to reach the quota. The vote of each voter is thus made effective, while under the ordinary system of representation, the

votes of many electors are of no use. The transfer of surplus votes, of course, takes place in the order of preferences indicated on the ballot paper.

When all the required number of candidates do not receive the quota by distribution of surpluses, the process is reversed,—by dropping out the candidate who has the least number of first preferences, and the second preferences on these ballot papers are then given to the appropriate candidate against whose name they are placed.⁸

Under *our* Constitution, the election of members of the Council of States [Art. 80 (4)] and of the Legislative Councils of the States [Art. 171 (4)] takes place according to the above system. The details of the procedure are explained in the Schedule of the Conduct of Elections Rules⁹ 1961 thus:

“Assume that there are seven members to be elected, sixteen candidates, and one hundred and forty electors.

The valid ballot papers are arranged in separate parcels according to the first preference recorded for each candidate, and the papers in each parcel counted.

Let it be assumed that the result is as follows:—

A	...	...	...	...	...	...	12
B	...	...	...	...	...	...	8
C	...	...	...	...	...	...	6
D	...	...	...	...	...	...	9
E	...	...	...	...	...	...	10
F	...	...	...	...	...	...	7
G	...	...	...	...	...	...	4
H	...	...	...	...	...	...	19
I	...	...	...	...	...	...	13
J	...	...	...	...	...	...	5
K	...	...	...	...	...	...	14
L	...	...	...	...	...	...	8
M	...	...	...	...	...	...	10
N	...	...	...	...	...	...	6
O	...	...	...	...	...	...	4
P	...	...	...	...	...	...	5
Total							140

Each valid ballot paper is deemed to be of the value of one hundred and the values of the votes obtained by the respective candidates are as shown in the first column of the result sheet.

The values of all the papers are added together and the total 14,000 is divided by eight (*i.e.*, the number which exceeds by one the number of vacancies to be filled) and 1,751 (*i.e.*, the quotient 1,750 increased by one) is the number sufficient to secure the return of a member and is called the quota.

The operation may be shown thus:—

$$\text{Quota} = \frac{14,000}{8} + 1 = 1,750 + 1 = 1,751.$$

The candidate H, the value of whose votes exceeds the quota, is declared elected.

As the value of the papers in H's parcel exceeds the quota, his surplus must be transferred. His surplus is 149 (*i.e.*, 1,900 less 1,751).

The surplus arises from original votes, and therefore the whole of H's papers are divided into sub-parcels according to the next preferences recorded thereon, a separate parcel of the exhausted papers being also made. Let it be assumed that the result is as follows:—

				Papers
B is marked as next available preference on	...	...	...	7
D is marked as next available preference on	...	...	...	4
E is marked as next available preference on	...	...	...	4
F is marked as next available preference on	...	...	...	3
Total of unexhausted papers				18
No. of exhausted papers				1
Total of papers				19

(8) Cf. r. 83 of the Conduct of Elections Rules, 1961.

(9) S.R.O. 1371, d. 6-9-51; Gaz. of India Extraordinary, d. 7-9-51, Pt. II, sec. 3, as amended by S.R.O. 434, d. 10-3-52.

The values of the papers in the sub-parcels are as follows:—

B	...	...	...	...	...	...	...	700
D	...	...	...	...	...	...	...	400
E	...	...	...	...	...	...	...	400
F	...	...	...	...	...	...	...	300
Total value of unexhausted papers								1,800
Value of exhausted papers								100
Total value								1,900

The value of the unexhausted papers is 1,800 and is greater than the surplus. This surplus is, therefore, transferred as follows:—All the unexhausted papers are transferred, but at a reduced value, which is ascertained by dividing the surplus by the number of unexhausted papers.

The reduced value of all the papers, when added together, with the addition of an value lost as the result of the neglect of fractions, equals the surplus. In this case the new value of each paper transferred is $\frac{149 \text{ (the surplus)}}{18 \text{ (the number of unexhausted papers)}} = 8$, the residue of the value of each paper ($100 - 8 = 92$), being required by H for the purpose of constituting his quota, i.e., on exhausted paper (value 100) plus the value (1.656) of 18 unexhausted papers.

These values of the sub-parcels transferred are:—

B = 56 (i.e., seven papers at the value of 8);

D = 32 (i.e., four papers at the value of 8);

E = 32 (i.e., four papers at the value of 8);

F = 24 (i.e., three papers at the value of 8).

These operations can be shown on a transfer sheet as follows:—

Transfer Sheet

Value of surplus (H's) to be transferred	...	...	...	149
Number of papers in H's parcel	...	...	...	19
Value of each paper in parcel	...	...	...	100
Number of unexhausted papers	...	...	...	18
Value of unexhausted papers	...	...	...	1,800
number of exhausted papers	149			8
Surplus	18			

Names of Candidates marked as the next avail- able preference	Number of papers to be trans- ferred	Value of sub- parcel to be transferred
B	7	56
D	4	32
E	4	32
F	3	24
TOTAL	18	144
Number of exhausted papers	1	...
Loss of value owing to neglect of fractions	...	5
TOTAL	19	149

The values of the sub-parcels are added to the values of the votes already credited to the candidates B, D, E and F. This operation is shown on the result sheet.

There being no further surplus, the candidate lowest on the pool has now to be excluded. G and O both have 400.

The Returning Officer casts lots and G is chosen to be excluded.

Being original votes, G's papers are transferred at the value of 100 each. A who was marked as next preference on two papers receives 200, while D and E were each next preference on one paper and receive 100 each. O now being lowest is next excluded and his 400 is similarly transferred to I, B and K, I receiving 200 and B and K 100 each.

This leaves J and P lowest with 500 each and J is chosen by lot for exclusion first. His papers are transferred at the value of 100 each to A, B, D and I, the three first named receiving 100 each, and I who had the next preference on two papers receiving 200. P is then excluded and his papers are transferred to E, L and K, the two first named receiving 100 each and K, who had the next preference on three papers, receiving 300.

K now exceeds the quota and is declared elected.

Prior to further exclusion, K's surplus of 49 has to be distributed.

The sub-parcel last transferred to K consisted of 3 votes transferred at the value of 100 each. This sub-parcel is examined; there are no exhausted papers and B, F and I are each next preference on one paper, and one paper is transferred to each of them at a reduced value determined by dividing the surplus (49) by the number of unexhausted papers (3). B, F and I accordingly receive 16 each.

The process of exclusion is now proceeded with.

C and N have 600 each, and C is chosen by lot for exclusion first. He has 6 original votes; B, D and E are each next preference on two papers, and each receive 200. N is then excluded; A is next preference on 3 of his papers and receives 300. F, I and L are each next preference on one paper and receive 100 each.

This brings A and I above the quota and they are declared elected. Their surpluses have now to be distributed and I's surplus which is the larger, 65, is dealt with first.

The last sub-parcel transferred to I consisted of one paper transferred at the value of 100, D is next preference on this paper, and receives the whole surplus of 65.

A's surplus of 49 is then dealt with. The last sub-parcel transferred to him consisted of 3 papers transferred at the value of 100 each. B was next preference on two of these papers and E on one, and the papers are transferred accordingly. The value to be transferred is 16 per paper, i.e., the surplus (49), divided by the number of the unexhausted papers (3). B accordingly receives 32 and E 16.

No other candidate having reached the quota, the process of exclusion is proceeded with and F, who is now lowest with 840, is excluded.

His seven original votes are transferred first. B, D and E are next preference on three, two and two papers, respectively, and receive respectively 300, 200 and 200.

The transferred votes are next transferred in the order of their transfers to F. The 3 votes received at the value of eight each at the distribution of H's surplus are transferred at the same value to L who was next preference on all 3 papers. The votes valued at sixteen received by F at the distribution of K's surplus, goes at the same value to M, who was next preference on each paper. The vote transferred at the value of 100 on the exclusion of N is then transferred at the same value to D, who thus receives a total of 300.

No continuing candidate having yet reached the surplus, M, who is now lowest with 1016, is excluded.

His ten original votes are transferred first. B and D are first preference on three papers each, and E and L on two each. B and D accordingly receive 300 each, and E and L 200 each. This brings B, D and E above the quota, and they are declared elected. The requisite number of candidates having now been elected, the election is at an end, and it is unnecessary to proceed to the transfer of M's transferred votes."

(B) Presidential election.

It has been clear from the foregoing discussion that the expression 'proportional representation by the single transferable vote' is strictly applicable to the case of a multiple-member constituency, i.e., where the number of members to be elected by the constituency is more than one.¹¹ In this case, the *surplus votes* are transferred to or distributed amongst the different candidates in order to get the number of members required to be elected, according to the procedure indicated above. Under our Constitution, the members of the Upper Houses of Parliament and of the State Legislatures will be elected according to the above procedure.

In the case of the election of the President (Art. 55) and of the Vice-President (Art. 66), however, it is only one member who is to be elected. The Government of India has, nevertheless, prescribed how the 'proportional representation' is to work in this case. *The method prescribed is more generally known as the 'alternative vote' in a single-member constituency.*

This may be illustrated as follows:

The total number of valid votes is 10,000, and there are four candidates, A, B, C, D. Suppose, they have polled as follows:

A	...	...	3,500
B	...	...	3,200
C	...	...	1,800
D	...	...	1,500

(11) The use of the term 'proportional representation' in the case of the Presidential election was criticised in the Constituent

Assembly on this ground [C.A.D. Vol. VII, pp. 1003-6].

Under the ordinary system of election by majority of votes, A would be elected at once. There is only one preference recorded by an elector, and there is no question of counting second or subsequent preferences. But under the system of alternative voting, this will not be possible, and, it may be that the next best candidate will be elected, and not the person who has got a majority according to the first preferences. In the given case, the *quota* will be¹⁰—

$$\frac{10,000}{1+1} + 1 = 5,001.$$

Hence, no candidate who has failed to secure 5,001 votes can be elected under the system of proportional representation.

If any candidate has got 5,001 votes or more according to the first preference, he is at once elected, and it is not necessary to count the subsequent preferences. But if, as in the given case, no candidate has secured this quota, the subsequent preferences have to be counted, *until a candidate with a quota is found out*. According to the Presidential and Vice-Presidential Election Rules, 1952¹² the procedure to be adopted for the counting of the subsequent preferences is as follows:

"5. If at the end of the first or any subsequent count, the total number of votes credited to any candidate is equal to, or greater than, the quota, or there is only one continuing candidate, that candidate is declared elected.

6. If at the end of any count, no candidate can be declared elected,—

(a) exclude the candidate who up to that stage has been credited with the lowest number of votes

(b) examine all the ballot papers in his parcel and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of votes in each such sub-paragraph and credit it to the candidate for whom such preference is recorded, transfer the sub-paragraph to that candidate and make a separate sub-paragraph of all the exhausted papers; and

(c) see whether any of the continuing candidates has, after such transfer and credit, secured the quota.

If, when a candidate has to be excluded under clause (a) above, two or more candidates have been credited with the same number of votes and stand lowest on the poll, exclude that candidate who had secured the lowest number of first preference votes, and if that number also was the same in the case of two or more candidates, decide by lot which of them shall be excluded.

All the sub-parcels of exhausted papers referred to in clause (b) above shall be set apart as finally dealt with and the votes recorded thereon shall not thereafter be taken into account."

It thus appears that the method prescribed for the transfer of votes in case no member has obtained the quota of votes, is the process of elimination of the candidate who has polled the *lowest* number of votes, according to the first preference, and so on, until either a candidate who has obtained the quota is found or all candidates save one are eliminated from the field. The candidate who remains after this process of elimination will be returned as the President (or Vice-President, as the case may be).

When we compare the method of counting of votes prescribed by the Schedule of the Conduct of Election Rules, 1961 (for the multi-member constituencies in the case of the Council elections) with that prescribed by the Schedule to the Presidential and Vice-Presidential Election Rules, 1952 (for the single member constituency of Presidential election), it is clear that while the election is secured in the former by the 'transfer of surplus votes' from the above, in the case of the latter, the process works from the bottom, by the transfer of the 'alternative' votes.

(10) Instructions 3 and 4 of the Schedule to the Presidential and Vice-Presidential Election Rules, 1952 (S.R.O. 527, dt. 20-3-52) explain how this quota is fixed:

"3. Ascertain the number of first preference votes secured by each candidate and credit him with that number.

4. Add up the numbers so credited to all

the candidates, divide the total by two, and add one to the quotient disregarding any remainder. The resulting number is the quota sufficient to secure the return of a candidate at the election."

(12) S.R.O. 527, dt. 20-3-52 = Gaz. of India, Extraordinary, Part II, Sec. 3, dt. 20-3-52, p. 438.

There is thus some justification for the criticism that the two procedures should not have been described in the Constitution by the same expression.

Legislation by Parliament.—In exercise of the power conferred by Entry 72 of List I—'Elections . . . to the offices of President and Vice-President', Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952,¹³ which contains, *inter alia*, provisions relating to the conduct of elections to these offices, e.g., nomination, procedure in contested and uncontested elections.

INDEX TO COMMENTS.

ARTICLE 55.

Other Constitutions :

Eire, 376.

India :

Cls. (1)-(2): Uniformity and weightage, 376.

Cl. (3): Proportional representation by the single transferable vote, 377 ; How the single transferable vote system works, 378.

Legislation by Parliament, 384.

56. (1) The President shall hold office for a term of five years from the date on which he enters upon his office :

Term of office of President.

Provided that—

(a) the President may, by writing under his hand addressed to the Vice-President, resign his office :

(b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in Article 61 :

(c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

OTHER CONSTITUTIONS

(A) *U.S.A.*—The President "shall hold office during the term of four years" [Art. II, Sec. 1 (1)]. Art. II, Sec. 1 (6) provides—

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties, of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and the Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

As to removal, Art. II, Sec. 4 provides—

"The President . . . shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanours."

(B) *Eire*.—Art. 12 (3) (1) of the Constitution of 1937 says—

"The President shall hold office for 7 years from the date upon which he enters upon his office, unless before the expiration of that period he dies, or resigns, or is removed from office, or becomes permanently incapacitated, such incapacity being established to the satisfaction of the Supreme Court consisting of not less than five judges."

(13) See Author's Acts, Rules & Orders under the Constitution of India, Book I, pp. 68 *et seq.*

(C) *Fourth French Republic*.—Art. 29 of the Constitution of 1946 provided that the President "shall be elected for seven years". Arts. 41 and 42 provided—

"If the President is not able to exercise his office for reasons duly noted by a vote of the Parliament, or in the event of a vacancy caused by death, resignation or any other circumstances, the President of the National Assembly shall assume the interim functions of the President of the Republic....."

"The President of the Republic may not be tried except for high treason. He may be indicted by the National Assembly and arraigned before the High Court of Justice under the conditions set forth in Art. 57."

(D) *Fifth French Republic*.—Art. 6 of the French Constitution of 1958 provides that the President shall be "elected for seven years". Art. 7 refers to contingencies when the President may be relieved of his office—

(a) 'Vacancy for any cause whatsoever', the grounds of which are not specified in the Constitution. It seems that death or resignation will come under this head.

(b) When the President is 'prevented' from exercising his functions. It may be due to incapacity. It is the Constitutional Council which is, on reference by the Government, to determine whether the 'prevention' is definitive.

(E) *West Germany*.—Art. 54 (2) of the West German Constitution of 1949 says that the term of the President is five years.

Art. 57 says—

"If the federal President is prevented from exercising his powers, or his office falls prematurely vacant, his powers will be exercised by the President of the *Bundesrat*."

The causes of premature vacancy are not elaborated. Death is obviously one. As to 'prevention', Art. 61 lays down that by the process of impeachment, the President may be "prevented from exercising the powers of his office". Impeachment will be dealt with under Art. 61, *post*.

INDIA

Art. 56 : Term of Office of President.

This Article lays down that the normal term of office of the President is 5 years. But it may terminate earlier, in any of the following ways—(i) By resignation in writing addressed to the Vice-President, which shall be forthwith communicated by the Vice-President to the Speaker of the House of the People. (ii) By removal for violation of the Constitution, by the process of impeachment as provided by Art. 61, *post*.

Cl. (1) (b) : 'Violation of the Constitution'.

The Constitution does not define what is meant by the above expression. In the *United States*, impeachment lies (Art. 11, Sec. 4) for 'treason, bribery or other high crimes and misdemeanours'. The expression 'misbehaviour' appears in the Constitution of *Eire*. Under the West German Constitution, 'wilful violation' not only of the Constitution but also of 'any other federal law' is a ground for impeachment. [See under Art. 61, *post*].

INDEX TO COMMENTS

ARTICLE 56.

Other Constitutions :

(A) U.S.A., 384 ; (B) *Eire*, 384 ; (C) *Fourth French Republic*, 385 ; (D) *Fifth French Republic*, 385 ; (E) *West Germany*, 385.

India :

Art. 56: Term of office of President, 385. Cl. (1) (b): 'Violation of the Constitution', 385.

57. A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.

OTHER CONSTITUTIONS

(A) *U.S.A.*—In the Constitution itself, there is no bar against re-election and nearly all important Presidents have been elected twice. In 1940 and 1944, during the emergency of World War II, President Roosevelt was elected for the third and fourth terms.

The 22nd Amendment to the Constitution^{13a} has now settled the question thus:

"No person shall be elected to the office of the President more than twice, and no person who has held the office of the President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once"

(B) *Eire*.—Art. 12 (3) (2) of the Constitution of 1937 says—

"A person who holds, or who has held, office as President, shall be eligible for re-election to that office once, but only once."

So, no person shall be eligible for the office of President for more than 2 terms.

(C) *Fifth French Republic*.—In the Constitution of 1958, there is no provision for re-election of the President.

(D) *West Germany*.—Art. 54 (2) of the Constitution of the Federal Republic of Germany, 1949 provides—

"Re-election for a consecutive term is permitted only once".
1957.

INDIA

Art. 57 : Eligibility of President for re-election.

On this point, *our* Constitution differs from the American and Irish precedents, by imposing no limit to re-eligibility. Under *our* Constitution, it will be possible to re-elect a worthy President as many times as he holds the people's confidence, and is not otherwise disqualified.^{13b}

Our first President, Dr. Rajendra Prasad, has already held two terms, being elected, in accordance with Art. 54, on May 6, 1952, and re-elected on May 10,

INDEX TO COMMENTS

ARTICLE 57.

Other Constitutions :

(A) *U.S.A.*, 386 ; (B) *Eire*, 386 ; (C) *Fifth French Republic*, 386 ; (D) *West Germany*, 386.

India :

Art. 57: Eligibility of President for re-election, 386.

Qualifications for election as President.

58. (1) No person shall be eligible for election as President unless he—

(a) is a citizen of India,

(b) has completed the age of thirty-five years, and

(c) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

(13a) Adopted on 27-2-51 ; See Author's *Select Constitutions of the World*, p. [12].

(13b) But Prime Minister Nehru declared

in Parliament that a convention is going to be established that a President shall not be re-elected more than once.

Explanation.—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor.....
.....¹⁴ of any State or is a Minister either for the Union or for any State.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art. II, Sec. 1 (5) of the Constitution says—

"No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States."

(B) *Eire.*—Art. 12 (4) (1) of the Constitution of 1937 says—

"Every citizen who has reached his 35th year of age is eligible for election to the office of President."

(C) *Fifth French Republic.*—The French Constitution of 1958 does not lay down any qualifications for the office of President. Hence, the electoral college, referred to in Art. 6, may elect anybody they please.

(D) *West Germany.*—Art. 54 (1) of the West German Constitution of 1949 says—

"Every German is eligible (for the office of President) who is entitled to vote for the Bundestag and who has attained the age of forty".

INDIA

Art. 58 : Qualifications for election as President.

Read with Art. 85, *post*, the present Article lays down the qualifications for being elected as President. While 25 is the minimum age requirement for being a member of the House of the People, 35 is the age required for being elected a President.

The *Explanation* provides that a sitting Governor, Minister of the Union or of a State or the Vice-President may seek election as President. A President may also seek re-election (Art. 57). In order to prevent abuse of authority by such candidates, the superintendence, direction and control of election for the office of President has been vested, by Article 324 (*post*), in an Election Commission which is subject to control of Parliament, and the decision of doubts and disputes relating to election of President is left to the Supreme Court (Art. 71, *post*).

INDEX TO COMMENTS

ARTICLE 58.

Other Constitutions :

(A) *U.S.A.*, 386; (B) *Eire*, 386; (C) *Fifth French Republic*, 386; (D) *West Germany*, 386.

India :

Art. 58: Qualifications for election as President, 386.

59. (1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State

Conditions of President's office.

be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

(14) The words 'or Rajpramukh or Upa-rajpramukh' have been omitted by the Constitution (Seventh Amendment) Act, 1956.

(2) The President shall not hold any other office of profit.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

CLAUSES (1)-(2).

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art. II, Sec. 7, says—

"The President shall, at times stated, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

(B) *Eire.*—Art. 12 (6) of the Constitution of 1937, says—

"(1) The President shall not be a member of either House of the Oireachtas. (2) If a member of either House of the Oireachtas be elected President, he shall be deemed to have vacated his seat in that House. (3) The President shall not hold any other office or position of emolument."

(C) *Fourth French Republic.*—Art. 43 of the Constitution of 1946 says—

"The office of the President is incompatible with any other public office."

(D) *Fifth French Republic.*—There is no provision corresponding to the above provision in the new Constitution.

(E) *West Germany.*—Art. 55 of the West German Constitution of 1949 says—

"(1) The Federal President may not be a member of the government or of a legislative body of the Federation or of a Land.

(2) The Federal President may not hold any other salaried office, nor engage in a trade, nor practise a profession, not belonging to the management or the board of directors of an enterprise carried on profit".

INDIA

Cl. (2) : 'Office of profit'.

See the meaning of this expression under Art. 102 (1) (a), *post*.

CLAUSES (3)-(4).

OTHER CONSTITUTIONS

(A) *U.S.A.*—See Art. II, s. 7, above.

The President receives an annual salary of 100,000 dollars and allowances.

(B) *Eire.*—Art. 12 (11) provides—

"The President shall have an official residence and shall receive such emoluments and allowances as shall be prescribed by law. Emoluments and allowances of the President shall not be varied during his term of office."

INDIA

Cl. (3) : Emoluments, Allowances and Privileges.

Under the present power, Parliament has enacted the President's Pension Act (XXX of 1951)^{14a} which provides for the payment (for the remainder of his life) of

(14a) See Author's Acts, Rules & Orders under the Constitution of India, Book I, p. 67.

an annual pension of Rs. 15,000 to a person who held office as President, on the expiration of his term or on resignation, provided he is not re-elected to the office.

In other respects, Parliament has not yet made any law, so that the emoluments of the President are as provided in the Second Schedule, *post*, i.e., a salary of Rs. 10,000 *per mensem*, with allowances.

60. Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the seniormost Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

Oath or affirmation by the President.

"I, A, B., do ^{swear in the name of God}_{solemnly affirm} that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India."

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art. II, Sec. 1 (8) of the Constitution says—

"Before the (President) enters on the execution of his office he shall take the following oath or affirmation:

'I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States'."

(B) *Eire.*—Art. 12 (8) of the Constitution of 1937, says—

"(8) The President shall enter upon his office by taking and subscribing, publicly, in the presence of members of both Houses of the Oireachtas, of judges of the Supreme Court and of the High Court, and other public personages, the following declaration: 'In the presence of Almighty God I . . . do solemnly and sincerely promise and declare that I will maintain the constitution of Ireland and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. *May God direct and sustain me*'."

(C) *West Germany.*—Art. 56 of the West German Constitution of 1949 provides—

"On assuming his office the Federal President takes the following oath before the assembled members of the *Bundestag* and *Bundesrat* :

'I swear that I will dedicate my efforts to the well-being of the German people, enhance its benefits, ward harm from it, uphold and defend the Basic Law (i.e., the Constitution) and the laws of the Federation, fulfil my duties conscientiously, and do all justice to all. *So help me God*'."

INDIA

Art. 60: Object of Oath.

The oath does not add to the *legal* liability or his powers as created by the other provisions of the Constitution.¹⁵ The object is only to impose a *moral* obligation.

61. (1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

Procedure for impeachment of the President.

(15) Cf. Willoughby, *Constitutional Law of the United States*, Vol. 3, p. 1473.

(2) No such charge shall be preferred unless—

(a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

(b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Sec. 4 of Art. II of the Constitution of the United States says—
"The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours."

The process of trial by impeachment was adopted in the American Constitution from the English, with some differences on points of detail. The procedure for impeachment in the United States has been thus described: First of all, some members of the House of Representatives, on the floor of the House, brings charges against a civil officer of the government. These charges, if the House believes that they are deserving of investigation, are then referred to a special committee. This special committee of the House, after looking into the matter, may recommend to the whole House that the charges be incorporated in Articles of impeachment and transmitted to the Senate for action. When that is done, all further proceedings rest with the Senate. *The House has no part in determining the verdict.*¹⁶

The Senate has the sole power to try impeachments [Art. I, Sec. (6)]. After the charge is transmitted by the House of Representatives to the Senate, the Senate hears the impeachments as a regular trial, at which witnesses are heard and the accused is permitted to be represented by counsel. A *two-thirds vote* of the Senators present at the impeachment is necessary for a conviction. Senators are placed under oath or affirmation at a trial of impeachment. The Vice-President presides in the case of trial of officers other than the President. At the trial of the President, the Chief Justice presides. There have been very few federal impeachment in the United States since the inception of the Constitution, and owing to the requirement of a two-thirds majority, conviction has been found to be difficult.¹⁶ Only one President has so far been impeached (President Johnson, 1868); but he was acquitted.

(B) *Fourth French Republic.*—Art. 57 of the French Constitution, 1946, laid down the procedure for indictment of the President as well as Ministers. The procedure was as follows:

(16) Munro, *Constitution of the United States*, pp. 11-12, 16; Pritchett, *American Constitution*, 1959, p. 179.

"The indictment shall be by the National Assembly and thereafter the person impeached will be arraigned before the High Court of Justice. The Assembly shall vote upon this question by secret and by an absolute majority of its members, with the exception of those who may be called upon to participate in the prosecution, investigation or judgment of the case."

(C) *Fifth French Republic*.—There is no provision for impeachment of Ministers under the new Constitution of 1958; they will be liable to be tried by the High Court for 'crimes and misdemeanours'.

The President shall be 'indicted' for 'high treason'. As under the previous Constitution, the indictment shall be by a vote of absolute majority in both Houses of Parliament. But it will be by an 'open' ballot. The trial shall be by the High Court of Justice, as before. Art. 68 says—

"The President shall not be held accountable for actions performed in the exercise of his office except in the case of high treason. He may be indicted only by the two Assemblies ruling by identical vote in open balloting and by an absolute majority of the members of the said Assemblies. He shall be tried by the High Court of Justice".

(D) *West Germany*.—Art. 61 of the West German Constitution of 1949 says—

"(1) The *Bundestag* or the *Bundesrat* may impeach the federal President before the *Federal Constitutional Court* for wilful violation of the Basic Law (i.e., the Constitution) or any other federal law. The motion for impeachment must be brought forward by at least one-fourth of the members of the *Bundestag* or one-fourth of the votes of the *Bundesrat*. The decision to impeach requires a majority of two-thirds of the members of the *Bundestag* or of two-thirds of the votes of the *Bundesrat*. The prosecution is conducted by a person commissioned by the impeaching body.

(2) If the Federal Constitutional Court finds the federal President guilty of a wilful violation of the Basic Law or of another federal law, it may declare him to have forfeited his office. After impeachment, it may issue an interim order preventing the federal President from exercising the powers of his office."

(E) *Eire*.—Under Art. 12 (10) of the Constitution of Eire, 1937, either House of the Oireachtas (Legislature) may impeach the President for 'stated misbehaviour', and after investigation of the charge he may be removed by a resolution passed by two-thirds of the other House. Cls. (2)-(7) of S. 54 of the Burmese Constitution, quoted below, reproduce, verbatim, the provisions of Art. 12 (10) of the Constitution of Eire.

(F) *Burma*.—Sec. 54 of the Burmese Constitution of 1948 provided—

"(1) The President may be impeached for—(i) high treason; (ii) violation of the Constitution; or (iii) gross misconduct.

(2) The charge shall be preferred by either Chamber of Parliament subject to and in accordance with the provisions of this section.

(3) A proposal to either Chamber of Parliament to prefer a charge against the President under this section shall not be entertained except upon a notice of resolution in writing signed by not less than one-fourth of the total membership of that Chamber.

(4) No such proposal shall be adopted by either Chamber of Parliament save upon a resolution of that Chamber supported by not less than two-thirds of the total membership thereof.

(5) When a charge has been preferred by one Chamber of Parliament, the other Chamber shall investigate the charge or cause the charge to be investigated.

(6) The President shall have the right to appear and to be represented at the investigation of the charge.

(7) If, as the result of the investigation, a resolution be passed, supported by not less than two-thirds of the total membership of the Chamber of Parliament by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained and that the offence, the subject of the charge, was such as to render him unfit to continue in office, such resolution shall operate to remove the President from his office."

INDIA

Cl. (3) : Investigation of the charge.

Cl. (3) of the Article should be read with the Proviso to Art. 361(1). When a charge of impeachment is preferred by either House of Parliament, the other House is to investigate the charge. But instead of making the investigation itself,

it may delegate the work of the investigation to any Court, body or tribunal appointed by the House for that purpose. Of course, mere investigation is not final. Removal of the President will require the resolution of that House to which the charge has been preferred, under sub-cl. (4) of the present Article.

Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.

62. (1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after, and in no case later than six months from, the date of occurrence of the vacancy; and the person elected to fill the vacancy shall, subject to the provisions of article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

OTHER CONSTITUTIONS

(A) *Eire*.—Art. 12 (3) (a) of the Constitution of Eire deals with similar matter.

(B) *Fifth French Republic*.—Art. 7 of the Constitution of 1958 provides—

".....In the case of a vacancy, or when the prevention is declared definitive by the Constitutional Council, the voting for the election of a new President shall take place, except in case of *force majeure* officially noted by the Constitutional Council, twenty days at the least and fifty days at the most after the beginning of the vacancy or the declaration of the definitive character of the prevention".

(C) *West Germany*.—Art. 54 (4) of the West German Constitution, 1949—

"The Federal Convention meets not later than thirty days before the expiration of the term of office of the federal President or, in the case of premature termination, not later than thirty days after this date. It is convened by the President of the *Bundestag*."

The Vice-President of India,

63. There shall be a Vice-President of India.

OTHER CONSTITUTIONS

(A) *U.S.A.*.—Provision for a Vice-President is made by Art. II, Sec. 1 (1) of the Constitution.

(B) *Eire*.—There is no provision for the office of a Vice-President. In case of a vacancy in the office of the President, his functions are to be performed by a Commission,—under these two Constitutions (*see* under Art. 65, *below*).

The Vice-President to be *ex-officio* Chairman of the Council of States.

64. The Vice-President shall be *ex-officio* Chairman of the Council of States and shall not hold any other office of profit:

Provided that during any period when the Vice-President acts as President or discharges the functions of the President under article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under article 97.

OTHER CONSTITUTIONS

U.S.A..—The normal function of the Vice-President is to act as the President of the Senate, "but he shall have no vote, unless they (Senators) be equally divided"

[Art. 1, Sec. 3 (4)]. When the office of the President becomes vacant, he acts as the President [Art. 11, Sec. 1 (6)]¹⁷

INDIA

Arts. 64-65: Functions of the Vice-President.

The Vice-President will be the highest dignitary of India, coming *next after* the President. No functions are attached to the office of the Vice-President as such. The normal function of the Vice-President will be to act as the *ex-officio* Chairman of the Council of States. [See Art. 89 (1), *post*]. But if there occurs any vacancy in the office of the President by reason of his death, resignation, removal or otherwise, the Vice-President shall act as President *until a new President is elected* and enters upon his office. But when the Vice-President thus acts as the President, he shall cease to perform the duties of the Chairman of the Council of States and then the Deputy Chairman of the Council of States shall act as its Chairman. Similarly, the Vice-President shall act in place of the President during a temporary absence of the President, illness or any other cause by reason of which he is unable to charge his functions.

The Proviso makes it clear that when the Vice-President acts as President in any of the contingencies specified in Art. 65, he shall not during such period act as the Chairman of the Council of States and shall not also be entitled to the emoluments attached to the office of the Chairman. It is also clear, conversely, that so long as the Vice-President does not get a chance to act as President, his sole function is to act as the Chairman of the Council of States¹⁸ and he cannot then claim any of the privileges or emoluments of the President.

65. (1) In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence, of President.

(2) When the President is unable to discharge his functions owing to absence, illness, or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

OTHER CONSTITUTIONS

(A) U.S.A.—Art. II, Sec. 1 (6) provides—

"In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office the same shall devolve on the Vice-President."

(17) In practice, the Vice-President also sits with the President's cabinet and keeps himself informed of administrative matters [Ogg & Ray, American Government. 1951, p. 390].

(18) As to the emoluments of the Chairman of the Council of States, see under Art. 97, *post*.

The Constitution does not define what is meant by 'inability' and none is authorised to determine whether any President is suffering from inability at any moment. It is striking that during the entire history of the American Constitution, there has not been a single instance of a Vice-President acting for a President on ground of the latter's inability and that illness has not been construed as inability.¹⁹

(B) *Fifth French Republic*.—Art. 7 of the French Constitution of 1958 provides—

"In the event of a vacancy in the presidency of the Republic, for any cause whatsoever, or in case of prevention officially noted by the Constitutional Council, the functions of the President of the Republic, with the exception of those provided for in Arts. 11 and 12, shall be temporarily exercised by the President of the Senate".

(C) *West Germany*.—Art. 57 of the West German Constitution of 1949 says—

"If the federal President is prevented from exercising his powers, or if his office falls prematurely vacant, his powers will be exercised by the President of the *Bundesrat*."

INDIA

CL. (1): '*Otherwise*'.—This includes setting aside of election of a President under Art. 71, *post*. It does not, however, include the contingency mentioned in Art. 56 (1) (c), *ante*.

CL. (2): '*Unable to discharge his functions*'.—Primarily, it is the President himself who is to determine whether he is at any time unable to discharge his functions.²⁰ But if the President is unable to determine that, say, owing to a sudden attack of serious illness, Parliament may determine that under its residuary power under Art. 70, *post*.

66. (1) The Vice-President shall be elected by the members of
*an electoral college consisting of the members of*²¹

Election of Vice-President. both Houses of Parliament assembled at a joint meeting in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

(2) The Vice-President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice-President.

(19) Willoughby, *Constitutional Law*, Vol. III, pp. 1470-1; Munro, *Government of the United States*, p. 168; Schwartz, *Constitution of the United States*, 1963, Vol. II, pp. 18 *et seq.*

(20) No machinery having been prescribed by the Constitution to determine when the President is unable to discharge his duties owing to absence from India or a like cause, it becomes somewhat delicate as to who should move in the matter on any particular occasion. It is to be noted that this provision of the Constitution had not been put into use prior to the 20th of June, 1960, though the President had been absent from India for a considerable period during his Eastern tour in the year 1958. It was during the 15-day visit of Dr. Rajendra Prasad to the Soviet Union in June 1960, that, for the first time, the Vice-President Dr. Radha-

krishnan was given the opportunity of acting as the President owing to the 'inability' of the President to discharge his duties.

The second occasion took place in May, 1961, when President Rajendra Prasad became seriously ill and incapable of discharging his functions. After a few days of crisis, the President himself suggested that the Vice-President should discharge the functions of the President until he resumed his duties. It appears that the power to determine when the President is unable to discharge his duties or when he should resume his duties has thus been understood to belong to the President himself.

(21) Substituted for the words "members of both Houses of Parliament assembled at a joint meeting", by the Constitution (Eleventh Amendment) Act, 1961, with effect from 19-12-61.

(3) No person shall be eligible for election as Vice-President unless he—

(a) is a citizen of India ;

(b) has completed the age of thirty-five years ; and

(c) is qualified for election as a member of the Council of States.

(4) A person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Explanation.—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor²².....of any State or is a Minister either for the Union or for any State.

OTHER CONSTITUTIONS

U.S.A.—The Vice-President is elected by an electoral college in the same manner as the President (*see* p. 392, *ante*). If no candidate for the office of the Vice-President has a majority, the election goes to the Senate. The Senators, each having one vote, elect the Vice-President out of the two candidates standing highest on the list returned by the electors. An absolute majority of all the members of the Senate is required for each election [The Twelfth Amendment (1804)].

INDIA

Amendment.—The change in Cl. (1) has been effected by the Eleventh Amendment Act, 1961.

The original Cl. (1) of Art. 66 provided for election of the Vice-President by the members of both Houses of Parliament *assembled at a joint meeting*. Though Art. 54 also provides for indirect election of the President and the members of both Houses of Parliament form a part of the electoral college for this purpose, no provision for a joint sitting of the two Houses has been prescribed for the voting. The members cast their votes individually. The Eleventh Amendment brings the election of the Vice-President in line with that of the President, by removing the obligation of summoning a joint sitting of the Houses for this purpose. The object of this change is thus explained in the *Notes on Clauses*:

"Under article 66 (1) of the Constitution, the Vice-President of India has to be elected by the members of both Houses of Parliament assembled at a joint meeting. Where there is only one duly nominated candidate the necessity for a joint meeting is not apparent and section 8 of the Presidential and Vice-Presidential Election Act, 1952, states that in such a case the Returning Officer shall forthwith declare the candidate to be duly elected. Even where there is a contest, conformity with article 66 can only be more formal than real in that important proceedings relating to the election, like the receipt of nominations, scrutiny of nominations and withdrawal of candidature, take place before the members of the two Houses of Parliament assemble at a joint meeting, and only the polling and declaration of results take place at that meeting. In practice also, there can be no meeting in the usual sense, but the electors will be coming in as and when they like, casting their votes and going away. The requirement that members should assemble at a joint sitting seems to be totally unnecessary and is also likely to cause practical difficulties. It may be noticed that article 54 contains no such requirement in the case of the Presidential election.

This clause therefore seeks to omit the requirement as to joint meeting and incidentally brings the language of this clause into conformity with the language of article 54."

(22) The words "or Rajpramukh or Upa-rajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

Art. 66 : Election of Vice-President.

Cls. (2)-(4) contain provisions similar to those of Arts. 58-59 relating to the President. But the mode of election prescribed by Cl. (1) differs from the mode of election of President as provided by Art. 54, *ante*, even after the Amendment of 1961 in this that the elected members of the Legislative Assemblies of the States, who are also members of the electoral college to elect the President, shall have nothing to do with the election of the Vice-President.

The *Explanation* indicates that a Vice-President is eligible for re-election.

Term of office of Vice-President.

67. The Vice-President shall hold office for a term of five years from the date on which he enters upon his office:

Provided that—

(a) a Vice-President may, by writing under his hand addressed to the President, resign his office;

(b) a Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution;

(c) a Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

OTHER CONSTITUTIONS

U.S.A.—The term of office of the Vice-President is the same as that of the President, *viz.*, 4 years and the mode of removal is also the same.

INDIA**Art. 67 : Term of Vice-President.**

This Article is analogous to Art. 56, *ante*, relating to the President. The term of the Vice-President is the same, *viz.*, 5 years. But the procedure for removal of the Vice-President as provided by Proviso (b) of the present Article differs from that of the President as laid down in Art. 61, *ante*. No regular impeachment will be necessary to remove a Vice-President. A resolution passed by a majority of all the members of the Council of States and agreed to by the House of the People will suffice for this purpose. [Compare Arts. 90 (c) and 94 (c), *post*].

'Agreed to by the House of the People'.—These words, read with reference to the preceding words 'the then members' mean that while in the Council of States, the resolution must be passed by a majority of the total membership of that House (excepting those whose seats were vacant)—in the House of the People, it would suffice if the majority of those who voted, agreed to the resolution.

Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.

68. (1) An election to fill a vacancy caused by the expiration of the term of office of Vice-President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after the occurrence of the vacancy, and the person

elected to fill the vacancy shall, subject to the provisions of article 67, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

69. Every Vice-President shall, before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation in the following form, that is to say—

Oath or affirmation by the Vice-President. Swear in the name of God solemnly affirm

"I, A. B., do that I will bear true faith and allegiance to the Constitution of India as by law established²³ and that I will faithfully discharge the duty upon which I am about to enter."

70. Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.

Discharge of President's functions in other contingencies.

OTHER CONSTITUTIONS

U.S.A.—Art. II, Sec. 1 (6) says—

"..... and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected."

Congress has passed an Act in 1792, under the above article.²⁴

INDIA

Art. 70 : Discharge of President's Functions in 'other contingencies'.

This article corresponds to Art. II, Sec. 1 (6) of the United States Constitution and empowers Parliament to make provisions for the discharge of the President's functions when a vacancy takes place in the offices of President and Vice-President, simultaneously, owing to removal, death, resignation or otherwise.

71. (1) All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.

Matters relating to or connected with the election of a President or Vice-President.

(2) If the election of a person as President or Vice-President is declared void by the Supreme Court, acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.

(3) Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President.

(23) It is striking that though by the 16th Amendment of the Constitution, the Oaths for all the dignitaries in the Third Schedule have been amended, to insert the words sovereignty and integrity of India, the 'Oaths

for the President and Vice-President, in Arts. 60 and 69, have escaped the attention of the draftsman.

(24) See Burdick's American Constitution, p. 60.

²⁵(4) *The election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him.*

Amendment.—Cl. (4) has been inserted by the Eleventh Amendment Act, 1961.

Art. 71 (1) provides that disputes relating to the election of a President or a Vice-President shall be decided by the Supreme Court. The Amendment is intended to take away one of the grounds for challenging any such election, namely, that both Houses of Parliament, which form the electoral college, was not fully constituted at the time of the election. The Notes on Clauses explains the object of the Amendment thus:

"In *Narayan Bhaskar Khare v. the Election Commission of India*, (1957) S.C.R. 1081, a point was made that for a valid election of the President, all elections to the two Houses of Parliament should be completed before the date of the Presidential election, as otherwise some members would have been denied the right to take part in the election. But the Supreme Court expressed no opinion on the point as it was not necessary to do so.

Every effort is made to complete such elections before the date of the Presidential election. It is, however, possible that the elections to the two Houses of Parliament may not be completed before the President or the Vice-President is elected. It is, therefore, proposed to amend article 71 of the Constitution so as to make it clear that the election of the President or the Vice-President cannot be challenged on the ground of any vacancy for any reason in the appropriate electoral college.

In *Dr. Khare's case*, when the notification for the election of the President was issued, elections in certain snow-bound areas in the North had not been completed. There may be vacancies for other reasons also. It is therefore desirable to make it clear that the election of a President or Vice-President cannot be challenged on the ground that there are vacancies in the appropriate electoral college for whatever reasons."

The words "any vacancy for whatever reason" are no doubt very wide, but it is not quite clear whether they will cover the case of the two Houses not being fully constituted by reason of the general election being not held for certain seats at all. The words 'vacancy' has a technical meaning, particularly, in relation to membership of Parliament, by reason of Art. 101 (see *ante*) which enumerates live contingencies in which the seat of a member of Parliament shall fall 'vacant', namely, (i) election to both Houses of Parliament simultaneously; (ii) election to both Parliament and a State Legislature; (iii) a member being disqualified; (iv) resignation; (v) absence not excused by the House.

It will be seen that all the contingencies mentioned in Art. 101 can happen only after the election has been held. The Dictionary meaning of 'vacancy' also involves the idea of quitting. Does it comprehend any state of affairs before the initial election is held and the electoral college composed of the members of the two Houses has not come into being at all? It seems that the Supreme Court may have to answer this question notwithstanding the amendment.

Of course, so far as the grounds enumerated in Art. 101 are concerned, the Amendment introduces a salutary provision inasmuch as a serious situation like the setting aside of a Presidential election should not be caused by any casual vacancy in the electoral college, after it has been duly constituted.

Cl. (1) : Decision of doubts and disputes relating to Presidential election.

Under Art. 324 (1), *post*, the superintendence, direction and control of the election of President and Vice-President is vested in the Election Commission, but the decision of *doubts and disputes* relating to election to any of these two offices is, by the present clause, exclusively vested in the Supreme Court. The present clause thus supplements Art. 131 which defines the original jurisdiction of the Supreme Court. But the procedure according to which the Supreme Court will 'inquire into and decide' such a dispute is left to the Supreme Court itself and its

(25) Inserted by the Constitution (Eleventh Amendment) Act, 1961, with effect from 19-12-61.

decision is declared 'final'. The result is, that the decision of the Supreme Court cannot be overridden by Parliament, even though it may regulate any matter relating to the election of President and Vice-President. [Art. 71 (3)].

When the inquiry can be made.

The word 'election' in Art. 71 (1) has the same meaning as in Art. 329 (b). It comprises the entire process culminating in a candidate being declared. In the result, the inquiry under Art. 71 (1) can be made only *after* the election is completed and a candidate is declared elected as President or Vice-President.²² In other words, all 'doubts and disputes' relating to any stage of the election process is to be canvassed by an election petition (challenging the validity of the election) presented to the Supreme Court only after the election in the above sense is completed.¹ There is no right to move the Court for a direction to withhold the election even though in some constituencies the polling had been fixed by the Election Commission on a date subsequent to the date fixed for the election of the President.¹

'Shall be decided'.

Art. 71 (1) merely prescribes the forum in which doubts and disputes in connection with the Presidential election shall be inquired into. It does not prescribe the conditions under which the petition could be presented to or determined by the Supreme Court.²

The power of Parliament under cl. (3) includes the power to lay down such conditions.² S. 14 of the Presidential and Vice-Presidential Elections Act, 1952 has provided that the petition presented under Art. 71 (1) must be made in accordance with the provisions of the Rules made by the Supreme Court under Art. 145.

Cl. (2) : Effect of adverse decision as to election of sitting President.

This clause merely applies the doctrine of *factum valet* to the acts of a President, whose election is subsequently set aside by the Supreme Court under Cl. (1). The decision of the Supreme Court, in short, shall have no retrospective effect as to acts done by the person whose election as President is declared void, on or before the date of the decision of the Supreme Court.

Cl. (3) : Legislative power.

The words 'subject to the provisions of the Constitution' make the power of Parliament to legislate as regards election of President and Vice-President very narrow. Thus, it shall have no power as to decision of doubts and disputes which is given to the Supreme Court by Cl. (1) of the present Article. Further, Art. 324 vests the superintendence, direction, control and conduct of elections to the offices of President and Vice-President, in the Election Commission. Subject to the provisions of the above two Articles, Parliament shall have the power to regulate any matter relating to or connected with such election.

Legislation by Parliament.—In exercise of the power conferred by the present clause, Parliament has enacted the Presidential and Vice-Presidential Elections Act (XXXI of 1952).³ Apart from providing how the election shall be conducted, this Act also provides that an election of the President or Vice-President may be called into question only by an election petition presented to the Supreme Court on any of the grounds specified in the Act. The powers of the Supreme Court in this matter are also laid down.

(1) *Khare v. Election Commission*, A. 1957 S.C. 694 (697).

(2) *Khare v. Election Commission* (II), A. 1958 S.C. 139 (140).

(3) See Author's Acts, Rules and Orders under the Constitution of India, Bk. I, p. 68.

Analogous Provision.—While the decision of disputes arising from election of President and Vice-President is vested in the Supreme Court by the present Article, Art. 324 provides that decision of disputes arising out of elections to the Legislatures shall be made by election tribunals to be appointed by the Election Commission.

Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

72. (1) The President shall have the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(a) in all cases where the punishment or sentence is by a Court Martial ;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends ;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor⁴ of a State under any law for the time being in force.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art. II, Sec. 2 (1) of the Constitution says—

"He (the President) shall have the power to grant reprieves and pardons for offences against the United States except in case of impeachment."

This is called the judicial power of the President. The pardoning power may be exercised by him at any time after the offence has been committed, either before or after trial or convention;⁵ and this power may not be limited by Congress,⁶ either as to persons or as to the effect of pardon.⁵ The President may even pardon a *criminal* contempt of Court⁷⁻²⁵ as distinguished from civil contempt. The only limitation is that it cannot bar impeachment. The pardoning power is not exercised by the President according to his own caprice but on the recommendation of the Department of Justice, after the latter has made a study of the records relating to the case.¹

It is open to a convict to refuse to accept a pardon on the ground that it is more disgraceful or onerous than the sentence.² But there is no such option where the sentence is remitted or commuted to a lesser punishment, for, there is no 'right to incarceration' guaranteed by the Constitution.³

(B) *England.*—The pardoning power is a royal prerogative, exercised on the advice of the Home Secretary. It is an executive act, but the Home Secretary is authorised by the Criminal Appeal Act, 1907, to refer a case to the Court of Criminal Appeal, either for opinion or for final disposal as if it was an appeal. Ordinarily the power is exercised *after* sentence when there is some special reason why a sentence shall not be carried out ; but a pardon also is available *before* con-

(4) The words "or Rajpramukh" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

(5) *Ex parte Garland*, (1866) 4 Wall. 333.

(6) *U. S. v. Klein*, (1872) 13 Wall. 128 (148).

(7-25) *Ex parte Grossman*, (1925) 267 U.S. 87.

(1) Munro, *Government of the United States*.

(2) *Burdick v. U. S.*, (1915) 236 U.S. 79.

(3) *Biddle v. Perovich*, (1927) 274 U.S. 480.

viction.⁴ It cannot, however, be pleaded in bar to an impeachment (Act of Settlement, 1707). Further, it is only an offence of a public character⁵ that may be pardoned, and not an action between subject and subject, and penalties payable to a private person cannot be remitted save by statute.⁶ At common law, the commission of a public nuisance cannot be pardoned until it has been abated.⁷

Save for the cases which are referred to the Court of Criminal Appeal for a final disposal upon judicial considerations, the advice of the Home Secretary to the Crown is considered as a purely executive act, guided by *policy consideration*, including public resentment against a sentence. For this reason, it has been an established practice in Parliament that no question may be asked nor any resolution or motion moved concerning the advice which the Home Secretary or the Minister should give to the Crown (in a pending case), except where a pardon being refused, *execution has taken place*.⁸

(C) *Eire*.—Art. 13 (6) of the Constitution of 1937 says—

"The right of pardon and the power to commute or remit punishment imposed by any Court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities."

(D) *Fifth French Republic*.—In the Constitution of 1958, the pardoning power of the President is not limited in any way. Art. 17 simply says—

"The President of the Republic shall have the right of pardon."

(E) *West Germany*.—Art. 60 (2)-(3) of the West German Constitution, 1949 explain the scope of the pardoning power of the President—

"He exercises the power of pardon on behalf of the Federation in *individual* cases. He may delegate these powers to other authorities."

Hence, the President has no power to declare a general amnesty under the above power.

(F) *Ceylon*.—Art. 10 of the Ceylon (Office of the Governor-General) Letters Patent, 1947, says—

"When any such offence has been committed for which the offender may be tried in the Island, the Governor-General may, as he shall see fit, in Our name and on Our behalf, grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such principal offenders if more than one, and further may grant to any offender convicted of any such offence in any Court within the Island, a pardon, either free or subject to lawful conditions, or any respite, either indefinite or for such period as the Governor-General may think fit, of the execution of any sentence passed on such offender, and may remit the whole or any part of such sentence or of any penalties or forfeitures otherwise due to Us."

Art. 3 of the Royal Instructions, 1947, lays down—

"We do hereby direct and enjoin that the Governor-General in the exercise of the powers conferred upon him by Art. 10 of the Letters Patent shall not grant a pardon, respite or remission to any offender without first receiving, in every case, the advice of one of his Ministers. Where any offender shall have been condemned to suffer death by the sentence of any Court, the Governor-General shall cause a report to be made to him by the Judge who tried the case; and he shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent, together with the Attorney-General's advice, to the Minister whose function it is to advise the Governor-General on the exercise of the said powers."

(G) *Government of India Act, 1935*.—Under Sec. 295 of the Government of India Act, and Sec. 402-A, Criminal Procedure Code, the pardoning power was divided between the Governor-General and the Provincial Governors. Broadly speaking, the power to grant 'pardon' belonged to the Governor-General and the Crown while the power of suspension, remission, etc., belonged concurrently to the Governor-General and the Provincial Governor.

(4) *R. v. Boys*, (1861) 1 B. & S. 311.

(5) 3 Co. Inst. 235.

(6) *Bradlaugh v. Clarke*, (1883) 8 App. Cas. 354.

(7) Wade & Phillips, Constitutional Law, 6th Ed., 304.

(8) 510 H. C. Deb., 5s., c. 854; 434 H. C. Deb., 5s., c. 959; 340 Parl. Deb., 3s., c. 128.

S. 295 of the Government of India Act, 1935 was as follows:—

“(1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province:

Provided that nothing in this subsection affects any powers of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court martial.

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.”

In the result, the Governor-General in his discretion had the power to grant pardon, remission etc. in cases of sentences of death and Governors of Provinces had the power in regard to all sentences passed in the Province, but the power of the Crown and of the Governor-General as a delegate of the Crown remained unaffected. In other words, notwithstanding the division of power between the Governor-General and the Governors by the Government of India Act, 1935 or any other existing law, the prerogative powers of the Crown and of the Governor-General as a delegate, remained unaffected.⁹

INDIA

Art. 72 : The Pardoning Power of President.

This Article confers upon the President the ‘pardoning power’, without prejudice to similar power possessed by the Governor of a State (*see below*), or of the military authorities under the Army Acts¹⁰ as regards conviction by Court Martial.

The object of the pardoning power is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections. It is an attribute of sovereignty, wherever the sovereignty may lie⁹ in the body politic, to relieve a convict from a sentence which is mistaken, harsh¹¹ or disproportionate to the crime.¹²

The ‘executive’ power of pardon also differs from the power of a Court to suspend a sentence, say, for the purpose of enabling the convict to obtain a pardon or, pending appeal (*cf.* s. 426, Cr. P. C.) or in the case of a pregnant woman (s. 382, Cr. P. C.) or to remit the sentence, say, after the convict has served a part of the sentence of imprisonment: for, the exercise of the judicial power is governed by *judicial* considerations, while pardon is granted on considerations of policy, other than that of innocence. Further, when a Court remits the sentence, it alters the sentence by a judicial act in the same way as the sentence was imposed in the first instance.¹³⁻¹⁴ In exercising the power of pardon, the Executive does not alter the sentence but abridges its *enforcement* and, in so doing, practically destroys the effect of the judicial punishment,¹⁵⁻¹⁶ without disaffirming the judicial verdict.

Extent of Pardoning Powers of President and Governor.

Under *our* Constitution, the pardoning power shall be possessed by the President as well as the State Governors.

(A) The President shall have the pardoning power in respect of—

- (i) Offences against Union laws coming within Art. 73 (1).
- (ii) All cases of sentence of death.

(9) *Cf. Nanavati v. State of Bombay*, A. 1961 S.C. 112 (128).

(10) Thus, Ch. XIV of the Air Force Act (XLV of 1950) empowers the Central Government, the Commander-in-Chief, an air or other officers commanding a group, or ‘the prescribed officer’ to pardon, remit, mitigate or commute a punishment awarded by a Court-martial under the Act.

Corresponding provisions are to be found in Ch. XIV of the Army Act (XLVI of 1950).

(11) *Ex parte Grossman*, (1924) 267 U.S. 87.

(12) *Biddle v. Perovich*, (1926) 274 U.S. 480.

(13-14) *U. S. v. Benz*, (1930) 282 U.S. 304.

(15) *Ex parte Grossman*, (1924) 267 U.S. 87.

(16) *Nanavati v. State of Bombay*, A. 1961 S.C. 112 (134).

But the power of the State Governor to grant suspension, remission or commutation of a sentence of death, conferred by any law, such as Secs. 401-402 of the Cr. P. Code or Secs. 54-55, I. P. C., shall remain unaffected.

Ss. 401 (1) and 402-402A of the Cr. P. C. provide—

“401. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

402. (1) The appropriate Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it:—

death, imprisonment for life, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code.

(3) In this section and in section 401, the expression “appropriate Government” shall mean—

- (a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4A) of section 401 is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government; and
- (b) in other cases, the State Government.

402A. The powers conferred, by sections 401 and 402 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government.”

Ss. 54-55A of the Indian Penal Code similarly provide—

“54. In every case in which sentence of death shall have been passed the appropriate Government may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

55. In every case in which sentence of transportation for life shall have been passed, the appropriate Government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

55A. In sections fifty-four and fifty-five the expression “appropriate Government” means,—

- (a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and
- (b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced.”

(iii) All cases where the punishment is by a Court Martial, without affecting any statutory power belonging to any Officer of the armed Forces to suspend, remit or commute sentence passed by a Court Martial [Art. 72 (2)].

B. On the other hand, the Governor of a State shall have the pardoning power in relation to any offence against any law relating to a matter to which the executive power of the State extends (Art. 161).

The Governor's statutory powers under ss. 54-55 of the I. P. C. and ss. 401-2 of the Cr. P. C. have already been stated. The statutory powers do not give the Governor to ‘pardon’ a sentence of death. This is also the effect of cl. (3) of the present article (see *post*).

Limitations upon the Pardoning Power.

(A) U.S.A.—In the United States, owing to the application of the doctrine of ‘Separation of Powers’ (p. 326, *ante*), it has been held that the ‘executive’ power shall not be subject to legislative¹⁷ control. The Legislature cannot also nullify the effect of a pardon granted by the President in the exercise of his constitutional power.¹⁸

In the words of the Supreme Court—

“Congress can neither limit the effect¹⁹ of his (President's) pardon, nor exclude from its exercise any class of offenders. The benign prerogative mercy reposed in him cannot be fettered by any legislative restrictions.”¹⁷

(17) *Ex parte Garland*, (1866) 4 Wall. 333.

(18) *U. S. v. Klein*, (1872) 13 Wall. 128.

(19) *Ex parte Grossman*, (1925) 267 U.S. 87.

With the exception stated in Art. II, s. 2, namely, that it cannot be exercised in cases of impeachment, the pardoning power of the American President is thus unlimited and extends even to contempts of court.¹⁹ It can also be exercised during the pendency of judicial proceedings at any stage.²⁰

(B) *England*.—The pardoning power is a 'Prerogative' of the Crown. Though Parliament has never chosen to fetter this Prerogative by legislation, like all other Prerogatives, it is subject to legislation by Parliament to which the Crown assents.²¹⁻²² As Blackstone²³ has put it picturesquely, the Royal Prerogative is no longer unlimited:

"There cannot be a stronger proof of that freedom which is the boast of this age and country, than the power of discussing and examining with decency and respect the *limits* of the King's prerogative, a topic that in former ages was thought too delicate and sacred to be profaned by the pen of a subject....."

(C) *Canada*.—The above view appears to have been taken by the Canadian Supreme Court²⁴ in holding that Prerogatives which affect the Dominion may be taken away or curtailed by legislation by the Canadian Parliament.

(D) *Australia*.—Following the decision in *De Keyser's case*,²⁵ it has been held that the royal Prerogative, in its application to the Commonwealth, may be curtailed by legislation by the Commonwealth Parliament²⁶ and, in the absence of Commonwealth legislation, by the Legislature of a State.¹

The Courts cannot, however, control the exercise of the prerogative power of pardon;² in other words, the Courts cannot examine the propriety of the exercise of the power in any particular case.

(E) *India*.

I. The majority of the Supreme Court in *Nanavati's case*³ has held that since the pardoning power in Arts. 72 and 161 of our Constitution is a relic of the Royal Prerogative embodied in s. 295 of the Government of India Act, 1935 and ss. 401-2 of the Criminal Procedure Code, 1898, it is subject to legislation, as in *England*.

It may be noted, in this connection, that under the Government of India Act, 1935, s. 295 (2) [see p. 396, *ante*] altogether excepted the prerogative of the Crown and of the Governor-General as his delegate, from the purview of the Act, so that no Legislature, acting in exercise of the powers conferred by the Act, could affect the royal Prerogative of pardon. In the Constitution, there is no provision expressly saving the pardoning power from legislative interference.

On the other hand, it may well be contended that the very fact that the pardoning power has been placed in Arts. 72 and 161 as powers belonging to the Executive and that the 'executive power' is not subject to any general limitation of regulation by the Legislature (p. 31, *ante*) nor is there any specific limitation in Arts. 72 or 161 (as there are in many other Articles of the Constitution) that the executive power conferred by these Articles is subject to legislation by the appropriate Legislature, implies that the executive power conferred by these two Articles of the Constitution cannot be controlled by any legislation.

The Supreme Court, however, in *Nanavati's case*,⁴ looked at the matter from the historical standpoint and held that since Arts. 72 and 161 embody the 'prerogative power' and since there is no express provision in the Constitution saving it from legislative interference, the English common law as to Prerogatives applies to the pardoning power under our Constitution, so that it may be fettered by legislation. Whether such legislation should be express or implied (a question raised by Kapur J. in the minority⁴) is, of course, a separate one.

(20) *Rogers v. Peck*, (1905) 199 U.S. 425.

(21) *Att. Gen. v. De Keyser's Royal Hotel*, (1920) A.C. 508 (526).

(22) *Nanavati v. State of Bombay*, A. 1961 S.C. 112 (118).

(23) Blackstone, Bk. I, Ch. 7, p. 237.

(24) *A. G. for Canada v. A. G. for Ontario*, 23 S.C.R. 458 (Can.).

(25) *Commonwealth v. N. S. W.*, (1923) 33 C.L.R. 1.

(1) *Uther v. Fed. Commr.*, (1947) 74 C.L.R. 508.

(2) *Horwitz v. Connor*, (1908) 6 C.L.R. 38.

(3) *Nanavati v. State of Bombay*, A. 1961 S.C. 112 (119).

The result of the majority view is that the pardoning power under Art. 72 or 161 will be subject to any limitation that may be imposed by any law made by a competent Legislature. Thus, s. 426 of the Cr. P. C. gives to an appellate Court the power to suspend a sentence pending appeal. In the result, the President or a Governor shall not be entitled to suspend a sentence during the period when an appeal is pending before an appellate Court.⁴

II. Another limitation which has been deduced in India is the power of the Supreme Court under Art. 142 of the Constitution, as to cases pending before the Supreme Court.

Prima facie, the words of Arts. 72 and 161, conferring the pardoning power on the Executive, do not contain any limitation as to the time when, the occasion on which, or the circumstances in which the power conferred by these Articles might be exercised.⁵

But though the pardoning power can be exercised by the Executive at any time, including the pendency of an appeal before the Supreme Court, so that the Court would be debarred from hearing an appeal if a full pardon were granted by the President or the Governor during the pendency of the appeal,⁶ an exception has been engrafted upon this proposition by the majority of the Supreme Court in *Nanavati's case*,⁷ as regards the power to *suspend a sentence* during the pendency of an appeal before the Supreme Court. It has been held that the Supreme Court has a plenary power, under Art. 142, to make any "such order as is necessary for doing complete justice in any cause or matter pending before it," which includes the power to suspend a sentence pending an appeal before it. Since the field is common to the Supreme Court as well as the Governor under Art. 161, a harmonious construction of the two powers must be made, with the result that "Art. 161 does not deal with the *suspension* of sentence during the time that Art. 142 is in operation and the matter is *sub judice* in this Court".⁸ Art. 145 empowers the Supreme Court to make rules in aid of its power under Art. 142. O. 21, r. 5 of the Rules made under Art. 145 requires the surrender of a convict before the Court when he moves a petition for special leave to appeal:

"Where the petitioner has been sentenced to a term of imprisonment the petition shall state whether the petitioner has surrendered. Unless the Court otherwise orders, the petition shall not be posted for hearing until the petitioner has surrendered to his sentence".

It has, accordingly, been held by the majority of the Supreme Court⁹ that the power of suspending a sentence *cannot* be exercised by the President or a Governor so as to interfere with the operation of O. 21, r. 5 of the Rules of the Supreme Court or any other powers of the Supreme Court under Art. 142 of the Constitution *during the period* when the matter is brought before the Supreme Court under Art. 136 or some other provision of the Constitution. The Court came to this conclusion on the principle of harmonious construction inasmuch as both Arts. 161 and 142 contain no words of limitation and cover a field common to both. Since Art. 161 (or Art. 72) covered the whole field while Art. 142 covered only a narrow part of it, namely, the power of *suspension* of sentence during the time when a case is *sub judice* in the Supreme Court, it must be held that Art. 161 (or Art. 72) does not deal with the suspension of sentence during the time that Art. 142 is in operation. In the result, the power to suspend a sentence will not be available to the President or a Governor while a case is *sub judice* before the Supreme Court. For the same reason, if the President or Governor has made an order of suspension of sentence prior to the convict filing a petition for appeal before the Supreme Court, the order of suspension so made will cease to operate as soon as "the matter became *sub judice* in this Court on the filing of the petition for special leave to appeal. "After the filing of such a petition this Court was seized of the case which would be dealt with by it in accordance with law It would be for this Court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass

(4) *Nanavati v. State of Bombay*, A. 1961 S.C. 112.

(5) *Nanavati v. State of Bombay*, A. 1960 S.C. 112 (123).

such other or further orders as this Court might deem fit in all the circumstances of the case".⁶

Illustration.

The Governor of Bombay, in exercise of the power conferred by art. 161, made an order suspending the sentence passed by the High Court upon *N* "until the appeal intended to be filed by him in the Supreme Court against his conviction and sentence is disposed of." Held, the order ceased to operate on the filing of the petition for special leave to appeal to the Supreme Court under art. 136, and that, accordingly, r. 5 of O. 21 of the Rules of the Supreme Court became applicable and that *N* must surrender to his sentence, on the filing of such appeal and thereafter obtain orders as to suspension of sentence pending the appeal from the Supreme Court itself.⁷

III. Like other executive powers, this power will also be exercised on Ministerial advice and, in cases of suspension and remission of sentence, the opinion of the Court which passed the sentence will be consulted [Sec. 401 (2) of the Cr. P. Code].

The pardoning power comprises a variety of acts, such as pardon, reprieve, respite, remission, suspension, commutation. The differences between these are explained below.

IV. Courts are powerless to question the propriety or expediency of the exercise of the pardoning power by the Executive in a particular case,⁸ but the Courts may interfere if the order is *ultra vires*, e.g., if a Governor issues pardon in respect of an offence against a law relating to a matter to which the executive power of the State *does not* extend (in contravention of Art. 161).⁹

Pardon and Dispensation.

Even though a pardon may be granted before conviction as a bar to indictment, it differs from the 'dispensing power' (p. 337, *ante*).

By the 'dispensing power', the absolute Kings of England used to dispense with penal laws with respect to particular named persons. The effect was that the person who had such dispensation could, with impunity, do an act which was unlawful if done by everybody else. A pardon, on the other hand, does not make lawful what was unlawful, but excuses the offence after the act was done. While dispensation relates to future conduct and is granted in anticipation thereof, pardon is granted after the offence is committed and saves the offender from its legal consequences.

The 'pardoning power' of the Executive is a part of the constitutional scheme;¹⁰ the exercise of this power does not dispense with the application of the law to particular cases but, assuming the application and the offence, seeks to offer mercy to the guilty person, absolving the guilty person from all punishment or disqualification attaching to a conviction for the offence.¹¹⁻¹²

Neither in England¹³ nor in the U.S.A.¹⁴ is the Executive competent to exercise the dispensing power as aforesaid, but the power to pardon remains a constitutional power till to-day. The position is the same in India.

Pardon and Amnesty.

The 'pardoning power' should be distinguished from 'amnesty'. While a pardon remits the punishment imposed by a Court upon an offender, amnesty overlooks the offence and absolves the offender from penalty. While pardon is addressed to ordinary crimes, or infractions of the peace of the State,—amnesty is

(6) Ibid, p. 125.

(7) *Nanavati v. State of Bombay*, A. 1961 S.C. 112.

(8) *Godse v. State of Maharashtra*, A. 1961 S.C. 600 (604).

(9) *State of Bombay v. Nanavati*, (1960) 62 Bom. L.R. 383.

(10) *Biddle v. Perovich*, (1926) 274 U.S. 480.

(11) Coke, 3 Inst. 233.

(12) *Nanavati v. State of Bombay*, A. 1961 S.C. 112 (123).

(13) Maitland, Constitutional History, 1908, 302-6.

(14) Annotated Constitution of the U.S.A. (Senate Doc. 1953, p. 408).

generally confined to 'political offences' or offences against the sovereignty of the State, and is exercised in favour of classes or groups of people.¹⁵⁻¹⁶ In short, amnesty is in the nature of forgiveness offered in advance of trial, to a group of people who have engaged in rebellion or like offences against the State itself.

(A) In the *United States*, though the power to pass an Act of Amnesty belongs to Congress,¹⁷ the President too, has sometimes declared amnesty by Proclamation,¹⁸ by virtue of his power to grant a 'pardon' before trial.

'Amnesty' is thus regarded as a species of 'pardon' within the meaning of Art. II, sec. 2, and it has been held that where the President issues an amnesty in exercise of his pardoning power, the Legislature cannot interfere with the effects of such amnesty: "the legislature cannot change the effect of such a pardon any more than the executive can change the law".¹⁹

(B) But *our* Constitution does not empower the Executive to grant a general amnesty. It is thus left to Parliament.

'Punishment'.—For the different kinds of punishment under the Indian Penal Code, see Sec. 53 of that Code.

'Offence'.—See Vol. I, p. 564; Vol. II, p. 24. Both in *England*²⁰ and in the *U.S.A.*,²¹ the offence of criminal contempt of Court is subject to the pardoning power. The same view has been taken under *our* Constitution.²²

Analogous Provision.—See Art. 161, *post*, regarding corresponding power of Governor.

Contents of the Pardoning Power.

The pardoning power comprises a variety of acts, such as pardon, reprieve, respite, remission, suspension, commutation. The differences between these are explained below.

Pardon.

A pardon should be distinguished from the absolute power of the sovereign to enter a *nolle prosequi*, which stops a criminal proceeding,²³ and the object of which is to prevent vexatious prosecutions. This power is given to the Advocate-General by Sec. 333 of *our* Criminal Procedure Code in respect of trials before the High Court. The section specifically provides that *nolle prosequi* will not amount to an 'acquittal' unless the Court otherwise directs.

A corresponding power to 'withdraw from the prosecution' is given to the Public Prosecutor in respect of proceedings before the subordinate Courts, by s. 494 of the Criminal Procedure Code. The peculiarities of this power are that—(a) the Public Prosecutor cannot exercise this power without the consent of the Court; (b) if the withdrawal takes place after a charge has been framed or in cases where no charge is required to be framed under the Code, the withdrawal shall result in an order of 'acquittal' of the accused.

A pardon, on the other hand, is an act of grace²⁴ which releases a person from *punishment* for some offence, on "the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed".²⁵

Effects of Pardon.

A pardon may be either full, limited or conditional.

(i) A *full* pardon wipes out the offence in the eye of law and rescinds the sentence as well as the conviction,¹ and frees the convicted person from serving any uncompleted term of imprisonment or from paying any unpaid fine.

(15) *Burdick v. U. S.*, (1915) 236 U.S. 79.

(16) *Chennagadu, in re*, I.L.R. (1955) Mad. 92 (105).

(17) *The Laura*, (1885) 114 U.S. 411.

(18) *Ogg and Ray*, Introduction to American Government, p. 368; *U. S. v. Klein*, (1872) 13 Wall. 128 (148).

(19) *U. S. v. Klein*, (1872) 13 Wall. 128.

(20) *Blackstone*, Vol. IV, 285, 397-8.

(21) *Ex parte Grossman*, (1925) 267 U.S. 87.

(22) *Chennagadu, in re*, I.L.R. (1955) Mad. 92 (105).

(23) *Queen v. Allen*, (1862) 1 B. & S. 850.

(24) *Blackstone*, Commentaries, Bk. IV, XXXI.

(25) *Biddle v. Perovich*, (1927) 274 U.S. 480.

(1) *Ex parte Garland*, (1866) 4 Wall. 333.

It restores the offender to that *legal* condition in which he would have been had the crime not been committed.¹⁻³ It does not, however, affect rights acquired by the Government or a third party under judicial proceedings prior to the pardon nor does it enable the offender to claim compensation from the Government for what he has already suffered.³ Nor does it, *ipso facto*, restore the offender to an office which he has forfeited by the offence,¹ or to property which he has lost owing to execution of the sentence.⁴ Again, a past offence, even though pardoned, may be taken into consideration as a circumstance of *aggravation*, when punishing a subsequent offence.⁵⁻⁶

(ii) A *limited* pardon relieves the offender of some but not all the consequences of the guilt. In *England*, a pardon other than a 'free' pardon relieves from the penalty but not from the conviction.

Thus, suspension or remission of a sentence cannot absolve a person from the civil disqualifications which he has incurred by the conviction.⁷

(iii) A *conditional* pardon, on the other hand, imposes some condition, *e.g.*, good behaviour, for the pardon to be effective. But the condition may not extend beyond the term for which the offender was sentenced.

Reprieve.

Reprieve means a stay of the *execution* of a sentence or of the enforcement of a penalty, for a temporary period.⁵ In *England*, a reprieve is granted till the birth of the baby where a female prisoner under sentence of death is pregnant (also in the *U. S. A.*) and where a prisoner becomes insane after judgment.²⁴ Under the *existing law in India*, Sec. 382 of the Cr. P. Code authorises the High Court to stay execution of a death sentence in the former case. Under the Constitution, the President and Governors shall also possess a power of reprieve to be exercised in fit cases.

Respite.

Respite means awarding a lesser sentence instead of the penalty prescribed in view of the fact that the accused has had no previous conviction or the like. In *England*, it is not available in the case of conviction of murder. But where a woman offender is pregnant, the sentence to be passed on her is one of penal servitude instead of death. This power is exercised by the Court. Under *our* Constitution, the Executive is also vested with this power.

Remission.

Remission reduces the *amount* of a sentence without changing its *character*, *e.g.*, a sentence of imprisonment for one year may be remitted to six months. Under Sec. 401, Cr. P. Code, the Central and Provincial Governments already possess this power.

Commutation.

Commutation is a change to a lighter penalty of a *different form*. Secs. 54 and 55 of the Indian Penal Code (p. 391, *ante*) deal with commutation of a sentence of death and transportation for life. But Sec. 402 of the Cr. P. Code is wider and says that each of the following sentences may be commuted for the sentence next following it: Death: imprisonment for life: rigorous imprisonment: simple imprisonment: fine.

The object is to ameliorate the rigours of the punishment awarded by the Court, by the Executive, on considerations of public welfare.

(2) *Hay v. Justices of London*, (1890) 24 Q.B.D. 561.

(3) *Knote v. U. S.*, (1877) 95 U.S. 140.

(4) *The Laura*, (1885) 114 U.S. 411.

(5) *Carlesi v. N. Y.*, (1914) 233 U.S. 51.

(6) 7 & 8 Ges. IV, c. 28, s. 33.

(7) *D. I. G. v. Rajaram*, A. 1960 A.P. 259 (261-2).

No limitation is imposed on the power of the Executive in India to commute a sentence under this statutory provisions just mentioned.⁸ It is assumed by the Legislature that imprisonment for life is a lesser punishment than death or that fine is a lesser punishment than imprisonment and is, accordingly, necessarily ameliorative to the convict.

Though, as explained earlier (p. 395, *ante*), the pardoning power, as a whole, is exercised in England as a matter of policy, the evidence before the Royal Commission on Capital Punishment⁹ shows that the Home Office, in practice, recommends a commutation of a sentence of death in a variety of cases (which are not exhaustive), such as—

(i) Mental abnormality; (ii) Killing of offspring by woman; (iii) Genuine suicide pact; (iv) Existence of special motives which excite sympathy, e.g., incurable disease or imbecility of the child who is killed; (v) Existence of doubt despite the jury's verdict; (vi) Physical condition of the prisoner which may cause difficulty in executing the sentence expeditiously or humanely; (vii) Where two or more persons were involved and it is considered that the one should be reprieved because the other has escaped trial or conviction or there are like circumstances which should be taken into consideration; (viii) Where there is a strong and widespread public opinion against the execution.

Court's power to interfere, if any.

1. The power to grant pardon is in essence an executive function to be exercised by the Head of the State after taking into consideration various matters which may be germane for consideration before a Court of law inquiring into the offence.¹⁰ The Court is, accordingly, precluded from examining the wisdom or expediency of exercise of the power in a particular case.¹⁰

2. The question of remission is exclusively within the province of the appropriate Government and the Court cannot interfere on the ground that it has been improperly refused.¹¹

On the other hand—

(a) Though the Court will not enter into the propriety or sufficiency of the reasons for the exercise of the power in a particular case, the Court may interfere if the Governor exceeds his powers under the Constitution, e.g., if he exercises the power in respect of an offence against a law relating to a matter to which the executive power of the State *does not* extend¹² or in a case of punishment by a Court Martial.

(b) Art. 361 of the Constitution only gives personal protection to the Governor where the action of the President or Governor is alleged to be against the Constitution or the law. It is competent for the Court to inquire into that question and make a proper order against the Government or its officials even though it will not be possible to make any order against the President or Governor personally.¹² Thus, if the Court finds that an order of the Governor purported to be issued under Art. 161 has exceeded the constitutional power of the Governor, the Court may issue a writ to the officer who is holding the accused in custody.¹²

CLAUSE (2).

Power conferred on other officers by the Army and Air Force Acts.

See Ch. XIV of the Army and Air Force Acts, 1950. See also ss. 162-4 of the Navy Act (62 of 1957).

(8) *Nanavati v. State of Bombay*, A. 1961 S.C. 113 (134).

(9) Minutes of Evidence. Royal Commission on Capital Punishment, pp. 3-4.

(10) *Chennugadu*, in re., I.L.R. (1955) Mad. 92.

(11) *D. I. G. v. Rajaram*, A. 1960 A.P. 259 (261-2).

(12) *State of Bombay v. Nanavati*, (1960) 62 Bom. L.R. 383.

CLAUSE (3).

Power of Governor in cases of sentence of death.

This clause saves the powers of the Governor conferred by laws, such as Sec. 54 of the Indian Penal Code, Secs. 401-2 of the Criminal Procedure Code (see p. 397, *ante*), to *suspend, remit or commute* a sentence of death. But the Governor shall have no power to 'pardon' a sentence of death. The power to grant 'pardon' in all cases of sentence of death is vested *exclusively* in the President.

Under s. 402A, the powers of suspension, remission and commutation may, in the case of sentence of death, also be exercised by the Central Government. This also follows from Art. 72 (1) (c) of the Constitution, explained above.

73. (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

Extent of executive power of the Union.

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State^{12a} to matters with respect to which the Legislature of the State has power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

OTHER CONSTITUTIONS

(A) *Australia*.—S. 61 of the Commonwealth of Australia Constitution Act, 1900 says—

"The executive power of the Commonwealth . . . extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

But though the executive power of the Commonwealth is co-extensive with its legislative power, so far as the *concurrent* legislative sphere is concerned, the States have the primary executive authority, unless ousted by Commonwealth legislation relating to the subject. As Wynes puts it—

"Where the legislative power of the Commonwealth is exclusive, *e.g.*, in the case of defence, the executive power in relation to the subject of the grant inheres in the Commonwealth; but in respect of *concurrent* powers, the executive function remains with the States until the Commonwealth legislative power is exercised."^{12b}

(B) *Canada*.—In *Canada*, the Constitution only distributes the legislative power as between the Dominion and the Provinces and the judicial view is that the executive power follows from the legislative power to deal with a subject:

"Executive power is in many situations that arise under the statutory constitution of Canada conferred by *implication* in the grant of legislative power."^{12c}

(12a) The words "specified in Part A . . . First Schedule" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

(12b) Wynes, *Legislative and Executive Powers*, p. 321.

(12c) *Bonanza Creek Gold Mining Co. v. R.*, (1916) 1 A.C. 566 (580).

(C) *U.S.A.*—See Art. II, s. 3, quoted *ante*.

The President's duty to execute the 'laws' obviously refers to the federal laws. The States have no power to execute federal laws and the executive power of the Union is co-extensive with its legislative power.

(D) *Weimar Germany*.—A most peculiar feature of the Constitution of the German Reich of 1919 was that the administration of national laws was primarily left to the States, under the control of the national Government. The relevant provisions were—

"Art. 14. The laws of the Commonwealth will be executed by the State authorities, unless otherwise provided by national law.

Art. 15. In so far as the laws of the Commonwealth are to be carried into effect by the State authorities, the National Cabinet may issue general instructions. It has the power to send commissioners to the central authorities of the States and, with their consent, to the subordinate State authorities, in order to supervise the execution of national laws. . . ."

See, further, under Art. 257, *post*.

(E) *West Germany*.—The West German Constitution of 1949 contains elaborate provisions as to the execution of federal laws.

(i) Direct federal administration is provided for with respect to certain specified matters, such as foreign service; finance; railways; postal services; federal waterways and shipping (Art. 87).

(ii) Certain federal administrative agencies may be established by federal legislation, such as federal frontier protection authorities; central offices for police information and communications, for the completion of data for the purpose of protecting the Constitution, and for criminal police (Art. 87).

(iii) Besides the aforesaid matters, the general execution of federal laws is left to the States (*Länder*). The States, therefore, execute not only their own laws but also those of the Federation. As regards the execution of the federal laws, the States shall be under the control of the Federation in the following ways:

(a) General supervision to see that the federal laws are faithfully executed, by sending commissioners to the State governments for this purpose [Art. 84 (3)].

(b) The Federal Government may, with the consent of the *Bundesrat* (Upper Chamber of the Federal Legislature), issue general administrative rules [Art. 84 (2)] and also individual instructions for particular cases where authorised by a federal law, with the consent of the *Bundesrat* [Art. 84 (5)]; regulate the uniform training of civil servants [Art. 85 (2)]; require the submission of reports and documents [Art. 85 (4)].

(c) As to the question whether a State Government has failed in the matter of execution of federal laws, the Federal or the State Government may bring the matter for decision before the *Bundesrat*, whose decision, again, may be challenged before the Federal Constitutional Court [Art. 84 (4)].

(d) In case of an established failure to execute the federal laws or their violation, the Federal Government is empowered to take compulsory measures, with the consent of the *Bundesrat*, to enforce compliance with the federal law as in the case of violation of the Constitution [Art. 37].

(F) *Government of India Act, 1935*.—Sec. 8 of the Government of India Act, 1935, provided—

"(1) Subject to the provisions of this Act, the executive authority of the Federation extends—

(a) to the matters with respect to which the Federal Legislature has power to make laws; (b) to the raising in British India on behalf of His Majesty of naval, military and air forces and to the governance of His Majesty's forces borne on the Indian establishment; (c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise and in relation to the tribal areas:

Provided that—(i) the said authority does not, save as expressly provided in this Act, extend in any Province to matters with respect to which the Provincial Legislature has power to make laws; (ii) the said authority does not, save as expressly provided in this Act, extend in any Federated State save to matters with respect to which the Federal Legislature has power to make laws for that State, and the exercise thereof in each State shall be subject to such limitations, if any, as may be specified in the Instrument of Accession of the State; . . ."

The result of the above provision was that the execution of Provincial laws was the concern of the Provincial Governments. The execution of federal laws relating to the Concurrent legislative sphere was also entrusted to the Provincial Governments [Proviso (i)]. The execution of all other federal laws was a matter for the federal Government together with its responsibility for the implementation of treaties; Defence and the Tribal Areas. Though the execution of federal laws in the Concurrent sphere was entrusted to the Provincial Governments, the federal Government was empowered to give directions to the Provincial Governments as to the execution of federal laws relating to those subjects which were enumerated in Part II of the Concurrent List [s. 126 (2)]. In times of emergency, the executive power of the federation might extend to Provincial subjects as well [s. 102].

INDIA

Art. 73 : Extent of Executive power of the Union.

(i) The Union shall have exclusive executive power for—(a) the administration of laws made by Parliament under its exclusive powers; (b) the implementation of treaties and agreements binding on the Government of India, whether entered into before or after the commencement of the Constitution (see, further, under Art. 253).

(ii) While executive authority in regard to matters in the Concurrent List shall be ordinarily left to the States, Parliament shall be entitled to provide that in exceptional cases the executive power of the Union shall also extend to these subjects.

By virtue of cl. (1) (a), the executive power of the Union shall be co-extensive with the legislative power of the Union Parliament. In other words, it will extend over the whole of the territory of India, with respect of the matters enumerated in Lists I and III of the 7th Schedule. But this is subject to the two exceptions engrafted in the Proviso to cl. (1) and in cl. (2).

(iii) The Proviso to cl. (1) says that executive authority in regard to matters in the Concurrent List shall be ordinarily left to the States, but Parliament shall be entitled to provide that in exceptional cases the executive power of the Union shall also extend to these subjects.

(iv) The existing executive power of a State shall continue, notwithstanding that the matter falls under Cl. (1), until Parliament provides otherwise.

'Subject to the provisions of the Constitution'.

Apart from the provisions of Arts. 73 and 162, executive power is conferred upon the Union as well as a State Government as regards three specified matters—

- (i) Carrying of any trade or business [Art. 298];
- (ii) acquisition, holding and disposal of property [Art. 298];
- (iii) making of contracts for any purposes [Art. 299].

Mutual Delegation of Executive Functions.

While Arts. 73 and 162 divide the executive power as between the Union and the States, Arts. 258 (1) and 258A enable the Union Government to delegate to a State Government an executive function belonging to itself (according to Art. 73) and *vice versa* (see *post*).

Legislative Delegation of Union functions to State Governments.

Though the executive power relating to subjects included in the Union List is exclusively vested in the Union, the State may be entrusted with specific executive functions by virtue of authorisation by Union legislation.

(I) There are certain pre-Constitution Central Acts which entrust specific functions to the State Governments. Hence, so long as these provisions are not amended by Parliament, the State Governments will continue to discharge these statutory functions,¹³ though the executive power relating to these subjects now belong to the Union, e.g.—

Manoeuvres, Field Firing and Artillery Practice Act, 1938: Ss. 2 (1), (2); 9(1), (2), (3); 13; Seaward Artillery Practice Act, 1949: Ss. 3 (1), (2); 9; Municipal Taxation Act, 1881: Ss. 3A; 5; Indian Soldiers (Litigation Act, 1925: S. 14 (1); Cantonments Act, 1924: S. 45 (1) (b); Exchange of Prisoners Act, 1948: Ss. 3; 4; 7; Indian Railways Act, 1890: Ss. 11 (1) a, b, (4); 12; 146 (1) a; Coasting Vessels Act, 1838 (S. 11, Prov.)

(II) After the Constitution, such delegation by law made by Parliament, is possible by virtue of Art. 258 (2) [see *post*].

Instances of post-Constitution Central Acts, entrusting functions to State Governments are—

Industries Development and Regulation Act, 1951 (s. 25); Forward Contracts (Regulation) Act, 1952 (s. 26); Mines and Minerals (Regulation and Development) Act, 1957 (ss. 7 (2); 10 (2), etc.); Estate Duty Act, 1953 (s. 81).

Statutory functions of Central Government relating to State Subjects.

Though with respect to matters included in the State List (List II, 7th Sch., *post*) the executive power belongs exclusively to the States, there are some existing Central Acts relating to these subjects which were passed by the Indian Legislature at a time when the governmental system was unitary, or when the relevant subjects belonged to the Central jurisdiction and there are certain provisions in such Acts which impose some functions or duties upon the Central Government. Though the legislative power relating to these subjects is now included in the State List, the Central Government must remain responsible for the discharge of these powers and obligations, so long as these Acts remain on the statute book, e.g.—

Court-Fees Act, 1870 (s. 1A); Indian Museum Act, 1910 (ss. 2 (1); 8 (1)); Indian Forest Act, 1927 (ss. 39, 41A).

Cl. (1), Proviso : Execution of laws in the concurrent field.

The Proviso lays down two propositions: Firstly, that the authority to execute laws relating to the concurrent field,—whether they were passed by the Central Legislature or by the State Legislatures,—would ordinarily belong to the States. But if any particular case, Parliament, while passing any law relating to the concurrent field, considers that the execution ought to be retained by the Centre, Parliament would have the power to do so.

While Sec. 162 (2) of the Government of India Act, 1935, merely authorised the Centre to give *directions* to the Provinces as to the carrying into execution therein of a Central law relating to a concurrent subject, the Constitution empowers the Union to take up the executive power from the State altogether, in any case it deems fit. The power of giving directions under the Act of 1935 was found inadequate and it was found that in some cases, the Provinces had practically rendered ineffective some Central legislation by not complying with the directions issued by the Centre. For example, some Provinces objected or refused to appoint factory inspectors to supervise the operation of the Factory Acts and regulations.

The object of the present Proviso is to ensure that the legislation of the Centre in the concurrent sphere becomes effective, by empowering the Centre to take up the administration of its laws in that sphere, for example, relating to the removal of untouchability,¹⁴ the prevention of child marriage, the prevention of

(13) Cf. *Jayantilal v. Rana*, A. 1964 S.C. 648.

(14) Cf. s. 9 of the Untouchability (Offen-

ces) Act, 1955 at p. 55 of the Author's Acts, Rules & Orders under the Constitution of India, Bk. I.

forced labour. While legislating on these subjects, it will be open to Parliament to reserve to itself the right to administer the Act by the Union Executive. The Proviso to Art. 162 (*post*) again, lays down that the executive power of a State in matters relating to the Concurrent List, shall be subject to the executive power of the Union as conferred by any law of Parliament. [Under the Government of India Act, 1935 (*see* Proviso (i) to Sec. 8, at p. 405, *ante*), the Central Legislature had no such option to reserve the power of administration to the Centre while legislating in the concurrent sphere].

The Provisos to both Art. 73 (1) and 162 further lay down that the executive power of the Union may be exercised in the Concurrent sphere where it is expressly committed to the executive power of the Union [*e.g.*, by Arts. 353 (b); 356 (1) (a)].

These Provisos are in accord with the view taken in *Australia* regarding the executive power of the Commonwealth and the State (*see* p. 404, *ante*).

'In this Constitution.'—Other provisions of this Constitution, which authorise the Union to exercise executive power over the concurrent [as well as over the exclusive State] sphere are—Art. 353 (b) [during Proclamation of Emergency]; Art. 356 (1) (a) [during Proclamation of failure of constitutional machinery in a State].

Instances of Executive functions reserved to the Central Government by laws made by Parliament.

Though the executive power relating to 'concurrent' subjects belongs to the State Governments, specific functions have been reserved to the Central Government, under the Proviso to Art. 73 (1) in certain Acts, such as—

Indian Medical Council Act, 1956 (ss. 3, 4, etc.); Essential Commodities Act, 1955 (ss. 3, 5); Special Marriage Act, 1954 (ss. 3, 10, 50).

Analogous Provision.—Art. 162 provides the extent of the executive power of a State.

Cl. (2) : Continuance of State power.

Certain legislative powers, which belonged to the Provinces under the Government of India Act, 1935, have been transferred by the Constitution to the Union. For instance, item 9 of List II of the Act of 1935 gave the Provincial Legislature exclusive power with respect to 'compulsory acquisition of land' including acquisition for purposes of the Centre. But the Constitution took away the legislative power as to 'acquisition or requisition of property for the purposes of the Union' from the State and placed it in Entry 33 of List I.¹⁵ The result was, that under Art. 73 (1) (a), the executive power as to acquisition or requisitioning for purposes of the Union would be automatically transferred to the Union Executive, on the commencement of the Constitution. Art. 73 (2) seeks to avoid this automatic lapse of the State Executive power and maintains the *status quo* until Parliament elected to provide that the executive power relating to such subjects as aforesaid shall be exercised by the Government of India.

The same observations will apply to other legislative powers which have been transferred by the Constitution to the Union,—for example, the power relating to 'highways declared by Parliament to be national highways',—while the power relating to all roads belonged to the Provincial Legislature, under the Act of 1935. Similarly, 'minor railways' were included in the State List in the Government of India Act, 1935, but under the Constitution all railways are included in the State List.

In short, cl. (2) says that though the State Legislature cannot make a new law relating to the subjects which have been transferred to the Union by List I of the 7th Sch. to the Constitution, until Parliament directs or provides, the State

(15) Prior to the Constitution (Seventh Amendment) Act, 1956, which made the entire subject *concurrent*.

Executive may continue to exercise executive power in respect of that subject under existing State laws.

Legislation by Parliament.—So far as the power of requisitioning and acquisition of immovable property for purposes of the Union is concerned, Parliament enacted the Requisitioning and Acquisition of Immovable Property Act (XXX of 1952) under which the power to requisition or to acquire immovable property for a *Union purpose* belongs to such person or authority as may be authorised by the Central Government. All orders of requisition and acquisition for Union purposes made by the State authorities under State laws between the commencement of the Constitution and the 25th January, 1952 were validated by s. 23 of this Act. Similar was the purpose of the State Acquisition of Lands for Union Purposes (Validation) Act, 1954.

INDEX TO COMMENTS.

ARTICLE 73.

Other Constitutions :

(A) Australia, 410 ; (B) Canada, 410 ; (C) U.S.A., 411 ; (D) Weimar Germany, 411 ; (E) West Germany, 411 ; (F) Government of India Act, 1935, 411.

India :

Extent of Executive power of the Union, 412.

Cl. (1), Proviso: Execution of laws in the Concurrent Field, 413 ; 'In this Constitution' 414 ; Analogous Provision, 414.

Cl. (2): Continuance of State power, 414 ; Legislation by Parliament, 415.

Council of Ministers

74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England.*—As Lowell¹⁶ has nicely put it, "Political liberty and romance in English history are both bound up with the shifting fortunes of the throne". In the last stage of this political evolution, we find that all plenitude of powers of the absolute monarch has passed into the hands of the Cabinet, speaking through the Prime Minister. The Crown must act on the advice of the Cabinet and must not act on any other advice.¹⁷ This convention is enforced through the rule of practice that every *public* act of the Crown must be done upon the counter-signature or responsibility of some Minister responsible to Parliament.¹⁸ The rule is so universal in its operation that it has been said that "there is not a moment in the King's life, from his accession to his demise, during which there is not some one responsible to Parliament for his public conduct."¹⁹

So, the Crown has ceased to possess any direct political power. But he still possesses, in the words of Bagehot, "*the right to be consulted, the right to warn, and the right to encourage*".²⁰ According to the earlier theory of the Constitution the Ministers were the counsellors of the King. It was for them to advise and for him to decide. Now the position is just the reverse, and the King is not usually consulted in matters of policy until the opinion of the Cabinet has taken shape.

(16) Lowell, *Government of England*, Vol. I, p. 16.

(17) Halsbury, *Hailsham Ed.*, Vol. VI, pp. 636-7.

(18) Herbert Morrison, *Government & Parliament*, 1954, p. 81.

(19) Todd, *Parliamentary Government in England*, 2nd Ed., Vol. I, p. 266.

(20) Bagehot, *English Constitution* (English Classics), pp. 67-8.

Of course, he is informed and consulted regarding all affairs of the State before the *final step* is taken, and has ample opportunities of discussing¹⁸ and persuading his Ministers to abandon a policy of which he does not approve, but if, backed by a majority in Parliament, they insist upon their views, he must yield. Again, it has been said that the opportunity for an exertion of royal influence is very narrow in domestic affairs and "that under ordinary circumstances the personal influence of the King in political matters is not likely to be very effectively asserted outside of *foreign affairs* . . . and some other appointments to office".²¹

But though it is settled that the Crown can act only according to the advice of the Cabinet as tendered through the Prime Minister, there is a consensus of opinion that on two matters, the Crown has still left to himself some authority to act on his individual judgment, within a narrow margin simply because the Prime Minister's advice is not available in such cases or that it is not possible to act on that advice consistently with the principle of ministerial responsibility (to Parliament) itself. These two matters arise in connection with—(i) the appointment of the Prime Minister himself; (ii) the Crown's right of dissolution of Parliament.

(i) As regards the appointment of the Prime Minister,—no doubt, the Crown must invite the leader of the party in majority in the House of Commons to be the Prime Minister. But, suppose *no party has a clear majority* in the House: Will the Crown then be guided by the advice of the outgoing Prime Minister, who has lost the confidence of the Commons, in the matter of selecting his successor? In practice, the Crown has taken the advice of the outgoing Prime Minister in 1924, 1929 and 1935 (*vide Keith*).²² But Lowell, writing in 1912, described any *right* of a Prime Minister who has lost the confidence of the Commons, to nominate his successor as 'improper, absurd and grotesque'.²³ An example of the Crown not seeking such advice was in 1923, when George V did not invite Bonar Law to recommend his successor. In fact, there is no constitutional obligation upon the Crown to consult the outgoing Prime Minister, in the matter of finding out his successor.²⁴ So, when no party has a clear majority in the House of Commons the King must then use his own judgment as to which leader he would summon, subject only to the condition that the person summoned must be able to command a majority, by some coalition or compromise with the other parties.

Whatever may be the position when the advice of the outgoing Prime Minister is available, certainly the Crown is left to exercise its discretion when such advice is not available owing to the *death* of a Prime Minister, and there is no acknowledged leader of the Opposition who can command a majority.²⁵

(ii) The Crown has the prerogative to dissolve Parliament at any time. Since the growth of the Cabinet system, this prerogative has come to be exercised on the advice of the Prime Minister. When defeated on a 'major issue' in the House of Commons, a Prime Minister may, instead of resigning, request the Crown to dissolve Parliament, on the ground that the House no longer reflects the opinion of the Electorate.²⁵ Thus, as *Dicey* observes, 'dissolution' has come to be a power at the hands of the Prime Minister,¹ "to appeal from the legal to the political

(21) Lowell, *Government of England*, Vol. I, pp. 31, 43, 46.

(22) Keith, *Constitutional Law* (1939), p. 146.

(23) Lowell, *Government of England* (1912), Vol. I, p. 34. See also Keith, *British Cabinet System*, 1952, p. 36.

(24) Jennings, *Constitution of Ceylon*, p. 89; Morrison, *Government & Parliament*, 1954, p. 77.

(25) For an interesting account of the development of the power of dissolution, see

Kohn, *Constitution of the Irish Free State*, pp. 292-3.

(1) Since 1918, it has been established in England that it is the Prime Minister who has the sole right to advise dissolution [Jennings, *Cabinet Government*, 1959 p. 419, 424]. In 1945, Mr. Churchill advised dissolution without consulting the Cabinet [Jennings, *Constitution of Ceylon*, p. 47]. It is also settled that the Crown cannot of its own initiative (i.e. when the Prime Minister does not ask for it) dissolve Parliament [Hood Phillips, *Constitutional Law*, 1957, p. 88].

sovereign". The question is whether the Crown may, constitutionally, refuse dissolution to a defeated Ministry.

In practice, the Crown has never refused such a request since 1784. Now, the fact that dissolution has never been refused since 1784 has led modern writers to hold that the Crown will no longer exercise any discretion in the matter. In *Anson's Law of the Constitution*^{1a} we find the opinion that the Crown has no right to refuse if dissolution is *properly* asked for *i.e.*, when there is reason to think that the House of Commons no longer reflects the opinion of the nation; but that the Crown may refuse it if it is *improperly* requested, *i.e.*, when it is requested a second time.² But this very rule has formed itself into a convention, *viz.*, that a defeated Ministry, at whose advice a dissolution has once been granted, should not ask for a dissolution again, finding themselves in a minority in the newly-elected House.³ And no such request has, in fact, been made by any Ministry in England. Again, the assent of the Crown to grant a dissolution at the request of the Labour Prime Minister, in 1924, would demonstrate that the Crown would not take upon itself the task of exploring whether any other Ministry is capable of being formed (as has been done in the Dominions and in India under the Act of 1935), before acceding to the request to dissolve.⁴

It is in this state of affairs that *Keith*³ observed (writing in 1939):

"The right of the Crown to refuse advice is sometimes asserted to exist in the case of requests for dissolution of Parliament and Queen Victoria seems to have held the view that the Crown could refuse. But the weight of authority as voiced, even in 1858, by Lord Aberdeen, is *wholly against* the power to refuse *one* dissolution to a Ministry..... A dissolution has thus come to have a *very different* sense from that which was held by Queen Victoria in the earlier part of her reign, when she regarded it as an appeal by the Crown to the country to reinforce the Ministry. It denotes an appeal from the verdict of the Commons to the political sovereign, the electorate, and *in no wise concerns the Crown*."³

(B) *Canada*.—As the Preamble Vol. I, p. 62, *ante*, shows, the Constitution of Canada is 'similar in principle to that of the United Kingdom'. This expression was used to indicate that the Canadian system of government should be a responsible Cabinet government as in the United Kingdom, notwithstanding the fact that Canada was having a written Constitution.

The system of Cabinet Government has thus been introduced in Canada through similar *conventions*, and there is the same divergence between theory and practice as in the Constitution of England. As in England, the existence of the powers of the Cabinet in Canada does not rest on any law.

Thus, Sec. 11 of the British North America Act says—

"..... There shall be a Council to aid and advise in the Government of Canada to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be removed by the Governor-General."

According to the terms of the Constitution Act, the Privy Councillors are mere advisers of and responsible to the Governor-General and there is no mention of their responsibility to the Legislature.

'But the fact is wholly different—the responsibility for the government of Canada rests upon a body of men not even mentioned in the legislation—the 'Cabinet' or 'Ministry'. The Privy Council does exist and has as its members all the present Ministry and the surviving members of past Ministries; but it, as a whole, is *faincant*—as a whole, it has no duties and

(1a) *Anson. Law and Custom of the Constitution*, 5th Ed., 1922, pp. 325-330; *Chalmers and Hood Phillips*, p. 52; *Jennings, Cabinet Government*, 1959, 427-8.

(2) It is interesting to note that the Weimar Constitution of Germany (Art. 25) expressly limited the right of dissolution to 'once only for any one reason'.

(3) *Keith, British Cabinet System*, 1952, pp. 2-3.

(4) Theoretically, however, the position remains that the Crown may refuse a

dissolution if it can obtain an alternative Ministry to carry on the government (*Keith, British Cabinet System*, 1952, p. 298). In India, the Rajpramukh of Travancore-Cochin refused dissolution to P.S.P. Chief Minister Thanu Pillai when a motion of no-confidence was passed against his ministry, in February, 1955, on the ground that the party to which the Chief Minister belonged was obviously in the minority and that it was possible for the Congress party to form a new Ministry. This was in accord with the Canadian practice.

performs no functions. The duties and functions assigned to the Privy Council are all performed by the 'Ministry' (the members of which, indeed, are Privy Councillors)....."⁵

The Privy Council is a large body, consisting not only of members of the Cabinet but also members of past Cabinets and other men of distinction. But the Privy Council, as a body, never holds any meetings and performs no functions. It is the Cabinet which functions as advisers of the Governor-General, in the name of the Council and formal decisions of the Cabinet are issued as Orders of the Governor-General in Council.

As in England, the principle of responsible government prevails in Canada, and the Governor-General cannot exercise any of his functions except with the advice of the Cabinet.⁶ But in the matter of exercise of the right of dissolution (Sec. 50, British North America Act) the Canadian Governor-General seems to possess a larger discretion than the English Crown, for the English convention that the Crown should not refuse a request for dissolution for the *first* time, has not been established in Canada. The rule in Canada, on the other hand, is that the Governor-General or the Governor would not readily grant a dissolution without exploring the possibility of forming another Ministry.⁷

On this point, *Riddell*⁸ observes—

"Sometimes a Ministry is defeated in a House of Commons thus showing lack of confidence of the House in it. The Ministry may resign or it may advise a General Election hoping to receive a favourable vote from the electorate. This is one of the few cases in which the Governor-General must exercise his judgment—he may accede to the request, or he may refuse. If he does refuse, the Ministry must resign, the Governor-General must call the leader of the dominant party to form a Ministry and relieve him of the responsibility for the refusal. Should the new Ministry be dissatisfied with the existing House, it may in its turn ask for a dissolution; and unless the Governor-General is prepared to take back the former Ministry and be guided by its advice, the request must be granted.

The actions of the Governor-General in granting or refusing a General Election are based on well-established constitutional rules. He must avoid becoming a party man. He must not engage in party politics or political intrigue, he must hold the scales even in respect of all political parties, he must be guided by a fair and candid consideration of the welfare of the people at large, he must not grant a dissolution simply to enable a political party to continue in office when there is no real and important question at issue between the parties."

A recent example of refusal by the Governor-General to grant dissolution was in 1926 when the Prime Minister, Mr. Mackenzie King had to resign upon the refusal of the Governor-General to accede to his request to dissolve the House. The refusal was, of course, not of moment in effect, for the leader of the Opposition (Mr. Meighen), who was called to form a Ministry, failed to secure a majority and so the Governor-General was obliged to dissolve the House.⁹

(C) *Australia*.—Sec. 62 of the Constitution Act says—

"There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth....."

Sec. 63 says

"The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council."

It has been judicially held¹⁰ that these sections give statutory authority to the institution of responsible government, by which the Australian Constitution is differentiated from that of the U.S.A. and resembles that of Canada.

The Governor-General acts in all matters on the advice of ministers.¹⁰

But in Australia, as in Canada, there are instances of the Governor-General's refusing to dissolve the House of Representatives on the advice of a defeated

(5) Riddell, *The Canadian Constitution in Form and Fact*, 1923, pp. 20 : 34-5.

(6) Dawson, *Government of Canada*, 1949, pp. 172, 178-9, 189.

(7) Riddell, *The Canadian Constitution in Form and Fact*, 1923, pp. 20 : 34-5.

(8) This obviously anomalous position led to a statement at the Imperial Conference

that the position of the Governor-General was essentially the same as that of the Crown in England (Dawson, *Government of Canada*, 1949, p. 166).

(9) *Amalgamated Society of Engineers v. Adelaide Steamship Co.*, (1920) 28 C.L.R. 129 (142).

(10) Nicholas, *Australian Constitution*, 2nd Ed., 1952, p. 68.

Prime Minister.¹¹ Thus, in 1904, it was refused to Mr. Watson; in 1905, to Mr. Reid; and in 1909, to Mr. Fisher.¹² In all these cases, the refusal was found on the assumption that an alternative Government with majority in the House was possible.

But since 1914, there has been no such case. On the other hand, in 1914 and 1952 the Governor-General accepted the advice of the Ministry to grant a *double* dissolution.^{9,11}

(D) *Eire*.—Art. 13 (9)-(11) of the Constitution of Eire, 1937, provide—

"(9) The powers and functions conferred on the President by this constitution shall be exercisable and performable by him only on the advice of the Government, save where it is with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.

(10) Subject to this constitution, additional powers and functions may be conferred on the President by law.

(11) No power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of the Government."

Art. 13 (2) provides—

"The President may in his absolute discretion refuse to dissolve Dail Eireann on the advice of the Taoiseach who has ceased to retain the support of a majority in the Dail Eireann."

The Constitution of Eire, thus, requires the President to act on the advice of ministers on all matters, but at the same time gives him *absolute discretion* (contrary to the English rule) in the matter of refusing dissolution to a defeated Prime Minister. In this latter respect, he is freer than the Dominion Governor-Generals. The reason behind this rule is that the Prime Minister is a person directly nominated by the Legislature (see under Art. 75 (1), *post*).

(E) *Fourth French Republic*.—Arts. 32 and 38 of the French Constitution of 1946 provided—

"32. The President of the Republic shall preside over the Council of Ministers. He shall order the minutes of their meetings to be recorded and shall keep them in his possession."

"38. Every act of the President of the Republic must be countersigned by the President of the Council of Ministers and by a Minister."

Though the President of the French Republic, unlike the formal head of any other Parliamentary system, was given the right to preside over the Council of Ministers, he had not the least discretion to act in his individual judgment in any matter, for every act of his could have legal validity only under a double counter-signature of the Prime Minister and another Minister responsible to Parliament.

The provision for dissolution of the Assembly in the Constitution of the Fourth Republic was extraordinary and did not follow the British precedent. Of course, the dissolution was proclaimed by a decree of the President of the Republic but as in other political functions, he had no real power in this matter. The dissolution could take place on the advice of the Council of Ministers, but the right of the Council of Ministers was hedged in by serious limitations which do not exist in England. These limitations were—

(i) The right could be exercised by the Cabinet only in the circumstances mentioned in Art. 51, *viz.*, that in the course of a period of 18 months, *two* ministerial crises had occurred owing to the Assembly voting want of confidence against it, in the manner specified in either Art. 49 or 50.

(ii) It could be exercised by the Cabinet only after obtaining the opinion of the President of the Assembly itself.

(iii) Another novel feature of the provisions for dissolution under the French Constitution of 1946 was that upon a dissolution of the Assembly, it was the President of the Assembly itself who was to act as the Prime Minister in the caretaken Ministry which would carry on the administration until the general election took place (Art. 52). As a result of an amendment of the Constitution in 1954,

(11) The power of dissolution under Sec. 57 of the Australian Constitution Act, to dissolve a disagreement between the two Houses, rests on different principles.

(12) Evatt, *The King and his Dominion Governors*, p. 50; Quick, *Legislative Powers*, p. 236.

this right of the President of the Assembly was limited only to the case where the dissolution was preceded by a vote of censure (Art. 50) against the Council of Ministers. *In other cases*, the Prime Minister and his Government were to remain in office until the general election.

(F) *Fifth French Republic*.—The Constitution of 1958 retains the provisions relating to the President, with a difference, namely, that in certain specified matters, the acts of the President shall not require the countersignature of any Minister. Arts. 9 and 19 are as follows—

"Art. 9.—The President shall preside over the Council of Ministers.

Art. 19.—The acts of the President of the Republic, *other than* those provided for under Arts. 8 (first paragraph), 11, 12, 16, 18, 54, 56 and 61, shall be countersigned by the Premier, and should circumstances so require, by the appropriate Ministers".

The excepted acts of the President are—(i) Appointment of Premier and acceptance of his resignation (Art. 8); (ii) Submitting certain bills to a referendum (Art. 11); (iii) Dissolution of the National Assembly, after consulting the Premier and the Presidents of the Assemblies (Art. 12); (iv) Emergency measures, after consulting the Premier and the Presidents of the Assemblies (Art. 16); (v) Sending messages to Parliament (Art. 18); (vi) Reference of a treaty to the Constitutional Council (Art. 54); (vii) Appointment of the President and 3 members of the Constitutional Council (Art. 56); (viii) Submission of laws before their promulgation, to the Constitutional Council (Art. 61).

The power of dissolution being included in the exceptions, it follows that though the President should consult the Premier in the matter of dissolution, he is free to act contrary to the advice of the Premier and issue his order without the countersignature of any Minister.

(G) *West Germany*.—The President, under the West German Constitution of 1949, is a nominal head of the executive, the real power being vested in the 'Federal Government' consisting of the Chancellor (*i.e.* Prime Minister) and the federal ministers (Art. 62). Art. 65 says—

"The federal Chancellor determines, and is responsible for, general policy..... The federal Chancellor conducts the business of the federal government in accordance with the rules of procedure adopted by it and approved by the federal President".

All official acts of the President require the countersignature of a Minister save certain specified ones. Art. 58 says—

"Orders and decrees of the federal President require for their validity the countersignature of the federal Chancellor or the appropriate federal minister. This does not apply to the appointment and dismissal of the federal Chancellor, the dissolution of the Bundestag under Art. 63 and the request under Art. 69, paragraph 3."

The acts which may be done by the President without ministerial advice are thus—

(a) The appointment and dismissal of the Chancellor. In this matter, as has been seen, no ministerial advice can be available. This power is, however, not unfettered, for the President's nominee can be appointed only if he is *elected* by the lower House of Parliament (*Bundestag*), and even in exercising his power of dismissal the President has to consider if his new nominee would be acceptable to the *Bundestag*. The President is also bound to dismiss a Chancellor who has lost the confidence of the *Bundestag* (Art. 67).

(b) The dissolution of the *Bundestag* is a power to be exercised ordinarily on the advice, of the Chancellor (Art. 68). It is only the dissolution referred to in Art. 63 (4) which takes place without ministerial advice because in this case no such advice is available. This happens when the person nominated by the President is not elected by the *Bundestag* and the *Bundestag* also fails to elect another person within the specified period, by the vote of a majority of its membership.

(c) The third case is the request by the President to an outgoing Chancellor to continue to government until the appointment of a successor (Art. 69 (3)). Here also there is no question of any ministerial advice available.

In the result, the German President has practically no function to discharge in his individual judgment.

(H) *U.S.A.*—In the Constitution of the United States, there is no provision for the President to act according to the advice of any other person or persons. Art. II, Sec. 2 (1), however, provides that the President—

"may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices."

It is left to Congress to create executive departments and to define their functions, but the heads of the Departments are appointed by the President with the consent of the Senate. These heads of departments have come to be called, in the United States, the President's 'Cabinet', according to the English analogy, but, in fact, there is no analogy between the English and American Cabinets. For, the President's Cabinet has no seat in, and no responsibility to, the Legislature. They are mere administrative officers under the President and are removable by him at his will. Nor is he bound to accept their advice. Hence, as President Taft observed—

"The Cabinet is a mere creation of the President's will, it is an extra-statutory and extra-constitutional body. It exists only by customs. If the President desired to dispense with it, he could do so."

Or, as President Lincoln once said—

"In a Cabinet meeting there are many arguments and opinions but only one vote—and that is the vote of the President."

(I) *Switzerland*.—There is nothing like a Cabinet in the British sense, in Switzerland. As has been stated already (p. , *ante*), the supreme executive body is vested in a collegiate body, *viz.*, the Federal Council. This body cannot be said to be a Cabinet because there is no formal head of the State whom it is to advise. The President of the Confederation, as has been already pointed out (p. 348, *ante*) is merely Chairman of the Council, with no overriding powers. Nor is the Federal Council to resign when defeated on any question of policy, in the Legislature. Though elected by a joint session of the two Houses of the Federal Assembly, the Federal Council holds for a fixed term of four years, which is co-terminous with the tenure of the Assembly itself (Art. 96).

But though the Legislature cannot bring about the fall of the Federal Council, the relation of the Council to the Assembly is one of subordination, the Council being regarded as the executive agency of the decisions of the Assembly. It is not a co-ordinate branch of government like the American President. Though the Council has the right to initiate legislative proposals in the Assembly and the Constitution confers a long list of executive powers upon the Council (Art. 102), the Council has no power to control or dissolve the Assembly, and in case of difference of opinion between the Council and the Assembly on any question, it is the Council which has to change its policy, for, the Assembly may not only call for reports on the general conduct of executive business, but may give specific directions to the Council both in matters of administration and legislation. In the exercise of any of the powers vested in the Council by Art. 102, the Council has to obtain either previous or subsequent assent from the Assembly.

Though each member of the Council is in charge of a Department, the constitutional powers are vested in the Council as a body and must be exercised collectively.

(J) *Japan*.—The relevant Articles of the Japanese Constitution of 1946 provide—

"Article 3.—The advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of state, and the Cabinet shall be responsible therefor.

Article 4.—The Emperor shall perform only such acts in matters of state as are provided for in this Constitution. Never shall he have power related to government.

Article 7.—The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state, on behalf of the people . . . Dissolution of the House of Representatives.

Article 65.—Executive power shall be vested in the Cabinet.

Article 66.—The Cabinet shall consist of the Prime Minister who shall be its head, and other Ministers of State as provided for by law."

Though the institution of monarchy has not been discarded by the Japanese Constitution of 1946, the position of the Emperor has been reduced to that of a titular head and both in theory and practice, his position is weaker even than that of the English King. The Constitution does not say that the Emperor is the source of any political power. On the other hand, the executive power is expressly vested in the Cabinet (Art. 65). The Emperor simply remains as "the symbol of the State and of the unity of the people, deriving his position from the will of the people" (Art. 1). Of course, the Constitution assigns certain formal acts to be done by him (Art. 7), such as the convocation and dissolution of the Diet, promulgation of laws, awarding of honours, attestation of diplomatic documents. But none of these acts, including even the 'performance of ceremonial functions' can be done by him without the advice of the Cabinet (Art. 7). The Emperor has, thus, no power to do any political act without ministerial advice.

He has no doubt the power to appoint the Prime Minister but he must appoint the person who is *nominated* by the Legislature (Art. 6). Similarly, he has the power to appoint the Chief Judge of the Supreme Court but he must appoint the person who is nominated by the Cabinet (*ibid*).

(K) *Ceylon*.—Sec. 4 (2) of the Ceylon (Constitution) Order in Council, 1946, says—

"All powers, authorities and functions vested in His Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty:

Provided that no act or omission on the part of the Governor-General shall be called in question in any Court of law or otherwise on the ground that the foregoing provisions of this sub-section have not been complied with."

Sec. 46 (1), again, provides—

"(1) There shall be a Cabinet of Ministers who shall be appointed by the Governor-General and who shall be charged with the general direction and control of the government of the Island . . ."

S. 4 (2) makes the conventions of the English system of Cabinet Government (see p. 409) a part of the constitutional law of Ceylon and secures that the executive head shall be a constitutional ruler as in England. But though the conventions are given a legal status, they are not enumerated and are not justiciable, so that no act of the Governor-General can be called in question in any Court on the ground that it was done without ministerial advice.

The Proviso is thus similar to Art. 74 (2) of *our* Constitution.

(L) *Government of India Act, 1935*.—The relevant provisions of that Act were in ss. 9 (1) and 10 (4) which were as follows:

"9. (1) There shall be a council of ministers, not exceeding ten in number, to aid and advise the Governor-General in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion....."

"10. (4) The question whether any and, if so, what advice was tendered by Ministers to the Governor-General shall not be enquired into by any Court."

INDIA

Relation between President and Council of Ministers.

Though the aim of Arts. 74-5 of *our* Constitution is to put into writing the principles of responsible government as it exists in *England*, it is to be noted that *all* the principles upon which Cabinet government rests have not been embodied herein, and even on some fundamental points, the framers of the Constitution have been obliged to leave the matter to convention¹³ and usage and the personal factor [see Vol. I, pp. 23-4].

(13) For the sake of elasticity [C.A.D., Vol. VII, p. 1155].

(A) I. The object of the framers of *our* Constitution, as would appear from the Constituent Assembly Debates, was to make the President a constitutional and formal head of the executive like the English King and to make him act with the advice of the Council of Ministers.¹⁴ (See p. 409, *ante*). The mere fact that there is no provision in the Constitution making it obligatory upon the President to act only according to ministerial advice, or the use of the words 'aid and advise' are not to stand in the way of establishing the principle of responsible government, for even under a similar position in the British North America Act, the Governor-General has been transformed into a constitutional ruler like the English Crown [p. 411, *ante*]. Of course, there are the words "with a constitution similar in principle to that of the United Kingdom" in the Preamble of the British North America Act, which are not to be found in *our* Constitution. But in *Australia* also, the word 'advise' (p. 418, *ante*) has not stood in the way of evolution of responsible government. In fact, the expression 'aid and advise' is nothing but the statutory form of the English convention by reason of which the King acts as a constitutional head, only on the advice of ministers while all power is legally vested in himself. From these Dominion precedents, the Government of India Act, 1935 adopted the expression 'aid and advise' in s. 9 (1) [see p. 416, *ante*]. Of course, in that Act a sphere was carved out of Ministerial responsibility by expressly requiring him to act in his discretion in certain specified matters. But outside the sphere taken out by those express provisions, it was never suggested that the Governor-General was free to act without or against ministerial advice, on the ground that the words 'aid and advise' did not bind him to act according to such advice.

The framers of *our* Constitution deliberately omitted all references to 'discretion' to ensure that the President shall act on the advice of Ministers on every matter. In view of the above established significance of the words 'aid and advise', it is, therefore, legitimate to conclude that by the use of these very words, the makers of *our* Constitution wanted to make it clear that the President would act as a constitutional head, though elected.

"The President.....will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice, nor can he do anything without their advice."¹⁴

II. A comparison of the different provisions of the Constitution itself leads to the same conclusion. Thus, while certain functions are specifically committed to the *discretion* of the Governor of a State by the use of the words "except in so far as . . . discretion" in Art. 163 (1), these words are deliberately omitted from Art. 74 (1).¹⁵ That the omission is deliberate becomes clear when we compare the language of Art. 74 (1) with that of s. 9 (1) of the Government of India Act, 1935, just referred to. According to the canons of interpretation, such deliberate difference in the language leads to the conclusions that while the Governor is authorised to act, in certain matters, in his discretion, no such sphere of discretionary action is left for the President.

III. It cannot be overlooked, in this context, that in the Constituent Assembly, there was indeed a proposal by some members that there should be an express provision in the Constitution that the President cannot act except on the advice of his ministers. This proposal was reiterated when the Emergency provision was before the Assembly. Opposing this proposal, Sri Krishnamachari, a member of the Drafting Committee, thus observed¹⁶—

The whole scheme of this Constitution has been envisaged on the basis that the President is a constitutional head even though we have not put it in so many words within the Constitution . . . The fact still remains that the President is only a constitutional head and nothing more. The President can only exercise his powers on the advice of his ministers and if we here put in a provision which explicitly says so then by implication it would mean that in reference to other provisions in this Constitution the President can act on his own,

(14) C.A.D., Vols. IV, p. 734; VII, pp. 32, 973.

(15) In fact, an amendment motion to insert similar words 'except in so far as.....

discretion' in Art. 74 (1) [Draft cl. 61 (2)] was lost in the Constituent Assembly [C.A.D., Vol. VII, p. 1145; 1158].

(16) IX C.A.D. pp. 122-6.

merely because of the fact we have put in here a specific provision that the President should act on the advice of his minister . . . Actually the President cannot do anything excepting by consulting ministers; if he does so, if he assumes to himself his dictatorial powers, then the provisions of article 50 and the subsequent articles could be brought into operation and the President may be impeached and thrown out of office."¹⁷

Even the President of the Assembly (Dr. Rajendra Prasad), who had at an earlier stage pointed out that there was no specific provision in the Constitution requiring the President of India to act on the advice of ministers in all cases, and the need for such a specific provision, was satisfied with the explanation given above by Sri Krishnamachari and allowed the motion to be voted and passed, without demanding for any such specific provision.^{17,19}

IV. Of course, there are some provisions in *our* Constitution which go against the English principles: (i) *Firstly*, instead of providing that the President shall be competent to act only upon the counter-signature of a Minister responsible to Parliament, Art. 77 (2) provides that the President himself shall make rules as to the mode in which his orders and instruments shall be authenticated.²⁰ (ii) In India, the Ministers shall have no *legal* responsibility for acts of the President. The difference on these two points, however, does not *per se* stand in the way of the theory that the President is to act as a constitutional head, for, the Government itself is liable to be sued [see under Art. 361] for acts of the President which are duly made and countersigned; the legal responsibility of a Minister is, therefore, not necessary in India to give the subject his remedy for illegal acts done in the name of the President. (iii) *Thirdly*, while under the English system, not only the choice of his colleagues but also the division of the offices or portfolios amongst them is a business of the Prime Minister,²¹ Art. 77 (3) of *our* Constitution provides that it is the President who shall make rules in this respect. Of course, if he makes these rules or revises them under the advice of each new Prime Minister, this provision would not affect the position of the Prime Minister. So, this also does not necessarily imply that the President shall have absolute power in this respect.

V. Both the Speaker of Parliament²² and the Supreme Court²³ have authoritatively laid down that the relevant provisions of *our* Constitution intend to make the President a constitutional head, as in *England*:

"Under Art. 53 (1) of *our* Constitution, the executive power is vested in the President but under Art. 75 *there is to be* a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a *formal or constitutional head* of the executive and the *real* executive powers are vested in the Ministers or the Cabinet".²⁴

VI. Not only as the result of legal interpretation but also as a matter of constitutional understanding, the English principle of responsible government has been adopted by *our* Constitution. Dr. Rajendra Prasad, who was the President of the Constituent Assembly and later became the first President of India expressed the

(17) IX C.A.D., pp. 122-6; X C.A.D., pp. 268-271.

(18) VIII C.A.D., pp. 215-6.

(19) The above is an answer to the query as to the intentions of the framers of the Constitution as to the position of the President in relation to his Ministers, which was raised by Dr. Rajendra Prasad subsequently, at the opening of the Indian Law Institute.

(20) So far, the President's orders are being authenticated by a Secretary, as under the Government of India Act, 1935,—and not by a Minister [see under Art. 77, *post*].

(21) Lowell, *Government of England*, Vol. I, p. 57; Munro, *Governments of Europe*, p. 90.

(22) Thus, during the discussion as to the constitutional propriety of exercising the Presidential power of making Ordinances during the recess of the Legislature as an

ordinary power of legislation irrespective of the existence of any emergency calling for immediate action, a member urged that since the Constitution gave the President the power to make an Ordinance whenever *he* was satisfied that it was necessary for him to exercise that power, the propriety of his action could not be called into question. The Speaker (Mr. Mavlankar) rejected this contention with the observation that the President was a constitutional President who acted on the advice of the Government. When, therefore, the Constitution said that the 'President is satisfied' it really meant 'Government is satisfied'. "And this House is entitled to criticise Government on that issue." [*Hindusthan Standard*, New Delhi, 17-2-54, p. 4].

(23) *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225.

hope that the English convention would be imported into India and that "the President would become a constitutional President in *all* matters."²⁴

VII. Coming now to the *sanctions* by reason of which the President may be obliged to act in conformity with ministerial advice,—the primary *legal* sanction is, of course, impeachment, which lies for "violation of the Constitution" [Art. 56 (1), Proviso (b)]. Now, impeachment is a proceeding which takes place in Parliament and there is no possibility of having a judicial review of the question as to what would constitute a "violation of the Constitution". The vote of the trying House [Art. 61 (4)] will be final on this question. When, therefore, the Prime Minister has the confidence of the prescribed majority in the trying House, it is reasonable to anticipate that the House will pass the resolution of impeachment against a President who has plainly violated ministerial advice. Of course, impeachment of a President is a drastic measure and Parliament will be slow in this matter.

More important is the indirect sanction of Art. 74 (1) itself which says that "*there shall be a Council of Ministers*", so that the President cannot help doing without Ministers as soon as a Cabinet resigns. Of course, there is no express provision in *our* Constitution, corresponding to Art. 28 (11) of the Constitution of *Eire*, that any Cabinet that resigns must carry on until their successors are appointed. There is therefore nothing to prevent the President from making *delay* in appointing another Council of Ministers, and in the interval, there is nothing to affect the validity of his acts, for they do not require the counter-signature of Ministers. This situation can be avoided only if the words '*there shall be*' be interpreted to mean '*there shall always be*', according to the grammatical meaning of the words,²⁵ so that the resigning Cabinet may be asked to continue in office until the next Prime Minister may be chosen, so that no scope is left for the exercise by the President of any power without ministerial advice even for a short time.

But, in practice, it will not be possible for the President to carry on the administration for any length of time if he seeks to carry on without finding out a new Council of Ministers after the existing Council has resigned by way of protest against the President's acting without its advice. For, the Constitution requires that certain acts may be done only by law made by Parliament, *e.g.*, taxation [Art. 265] or expenditure of money from the public revenues [Art. 266 (3)]. No Parliament would help him with supplies or by passing necessary laws, if he proceeds to act autocratically after having refused to act according to the advice of a ministry which has a solid majority in Parliament.

Hence, even though the President may possibly issue orders through some Secretary against the wishes of the Ministers, sooner or later, such orders are bound to be challenged before the Courts as invalid for contravention of constitutional provisions such as those just mentioned.

(B) But though the Indian President must normally act in accordance with ministerial advice, there are some marginal cases where he will be free to exercise his individual judgment because in such cases, either ministerial advice is not available or it is not *possible* to act according to such advice in the specific matter and even in *England* (p. 416, *ante*), the Crown is allowed to exercise its discretion.¹⁻²⁰ These two matters are—(i) appointment of the Prime Minister; (ii) Dissolution of Parliament.²¹

(24) X C.A.D., p. 988.

(25) If this view is taken by Parliament, a President who seeks to rule for a single day without a Council of minister would be liable to be removed by impeachment.

(1-20) Jennings, Cabinet Government, 1959, pp. 40-51; 394; 424; 427-8.

(21) Dr. Ambedkar conceded [C.A.D. Vol. VII, p. 1158] that under the Indian Constitution, too, it was not possible "to avoid vesting the discretion in the President" in these two matters, but he preferred to call

these two powers as 'prerogatives' as distinguished from 'discretionary functions' and that, accordingly, these two powers did not form exceptions to the rule that the Indian President was a constitutional head. To call the powers of the elected President a 'prerogative' would be anomalous, but it is agreed on all hands that the 'aid and advise' formula admits of these two exceptions as cases where it is not possible to act according to ministerial advice, and that serves our purpose.

I. As regards the *choice of the Prime Minister*, there is practically no fetter upon the discretion of the President save that the person appointed must have the confidence of the House of the People [Art. 75 (3)]. The quantum of discretion left with the President in calling a particular party leader to form the government was clearly expressed in Art. 37 (3) of the Constitution of Pakistan, 1956, in these words—

“The President shall, in his *discretion*, appoint from amongst the members of the National Assembly a Prime Minister, who, in his *opinion*, is most *likely* to command the confidence of the majority of the members of the National Assembly”.

Under *our* Constitution any person who is not a member of Parliament may remain a minister for 6 months [Art. 75 (5)] and the President has the power not to summon Parliament within 6 months from the date of its last sitting [Art. 85 (1)]. So, there is scope for the President to appoint any person as Prime Minister for some period less than 6 months even though such person may not command a majority in the House of the People for the time being.

Again, in the marginal cases mentioned at p. 425, *ante* (e.g., where a Prime Minister dies in office or no party has a clear majority), *our* President shall have some scope for the exercise of individual judgment in the matter of appointment of the Prime Minister.

II. As regards the power of *refusing dissolution* to a Prime Minister, it may be anticipated that the President of India will follow the Dominion practice, rather than the convention established in England of late.²² According to the Dominion practice, notwithstanding the words ‘aid and advise’, the President will be free to refuse a dissolution where it is *improperly* asked, or where to accede to the request to dissolve would amount to an abuse of that power. Thus, it would no doubt be refused when dissolution is sought by the same Prime Minister for the *second* time, as in England (see p. 417, *ante*). In other cases, the President may consider whether it would be possible to form an alternative Council of Ministers,²³ without that Prime Minister who, personally, might have lost the support of his own colleagues and party.²⁴ It would, again, be an *improper* request for dissolution when it is made by a Government—

“not because its majority is slender or unreliable, nor because new issues would seem to require a new mandate from the electorate, but because it considered a given situation as opportune for obtaining a *new lease* of life from the electorate which might not be accorded so readily if the existing Legislature were allowed to run out its normal course. A moment of national excitement after external victory or internal commotion may offer a welcome opportunity for drowning memories of administrative blunders and unpopular legislation in a wave of legitimist or revolutionary enthusiasm and securing a lengthy extension of the term of office of the party in power The very foundation of the system breaks down if the party in office has the power, by an unscrupulous use of the power of dissolution, to mislead and escape electoral judgment.”²⁵

According to Dominion precedent,²⁴ dissolution may be refused—(a) where the Ministry has been defeated on a purely administrative matter as distinguished from a legislative matter of importance; (b) where there is no reasonable assurance that a dissolution would produce a working majority in favour of the defeated Ministry; (c) where the Ministry has been defeated in the House elected under its own auspices.

On this point, it would be interesting to note the observations of Dr. Ambedkar in the Constituent Assembly²⁵ as to how the President would be expected to exercise his power of dissolution under *our* Constitution:

“.....the King has a right to dissolve Parliament. He generally dissolves it on the advice of the Prime Minister, but at one time when Macaulay wrote English History where he has propounded this doctrine of the right of dissolution of Parliament, the position was this: it was agreed by all politicians that, according to the convention *then understood*, the

(22) *Vide* Constituent Assembly Debates, Vol. VIII, p. 107. The instance in Travancore-Cochin (p. 417, *ante*) justifies this forecast made at p. 291 of the 2nd Ed. of this Commentary.

(23) *Cf.* Jennings, *Constitution of Ceylon*, p. 50.

(24) Quick, *Legislative Powers*, pp. 233-4.

(25) C.A.D., Vol. VII, p. 107.

King was not necessarily bound to accept the advice of the Prime Minister who wanted a dissolution of Parliament. The King could, if he wanted, ask the leader of the Opposition if he was prepared to come and form a Government so that the Prime Minister who wanted to dissolve the House may be dismissed and the leader of the Opposition could take charge of the affairs of Government and carry on the work with the same Parliament without being dissolved If the King failed either to induce the leader of the Opposition or any other Member of Parliament to accept responsibility for governing and carry on the administration he was bound to dissolve the House.

In the same way, the President of the Indian Union will test the feelings of the House whether the House agrees that there should be dissolution or whether the House agrees that the affairs should be carried on with some other leader without dissolution. If he finds that the feeling was that there was no other alternative except dissolution, he would as a constitutional President undoubtedly accept the advice of the Prime Minister to dissolve the House. I think we could trust the President to make a correct decision between the party leaders and the House as a whole.

But, whatever be the attitude taken by the Indian President, he has to remember that the position of the constitutional head is impartial and that he must not take up the cause of an particular party. On the other hand, a Prime Minister, seeking dissolution, has to remember that the power of dissolution should not be "misused for party purposes".¹ A proper case for an advice to dissolve arises, for example, when, owing to the emergence of new issues or the like, it is necessary to obtain a new mandate from the electorate,—the ultimate source of authority,—which may not be available from representatives who were elected upon different issues and under different circumstances.

III. A more controversial case is the exercise of the veto power. This will be fully discussed under Art. 111, *post*.

In fine, it should be stated that even in the marginal cases, such as the refusal of dissolution, any question as to the President's differing from the Council of Ministers may possibly arise only when the Ministry's hold over the House of the People is not secure and the President belongs to a party other than that of the Council of Ministers. If the President is confident of securing another party leader who is competent to form an alternative government, upon the resignation of the Council of Ministers in power, it is only then that the President can think of differing from them. At present it is unimaginable because the political conditions are to the other extreme. What shape the problem will take in other circumstances, history alone can answer.

It should be noted that while in *England*, it is not possible for the Sovereign to dismiss a Ministry without finding another because every act of the Sovereign requires the countersignature of a Minister, in *India*, it is theoretically possible for the President to dismiss a Council of Ministers and, until another Ministry is formed, issue orders under the signature of a Secretary, provided, of course, he is in a position to carry a sufficient majority in Parliament with him, so as to be saved from the risk of impeachment. Such a contingency depends on the political situation, but is not unthinkable.

Analogous Provision.—Art. 163 (1) makes similar provision in the case of the State Governor, but with the addition of a 'discretionary' clause (see under that Article).

CLAUSE (2).

OTHER CONSTITUTIONS

(A) *England.*—The principle underlying the present Clause of *our* Constitution emerges out of the historical foundation of the Cabinet system. In *law*, all governmental powers are vested in the Crown and the Ministers are nothing but the servants and confidential advisers of the Crown. Even though every royal order requires the countersignature of a Minister, the order is expressed to be that of the Sovereign and the entire administration is run in the name of

(1) Cf. Lowell, *Government of England*, Vol. I, p. 34.

the Sovereign. The absolute English monarch has been turned into a constitutional ruler not by the letter of the law, but by convention. If, therefore, a monarch of to-day ventures to act without or contrary to ministerial advice, the Courts of law have nothing to do with such 'unconstitutional' act of the Sovereign. That is why the Courts are not entitled to enquire into the factum or contents of the advice tendered to the Sovereign by the Cabinet.

The entire proceedings of the Cabinet being of a confidential nature, it is essential that the Ministers should not be compellable to disclose them even before a Court of law. Even under the ordinary law of evidence, a witness cannot be compelled to disclose confidential advice [*cf.* s. 126, Indian Evidence Act, 1872].

(B) *Ceylon*.—See Proviso to Sec. 4 (2) of the Constitution Order in Council, quoted at p. 416, *ante*.

(C) *Government of India Act, 1935*.—Sec. 10 (4) of that Act was—

"The question whether any, and if so, what advice was tendered by Minister to the Governor-General shall not be enquired into in any Court."

INDIA

Jurisdiction of Courts barred.

Since there is no explicit constitutional obligation binding the President to act only in conformity with ministerial advice, and the relation between the President and the Council of Ministers is left to convention, there is no provision in the Constitution for invalidating any act of the President on the ground that it was not done in conformity with ministerial advice. Art. 361 (1), again, expressly provides that the President shall not be answerable to any Court for any act done or purported to be done by him in the performance of the duties of his office. Hence, it would be meaningless to bring the question of ministerial advice before the Courts.

This principle is, of course, in accord with the *English* doctrine 'King can do no wrong'. The principle is so rigorously observed that the King's name cannot be referred to in connection with any public act not only in the Courts but also within or without Parliament.²⁻³ Not only is the relation between the Crown and the ministers confidential, the relation between the ministers *inter se* is also confidential and no member of the Cabinet can disclose Cabinet deliberations to anybody outside the Cabinet, without the Prime Minister's permission.⁴ The only exception is that when a member of the Cabinet resigns owing to his disagreement with some Cabinet decision, he is allowed to explain in Parliament the causes of his resignation confining his explanation to his own point of view.⁵

Analogous Provision.—Similar provision is made in Art. 163 (3), in connection with the State Governor and his Ministers.

Position and Functions of the Cabinet or Council of Ministers under the Parliamentary system.

It is through the institution of the Cabinet that the absolute monarch of *England* has been transformed into a constitutional ruler,—the *formal* head of the Executive.⁶ In law, and in strict theory, the Crown is still the source of all

(2) *Cf.* Lowell, *Government of England*, Vol. I, p. 39.

(3) This is also indirectly provided in Rules of the two Houses of *our Parliament*. Thus, r. 200 (*vi*) of the Rules of the Council provides that "a member while speaking shall not use the President's name for the purpose of influencing the debate".

(4) Keith, *Constitutional Law*, p. 154; Lowell, *Government of England*, Vol. I, p. 65.

(5) *Cf.* Jennings, *Constitution of Ceylon* p. 84.

(6) Lowell, *Government of England*, Vol. I, p. 26.

authority, and the Cabinet, *as such*, is still unknown to the law.⁷ But though unknown to the law, the Cabinet is the 'driving and steering force' in the English system of Government to-day. The main principles upon which this system of responsible government rests, were evolved as a result of the Revolution of 1688, *viz.*—(1) The Sovereign is irresponsible, but (2) He must act through Ministers enjoying confidence of Parliament (*i.e.*, of the majority in the House of Commons), and must retain them only so long as that confidence is maintained. This latter principle rests entirely upon convention and there is no law to enjoin it.

In the words of *Ilbert*⁸—

"The essential features of the Cabinet system of government, those which distinguish it from the presidential system of the United States, are that the king's principal ministers, the men who are responsible for the government of the country, must be members of parliament, and must resign office if they are unable to command the confidence in the House of Commons."

In the words of the Parliamentary Committee on the Machinery of Government (1918)⁹⁻¹⁰ the main *functions* of a modern Cabinet are threefold—

"(a) the final determination of the policy to be submitted to Parliament; (b) the supreme control of the national *executive* in accordance with the policy prescribed by Parliament; and (c) the continuous *co-ordination* and delimitation of the interests of the several Departments."

(a) The primary function of the Cabinet is *formulation of the policy* according to which the nation is to be governed. It is, by its very nature, incapable of carrying on the actual administration of the country. What the Cabinet does is to determine the policy by consultation amongst its members who are the heads of the different Departments or 'Ministries' and after the policy is determined, it is the duty of each of the Departments to carry out that policy and also to fill in the details within the framework of the policy laid down by the Cabinet (and approved by Parliament either by a debate or by legislation where legislation is necessary to carry out the policy).

(b) The next function is to control the entire administration in the matter of implementation of the policy so laid down. Even in carrying out the policy thus laid down, reference to the Cabinet becomes necessary whenever any question of policy is involved in taking an administrative decision. In fact, one of the potent sources of evolution of new policies is the problems arising out of the administration of existing policies and laws. To a certain extent, it depends on each individual Minister to determine which matters should be referred to the Cabinet; but the exercise of this discretion is controlled by the very nature of ministerial responsibility, and the loyalty of each Minister to the Cabinet and ultimately to the Prime Minister. While, therefore, it would be unnecessary and unwise for a Minister to refer questions of mere administrative details to the Cabinet which it has no time to deal with, it would be equally unwise for a Minister to withhold questions involving policy from the Cabinet and make a decision on his sole responsibility. Even the Prime Minister can hardly afford to commit himself to major questions without prior consultation with his colleagues. In this matter, as in all other matters relating to the Cabinet, there is no hard-and-fast rule, but the whole machine works smoothly according to convention and good sense. Apart from questions raising new issues of policy, a Minister would, as a matter of prudence, place before the Cabinet issues which have external implications or are likely to raise serious controversy in Parliament or a dispute with another Department.

(7) It is only in 1937, that Ministers were named, individually, in a statute (Ministers of the Crown Act, 1937) for purposes of their salary. Later, the functions of the Minister of Defence have been laid down in the Ministry of Defence Act, 1946.

(8) Ilbert, Parliament (H.U.L.), 1950, p. 131.

(9-10) (1918) Cmd. 9230 (known as the Haldane Committee).

In *England*, there are certain matters which are *not* placed before the Cabinet¹¹ but are dealt with by the individual Ministers in charge of each Department or by the Prime Minister, though informal consultation is not unlikely:

(i) The exercise of the prerogative of mercy is regarded as a quasi-judicial function and is normally left to the Home Secretary. Similarly, criminal prosecutions are left to the Attorney-General, unless a political issue is involved.

(ii) Appointments do not normally come before the Cabinet, unless any political issue is involved.

(iii) Conferment of honours is left to the Prime Minister.

(iv) Similarly, the advice to dissolve Parliament is, since 1918, given by the Prime Minister without any formal Cabinet consultation.¹²

(v) As regards the Budget Statement, it is almost correct to say that it is prepared on the sole responsibility of the Chancellor of the Exchequer. Though questions relating to estimates are occasionally discussed in the Cabinet when there may be conflicting claims of different Departments, proposals for new taxation are, in the interests of secrecy, only orally disclosed to the Cabinet a few days before the actual presentation of the Budget before Parliament. Of course, there have been occasions when some particular new taxation proposal has been examined by a Committee of the Cabinet or by the Cabinet itself.

(c) Next in importance is the part played by the Cabinet in *legislation*. Its initiation and control in the matter of legislation has become so much overwhelming that, as *Ilbert* observed¹³—

“To say that at present the Cabinet legislates with the advice and consent of Parliament would hardly be an exaggeration.”

(i) It is the Cabinet which prepares, introduces and steers through Parliament all the important measures of legislation.

(ii) Even though a private member of Parliament has the right to introduce a Bill, owing to the command of Government over the party machinery and over the time in the House, a private member's Bill has little chance of being passed unless it obtains the support, active or passive, of the Government. Even where Government agrees with the policy underlying a private member's Bill, it would often oppose the measure on the ground that Government itself would bring a more comprehensive Bill on the subject. Want of assistance from the Government draftsmen is also likely to render a private member's Bill unacceptable in form.

(iii) As regards Bills initiated by the Government, on the other hand, though private members have proper opportunity of discussion and of suggesting amendments (and sometimes there is a plethora of amendments tabled), very seldom would amendments brought by private members succeed in getting through unless Government accepts them. Where the Government is backed by a solid majority in the House, it is sure to obtain the passage of any measure sponsored by it, unscathed in substance as well as form, by virtue of its hold over the party machinery which prevents any rebellion within the ranks of the Government's own party.

(d) The control of the Cabinet over *financial legislation* is almost absolute. The Cabinet has the sole responsibility of preparing and laying before Parliament both the estimates for expenditure as well as the proposals for taxation. This control rests on two principles which will be explained more fully in the context of financial legislation (see under Art. 112, *post*). These principles are—

(i) Parliament cannot vote money for any purpose except at the demand of the Crown,—which means Crown as advised by his Ministers.

(ii) Parliament cannot, similarly, impose a tax except upon the recommendation of the Crown acting on the advice of his Ministers.

(11) Keith, *British Cabinet System*, 1952, pp. 88 *et seq.*; Jennings, *Cabinet Government*, 1948, p. 216.

(12) Jennings, *Cabinet Government*, 1959, p. 419.

(13) Ilbert, *Parliament*, 1950, p. 60; Lowell, *Government of England*, Vol. I, p. 326.

It follows, therefore, that the Cabinet must have the exclusive right to initiate all legislation necessary for spending or raising money.¹⁴ A private member cannot even move to increase expenditure or a tax as proposed by Government. He may move for the reduction of supplies or the rate of a tax, but the exercise of this power is restricted by the practical consideration that if it is pursued against the wishes of the Government, it would be treated as a vote of want of confidence and would mean the fall of the Government. The right of Parliament to amend a financial bill is thus restricted and unreal (see, further, under Arts. 112-117, *post*).

(e) Next in importance to the function of policy-making is the function of *co-ordination*. While each individual Minister is in the charge of administering a particular Department and pilots through Parliament the measures connected with that Department and also defends its actions, the Cabinet, as a whole, is responsible for the entire administration and it can hardly answer that responsibility unless the divergent and sometimes conflicting claims of the different Departments are harmonised in order to make one consistent line of action for which a collective body may possibly remain responsible.

It is the Cabinet which *co-ordinates* and guides the political action of the different branches of the government, and thus to create a consistent policy.¹⁵ Hence, *Bagehot* called it "a hyphen that joins, a buckle that fastens, the executive and legislative together". It formulates the *general policy* of the government and is collectively responsible to Parliament for that. Apart from this general function of co-ordination and leadership, it exercises actual *executive* and *legislative* functions. As the adviser of the Crown, the Cabinet exercises all the prerogative and statutory powers of the Crown and its individual members administer the various Departments of government. On the other hand, it possesses the exclusive right of initiating and conducting public bills in Parliament and exercises exclusive control over all financial measures.

The Cabinet, in fact, forms the pivot round which the whole political machine of England revolves.

"On the one hand, they are the king's ministers, exercising their powers in the king's name, and it is by them, and not by either house of Parliament, or by any committee of either house, that the government of the country is carried on. On the other hand, they are members of the legislature, liable at any moment, so long as Parliament is sitting, to be called to account for their actions by the House to which they belong, and dependent for their tenure of office (technically on the king's pleasure), but practically on the good-will of the House of Commons."¹⁶

How Cabinet deliberations take place in England and in India.

(A) *England*.—Not only its existence but the working of the Cabinet system, as a whole, rests on convention. As Gladstone observed—

"The Cabinet lives and acts simply by understanding, without a single line of written law or constitution to determine its relations to the monarch, or to Parliament, or to the nation; or the relations of its members to one another, or to their head."

The entire proceedings of a Cabinet meeting are informal,¹⁷ except that since 1917 the Cabinet has a secretariat¹⁸ to keep minutes of its proceedings,—which, however, are not meant for the public. There is no order of precedence at Cabinet meetings, nor any quorum. Except on unusual occasions, no vote is taken,¹⁹ and any Minister who cannot reconcile himself with the decision taken at the meeting must resign.²⁰

"Resignations may entail the breaking up of the Cabinet and, in addition, a party split. Great efforts are, therefore, made to secure agreement. Compromise is the first and last order of the day."²¹

(14) Contrary to the position in the U.S.A., a private member of the English Parliament has no right in this respect.

(15) Jennings, *Cabinet Government*, 1948, p. 1.

(16) Ilbert, *Parliament* (Home University Library), 1950, p. 131.

(17) Keith, *British Cabinet System*, 1952, p. 98.

(18) Morrison, *Government and Parliament*, 1954, pp. 11-14.

(19) Cf. Jennings, *Constitution of Ceylon*, p. 84.

(20) Jennings, *Cabinet Government*, 1948, pp. 243, 258.

The advice tendered by the Cabinet through the Prime Minister must be formally unanimous, and the King has no right to enquire into Cabinet divisions. Sometimes the Prime Minister even ventures to advise the King against the adverse opinion of the Cabinet, but before doing that, the Prime Minister must be very sure of the strength of his personal leadership. Particular matters are referred to committees of the Cabinet, for the purpose of speedy and efficient disposal.

Another characteristic of Cabinet deliberations is their *secrecy*. A Cabinet decision being theoretically an advice to the Crown, it cannot be made public without the consent of the Crown. So, even though a resigning Minister is permitted to make a statement in Parliament,²¹ referring to the causes of his differences with his colleagues, Cabinet discussions can be disclosed in such statement only with the permission of the Crown, through the Prime Minister.²² Each member of the Cabinet is prohibited from disclosing any information relating to Cabinet deliberations not only by the oath which he takes as a member of the Privy Council but also by the provisions of the Official Secrets Act.

The rule of secrecy binds the members of a Cabinet even after retirement or fall of a Cabinet. Hence, a former Minister cannot disclose the deliberations of a previous Cabinet or the attitude of any member of that Cabinet, including himself.

(B) *India*.—All the foregoing principles are generally being followed in *India*. The principle of homogeneity is illustrated by the fact that there have been resignations of individual Ministers who failed to agree with the policy decisions of the Cabinet, e.g., Dr. S. P. Mookerjee and Shri K. C. Neogy resigning in 1950 on the issue of Agreement with Pakistan; Dr. Ambedkar resigning in 1951 on the ground of slow progress of the Hindu Code Bill.

All major decisions take place at meetings of the Cabinet but to help the Cabinet in coming to decisions, the Cabinet, as in *England*,²³ has a number of standing Committees which discuss matters in a more informal manner and report their conclusions to the Cabinet. The committee system within the Cabinet, which is itself in the nature of a Committee, is a time-saving device. The whole thing being informal, there is no fixed number of Cabinet Committees; but mention may be made of the Defence Committee, Planning Committee, Economic Committee, Foreign Affairs Committee, Appointments Sub-Committee, Production and Distribution Committee, Parliamentary Affairs Committee.

The proceedings of a Cabinet Committee are as secret as those of the Cabinet itself. To assist the Cabinet in its work, there is a Cabinet Secretariat, headed by a Secretary to the Government of India. Broadly speaking, the functions of the Cabinet Secretariat are—

(a) to prepare the agenda of the meetings of the Cabinet and its Committees, under the direction of the Prime Minister and the Chairmen of the Committees, respectively;

(b) to circulate the papers required for such meetings;

(c) to issue summons for such meetings;

(d) to make and maintain the minutes and records of the proceedings of the Cabinet and its committees and to circulate them amongst the members;

(e) to prepare the reports of the Cabinet committees;

(f) Apart from the foregoing functions done in the Main Secretariat, the Cabinet Secretariat has an O. & M. (Organisation and Methods) Division whose function, in brief, is to improve the administrative machinery of the different Departments of the Government of India, and includes—

(i) securing expeditious disposal of business;

(ii) securing improvements in procedural competence, technique, etc.;

(iii) securing economy, and the like.

(21) See, further, under Art. 75 (3), *post*;
r. 199 of the Rules of the House of the
People.

(22) Britain, 1954, p. 30.

(23) Jennings. Cabinet Government, 1959,
pp. 255 *et seq.*

(iv) The Cabinet Secretariat has also an 'Attached Office', namely, the Central Statistical Organisation, to advise the Ministries on statistical matters and co-ordinate the statistical work of the Ministries. It also prepares and publishes a number of publications, such as the Annual Statistical Abstract.

Relation between Cabinet and Parliament under the Parliamentary System.

It has already been stated that in the Parliamentary or Cabinet system of Government of the English model, there is a blending of the legislative and executive functions and a relation of interdependence between the Cabinet and the Parliament (contrary to the American system founded on the theory of Separation of Powers). This interdependence may be explained from both sides:

(A) *Control of Cabinet by Parliament*.—Parliamentary Government does not mean government by Parliament, but government *responsible to Parliament*. As Ilbert²⁴ observes:

"Parliament does not govern, and is not intended to govern. A strong executive government, tempered and controlled by constant, vigilant, and representative criticism is the ideal at which parliamentary institutions aim."

What is done by Parliament is—(a) to secure that the Cabinet which exercises the executive authority, retains the confidence of the majority in the House of Commons; and (b) to control the action of the Ministers by means of questions and criticism.²⁵

Information as to the conduct of the government may be obtained by the House of Commons in the following ways—

(i) Any member has a right to ask *questions*¹ to any Minister about the administration of the department under his charge. "There is no more valuable safeguard against mal-administration, no more effective method of bringing the searchlight of criticism to bear on the action or inaction of the executive government and its subordinates"² than these questions in the House.

Though the primary object is to obtain information relating to public affairs and the rules of Parliament (both in *England* and *India*³) seek to confine the use of questions to this purpose, in practice questions are often asked and followed up by supplementary questions with the intention of criticising the Ministry concerned or of drawing its attention to some alleged grievance or to press for some action in the light of the facts disclosed, even though no debate is allowed upon the questions. And even though a Minister is *not bound* to answer a question,⁴ questions have been found to be highly serviceable "in obviating the necessity in many instances of more extended debate"⁴ and in turning "a searchlight upon every corner of the public service".⁵

In short, the right to ask questions to Ministers is at once an effective weapon in the hands of the Opposition and a very valuable medium for a private member on the Government side, to demonstrate to his constituency "the attention which he devotes to public affairs and to their special interests".²

(ii) Any member may also move for obtaining returns for *supplying information* on matters of public importance.⁶⁻⁷

(24) Ilbert, *Parliament* (Home University Library), 1950, p. 103.

(25) See also Jennings, *Parliament*, 1948, p. 6.

(1) As to the procedure relating to 'questions', see under Art. 118. *post*.

(2) Ilbert, *Parliament*, 1950, pp. 98-9.

(3) May, *Parliamentary Practice* 15th Ed., p. 341.

(4) Todd, *Parliamentary Government*, 1892, Vol. II, p. 85.

(5) Lowell, *Government of England*, 1912, Vol. I, p. 332.

(6) This is also called a 'motion for papers' (see r. 175 of the Rules of our Council of States, 1964).

(7) Information is also supplied to the House by the Ministers of their own initiative by making 'Statements' (cf. r. 251 of the Rules of the Council) or by 'laving Papers on the Table' (cf. r. 249 of the Rules of the Council). In *England*, papers laid on the Table by the Government of its own initiative are known as 'command papers'.

(iii) Opportunities for a debate on Governmental action is also provided in our Parliament through the following media—

- (a) Resolution relating to a matter of public importance;⁸
- (b) Motion relating to a matter of general public importance;⁹
- (c) Notice of discussion on matter of urgent public importance for short duration;^{9a}

(d) Motion for adjournment on a matter of urgent public importance;^{9b}

(e) Half-an-hour discussion on matter of public importance arising out of a question, the answer to which requires elucidation.^{9c}

All these will be fully explained under Art. 118, *post*.

(iv) Information may be obtained by the House regarding the administration, by appointing Parliamentary Committees and Commissions.

Apart from obtaining information, the House can actively criticise and discuss the administration in the following ways:—

(a) *Amendments to the King's speech*.—At the beginning of each session, amendments may be framed on the address in reply to the King's speech in such a way as to criticise the general policy of the Cabinet.

In India, similar opportunities are provided during the debate on the President's opening speech, under Art. 87 (see *post*).¹⁰

(b) *Debate on vote for supply*.—At the debate on the grants of Supply, the action of each Minister and of his department may be discussed and criticised in connection with the grant with which he is concerned. Demands for supplementary estimates likewise give opportunities for criticism.

See under Arts. 113-115, *post*.

(c) *Vote of want of confidence*.—The leader of the Opposition can at any moment bring a direct vote of want of confidence against the Cabinet.¹¹

But the English Parliament does not aim at the control of the daily administration. A primary assumption of the Parliamentary system of England is that public administration is a matter for experts and that the ordinary members of Parliament do not possess the requisite qualification for taking an active part in the highly complicated work of modern government. Parliament therefore chooses a Government and allows it to carry on the administration with the non-political services, subject to direction of and criticism by Parliament. In the words of Lowell:¹²

"If the Cabinet to-day legislates with the advice and consent of the House, it administers subject to its constant supervision and criticism."

In the words of Jennings,¹³ the two fundamental principles are—

"(a) that the Government shall, so long as it can maintain a majority, be able to secure such legal powers as it considers necessary for administration; and (b) that minorities, however small, shall be able to criticise that administration."

The utility of this criticism is illustrated by the fact that even Governments backed by a strong majority have sometimes withdrawn important Bills, involving policy, which have met with criticism in the House of Commons,—though the Governments might have carried those Bills by sheer command over the majority party, if they so liked.¹³

The control of a modern Parliament over the Cabinet is thus, in a sense, latent, as Dawson¹⁴ expresses it:

"The House of Commons does control the Cabinet—rarely by defeating it, often by criticising it, still more often by the Cabinet discounting the criticism before subjecting itself and its acts to the House....."

(8) R. 172 of the Rules of the House of the People.

(9) R. 184, *ibid*.

(9a) R. 193 *ibid*.

(9b) R. 56, *ibid*.

(9c) R. 55, *ibid*.

(10) Rr. 16-18 of the House of the People.

(11) See r. 198 of the Rules of the House of the People.

(12) Lowell, Government of England, Vol. I, Ch. XVIII. p. 327.

(13) Cf. Jennings Parliament, 1948, pp. 8, 51, 131.

(14) Dawson, Government of Canada, 1949. 435.

(B) *Control of Parliament by Cabinet.*—We have seen how Parliament controls the Cabinet. But no less important in modern times is the control of Parliament itself by the Cabinet, though in form the Cabinet is practically a committee of the House of Commons, which remains in power only so long as it retains the confidence of the House.

As Keith¹⁵ observes: "The position of the Cabinet towards Parliament has unquestionably come to assume a more or less dictatorial character."

(a) The growth of this dictatorial power is due to the strengthening of the party organisation. The members of the House of Commons and the business of the House itself are controlled by the 'whips' of the Government party, who are paid officials. They are the agents through whom the party machinery is used for ensuring discipline and solidarity amongst the party members. When thus backed by a strong majority, a modern Cabinet not only wields the supreme executive authority, but also supreme initiation and control over legislation.¹⁶

(b) Apart from party loyalty and *patronage*, the Cabinet possesses over its followers, and to some extent even over the Opposition, a powerful weapon in the possibility of securing a *dissolution* of Parliament. In the words of Anson¹⁷—

"..... the power of dissolution is a formidable disciplinary weapon in the hands of the Prime Minister and becomes more formidable as the rapidly changing opinions of the modern electorate make the prospect of a general election more unwelcome to the member who values his seat. The Prime Minister can always use this power as a threat and thus influence 'waverers' in an approaching party division or follows who are slack in attendance and support."

(c) As has been already pointed out (p. 425, *ante*), the Cabinet commands the time and programme of the House of Commons and initiates all important legislation of a public nature.¹⁸ Private members have little chance or scope for conducting a measure which is not backed by the Cabinet.

It is the responsibility of the Cabinet to initiate legislation as to conduct administration.¹⁸

The part played by the English Cabinet in legislation is thus summarised by an American writer:¹⁹

"Its most important duty is legislation; of its own initiative and upon its own responsibility it makes the laws, modified only as the criticisms of Parliament may be accepted, and subject to veto only if it loses its majority in the House of Commons; it shapes the programme and directs the procedure of Parliament; save for the opportunity to criticize or to vote in opposition the member of Parliament not in the Cabinet is a negligible factor; inasmuch as the Prime Minister necessarily dominates the Cabinet, he is in effect an *autocrat*, controlled by an unformulated Constitution which obliges him to act within the law, and having duration of power contingent upon the popular will."

Similarly, the following observations of a Canadian writer²⁰ give a correct picture of the modern relation between the Cabinet and Parliament wherever the Cabinet is assured of a stable majority:

"The functions of Parliament would seem to have degenerated until all that it does is to pass on the measures which the Cabinet chooses to offer within the time which the Cabinet chooses to allow; to spend and raise the money which the Cabinet desires without the opportunity of increasing either revenue or expenditure; to fall in constantly behind the majority, which in turn automatically falls in behind the Cabinet. Responsible government would appear to have suffered a strange and alarming inversion: the Cabinet is no longer responsible to the Commons; the Commons has become instead responsible to the Cabinet."

Relation between the Council of Ministers and the Party in power.

Since the Council of Ministers is chosen from amongst the members of the party which commands the majority in the lower House of Parliament, it is

(15) Keith, Introduction to British Constitutional Law.

(16) Jennings, Parliament, 1948, pp. 7-9; 118; 123.

(17) Anson, Law and Custom of the Constitution, p. 327.

(18) Jennings, Parliament, 1948, pp. 7-9; 118; 123.

(19) Luce, Legislative Problems, p. 281.

(20) Dawson, Government of Canada, 1949, p. 434.

relevant to inquire into the relationship that should subsist between the Council of Ministers and the rest of the members of its party in Parliament.

Though the Cabinet professes to carry out, in general, the programme and professions of the party to which it belongs, and may, on rare occasions, refer to a meeting of the parliamentary party a question of importance, such as conscription,²¹ the Cabinet is not a 'delegate' of the parliamentary party any more than a member of Parliament is a delegate of his electorate. It is, therefore, not open to the parliamentary party to instruct or control the Cabinet on every question that arises nor is it open to the Cabinet to disclose its decisions of informations in advance to the parliamentary party, owing to several reasons—

(a) The responsibility of the Council of Ministers, as in *England*, is not to the members of its own party but to the entire House of the People [Art. 75 (3)]. The rights of the Opposition would be seriously prejudiced if the decisions or policies of the Council of Ministers were first disclosed not in the House itself but in a private meeting of particular members of the House.

(b) The position of the Council of Ministers, whether in *England* or in *India* is that of confidential advisers to the formal head of the State. The confidence is reposed in the members of the Council of Ministers as a body and not in the larger membership of the party from which these advisers are chosen. It would, therefore, be contrary to the principles of Cabinet Government if the parliamentary party could dictate the advice to be given to the head of the State, though there is nothing to prevent the Ministers to discuss particular issues, in a general way at the party meetings and to ascertain the views of the party on such issues.

(c) The deliberations of the Cabinet and the information and materials before it as well as the advice given to the head of the State are all *secret*. It would be a breach of that secrecy if these are disclosed to members of a private meeting.

If the above principles are observed, there is nothing wrong in placing the conclusions arrived at by the Government before the Party in Parliament before they are presented in Parliament, e.g., motions, Bills and resolutions to be introduced by the Government, as is done in *India*.²² It not only enables the Government to understand the viewpoint of the members of the Party outside the Government but also enables the members of the Party to prepare themselves in conformity with the views of the Government before they are called upon to debate in Parliament.

Link between the Cabinet and Parliament.

It has been amply demonstrated that the relation between Cabinet and Parliament is one of mutual control. Some agency is required to act for the Cabinet in this complicated system of control. Though the Prime Minister is the leader of the Party-in-power in Parliament, he requires a more active agency to control the members of his party and to arrange for the Government business in Parliament through the Speaker. This function is performed, in *England*, by the Government 'whips'.²³

In *India*, there is a similar organisation of the whips but the office of the Chief Government Whip has been elevated to that of a Minister of State, named, Minister for Parliamentary Affairs. He has got a full-fledged Department which is concerned with the supervision of all matters relating to the conduct of official business in Parliament.

The Minister for Parliamentary Affairs, thus, performs two-fold functions—

(a) As the Chief Whip of the Government, he controls the members of the Party in power in the two Houses, with his organisation of subordinate whips ;

(21) Cf. Morrison, *Government & Parliament*, 1954, p. 136.

(22) Cf. Morrison, *Parliament in India*, p. 187.

(23) Jennings, *Cabinet Government*, 1959, pp. 59 ; 500.

(b) As the Minister in charge of the Department of Parliamentary Affairs, he is in charge of conducting the Government business in the two Houses, under the constant directions of the Prime Minister:

(i) The Minister for Parliamentary Affairs is also a member of the Business Advisory Committees of both Houses. It is through this Committee that he secures the time and priority for disposal of the Government business.²⁴

(ii) He acts as a link between the two Houses and the several Ministries, and, in particular—

(a) ascertains the stand of the Ministries on non-official Bills and Resolutions etc. moved in either House;

(b) extracts from the proceedings of either House the statements, assurances and undertakings given by the Ministers in reply to questions and in course of debates and ensures their implementation;

(c) advises the Ministries on parliamentary procedure;

(iii) He submits to the Speaker the list of members of the Government party who want to speak on a matter in debate; the names for Select Committees, Parliamentary Delegations etc.;

(iv) He also keeps in touch with the State Legislatures in respect of their procedures and programmes.

The position of the Minister for Parliamentary Affairs, in short, is that of the executive agency of the Government in Parliament.

INDEX TO COMMENTS

ARTICLE 74.

Cl. (1).

Other Constitutions :

(A) England, 415; (B) Canada, 417; (C) Australia, 418; (D) Eire, 419; (E) Fourth French Republic, 419; (F) Fifth French Republic, 420; (G) West Germany, 420; (H) U.S.A., 421; (I) Switzerland, 421; (J) Japan, 421; (K) Ceylon, 422; (L) Government of India Act, 1935, 422.

India :

Relation between President and Council of Ministers, 422; Analogous Provision, 427.

Cl. (2).

Other Constitutions :

(A) England, 427; (B) Ceylon, 428; (C) Government of India Act, 1935, 428.

India :

Jurisdiction of Courts barred, 428; Analogous Provision, 428.

Position and Functions of the Cabinet or Council of Ministers under the Parliamentary system, 428; How Cabinet deliberations take place in England and in India; (A) England, 431; (B) India, 432; Relation between Cabinet and Parliament under the Parliamentary System, 433; Relation between the Council of Ministers and the Party in power, 435; Link between the Cabinet and Parliament, 436.

75. (1) The Prime Minister shall be appointed by the President and

Other provisions as to the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(24) As to the 'Business Committee', see post.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England*.—Owing to the fundamental principle of Cabinet Government that the Cabinet must have the confidence of the majority in the House of Commons, the choice of the Prime Minister by the Crown has become almost automatic, in normal circumstances, and the King must invite the leader of the party or group commanding a majority in the House of Commons, to form a Ministry.²³ The Crown can no longer impose his personal wishes as against the majority in the House of Commons, in the choice of his ministers. So stated,—

"The party who command the majority in the House of Commons are entitled to have their leader placed in office with the right to select his colleagues."²⁴

This does not mean, however, that there is no scope for the exercise of individual judgment by the Crown in the matter under any circumstances whatever. On the other hand, the appointment of the Prime Minister, as has been already seen, is one of the few cases where the King has still left to him some degree of personal discretion, at least in a marginal sphere,²⁵ e.g., when more than one leader enjoys the confidence of the majority and is capable of forming a Ministry.³ The Sovereign's discretion would, again, effectively increase if, with a multiple party system, neither party commands an absolute majority in the House (as happened in 1931), in which case the Sovereign's influence may shape the alignment of leaders to form a coalition government. But even then, the convention is that the Sovereign should not take interest in any particular party but should maintain his impartial position.

The conventional rules which guide the selection of the Prime Minister in England may be thus summarised:

(i) Though normally the King takes the advice of the outgoing Prime Minister in the matter of the selection of his successor, he is not bound to invite such advice at all.⁴ Such advice, again, is not physically available where a new Cabinet has to be formed on account of the death of a Prime Minister.

(ii) When a Cabinet tenders resignation on ground of defeat in the House of Commons, the practice is that the King first consults the leader of the Opposition.⁵ In such a case, it is also the duty of the leader of the Opposition to form a Government, if asked to do so.⁶

(iii) The King is bound to invite the leader of the majority, if there is a recognised leader.⁶ But if there is more than one leader who is able to command the support of the majority, the King may act on his individual judgment.⁷

(iv) In the case of plurality of leaders capable of commanding support of the majority, a Commoner will be preferred to a peer.⁸ Apart from this, in practice, no Prime Minister has been chosen from the House of Lords since 1902.

(25) Hood Phillips, *Constitutional Law*, 1957, p. 247.

(1) Keith, *Constitutional Law* 1939, p. 5.

(2) Jennings, *Cabinet Government*, 1949, pp. 25 *et seq.* Hood Phillips, *Constitutional Law*, 1957, p. 248.

(3) Such a situation arose as late as in 1925, but is not likely to arise very often owing to the development of party organisation and discipline.

(4) Keith, *British Cabinet System*, 1952, p. 36; Jennings, *Cabinet Government*, 1959, p. 41.

(5) Jennings, *Cabinet Government*, 1959, p. 32.

(6) Keith, *Constitutional Law*, p. 147.

(7) Keith, *British Cabinet System*, 1952, p. 26; Jennings, *Cabinet Government*, 1959, p. 25.

(8) Chalmers & Hood Phillips, pp. 34, 300.

(v) If no single party controls a majority in the House of Commons, the King must use his own judgment as to whom he should summon. He would then summon a leader who, in the King's estimate, is capable of controlling a majority by entering into a coalition or compromise with some other party.⁹

The first business of the Prime Minister, after he himself is appointed, is the selection of his colleagues. Of course, the appointment is formally made by the King, but a modern King is not expected to interfere with the Prime Minister's selection of Ministers. Owing to the rule of collective responsibility, the Prime Minister, however, has not got a free hand to act according to personal preferences, and in order to make his Government strong and stable, he must make it as broadly representative as possible. In the matter of this selection, a Prime Minister may be said to be influenced by the following considerations:

(a) It is now an established convention that members of the Cabinet must be members of either House of Parliament. By the Ministers of the Crown Act, 1937, the number of Ministers who may sit and vote in the House of Commons has been limited to a particular number,¹⁰ with the result that *some* of the Cabinet Ministers must be taken from the House of Lords.¹¹

(b) He must see that various parts of the country are geographically represented in the Cabinet.

(c) He must try to recruit as much tactical skill as he can command, by taking in men who have served as previous Ministers or have been the most effective Parliamentary critics of the outgoing Ministry.

(B) Canada.—The political party in the majority in the House of Commons selects a leader by some process, formal or informal, and that leader becomes Prime Minister; the Prime Minister selects the other ministers so as to form a body of men who can obtain the support and vote of a majority of the House of Commons. While, so far as any written law goes, it is open to the Governor-General to select anyone as Prime Minister, he must in fact select the person whom the majority of the House of Commons will follow,—either the existing House of Commons or a House obtained by a new General Election. All Ministers are appointed "by the Governor-General by commission under the Great Seal", but "never by the personal selection of the Governor-General; he takes and can take no active part in such selection—such a course would be *unconstitutional* in the Canadian sense of the word. . . ."¹²

As regards the choice of his colleagues by the Prime Minister, the position in Canada offers a striking contrast to that in England, in the following respects:

(i) Curiously, it is the Cabinet which reflects the federal principle by taking one representative of every Province, if possible, in the Cabinet.¹³ On the other hand, since 1921, the practice has been to take into the Cabinet no member of the federal Chamber (the Senate) excepting the Government leader in the Senate, who, again, is given no portfolio.¹⁴

(ii) Even apart from provincial representation, it has been established in Canada, that the Cabinet must represent all sectional interests throughout the Dominion.¹⁵

The Prime Minister's choice is, accordingly, very much restricted by these considerations and even the consideration of merit does not always get proper weight. As Riddell¹⁶ observes—

"Thus it happens that the executive government specially placed in power to benefit the whole nation is generally a balancing of interests, which calls for political management of

(9) Munro, *Governments of Europe*, 1947, p. 85; Keith, *British Cabinet System*, p. 32.

(10) Keith, *British Cabinet System*, 1952, pp. 42-3.

(11) The actual number of Ministers taken from the House of Lords, of course, varies with the party complexion of the Cabinet. Thus, in the Labour Cabinet of 1948, there were only two representatives of the Lords,

while in the Conservative Cabinet of 1952, there were as many as seven.

(12) Riddell, *The Canadian Constitution in Form and in Fact*, 1923, p. 20.

(13) Dawson, *Government of Canada*, 1949, pp. 211-2, 215.

(14) Riddell, *Some Aspects of Constitutional Law*, 1932, pp. 108-9.

no mediocre order. A prime minister may find himself forced to choose a colleague because he is the sole supporter of his party elected in a province, although his claim to cabinet office is the uniqueness of a position due to local reasons or to local political organisation. A prime minister may find himself compelled to bring to the council chamber men endowed with neither political wisdom, nor national outlook, nor the capacity for them."

(C) *Eire*.—Art. 13 (1) of the Constitution of 1937, says—

"(1) 1. The President shall, on the nomination of Dail Eireann, appoint the Taoiseach, that is, the head of the Government or Prime Minister. 2. The President shall, on the nomination of the Taoiseach with the previous approval of Dail Eireann, appoint the other members of the Government. 3. The President shall, on the advice of the Taoiseach, accept the resignation or terminate the appointment of any member of the Government."

Art. 28 (1)-(2), provide—

"(1) The Government shall consist of not less than seven and not more than fifteen members who shall be appointed by the President in accordance with the provisions of this Constitution. (2) The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."

The Constitution of Eire leaves nothing to the discretion of the President in the appointment of the Prime Minister. He must be nominated by the lower House of the Legislature. The appointment of the nominee of the majority party is thus secured by a constitutional provision. Similarly, though the other Ministers are selected by the Prime Minister, he must get the approval of the lower House of the Legislature before they are appointed.

(D) *French Constitution of 1958*.—Art. 8 of the Constitution of 1958 provides—

"The President of the Republic shall appoint the Premier. He shall terminate the functions of the Premier when the latter tenders the resignation of the Government.

On the recommendation of the Premier, the President shall appoint the other members of the Government and shall terminate their functions."

There is no longer any provision for an initial vote of approval by the National Assembly as to the forming of the Cabinet, as under Art. 45 of the Constitution of the Fourth Republic.

(E) *West Germany*.—The provisions in the West German Constitution of 1949, in this respect, are rather complicated. The primary principle is of election by the lower House of the Legislature, after nomination by the President (Art. 63). In order to be elected Prime Minister (called federal Chancellor), the nominee of the President must obtain the votes of the majority of *members* of the *Bundestag* (lower House of the federal Parliament). If the nominee of the President fails to secure this majority vote, the *Bundestag* may elect a person of their own choice, by such majority vote. If the person elected by the *Bundestag*, in this latter case, fails to secure the vote of the majority of membership of the House, the President has the option of either appointing him or dissolving the *Bundestag* itself.

(F) *Japan*.—The relevant provisions of the Japanese Constitution of 1946, are—

"Article 6.—The Emperor shall appoint the Prime Minister as designed by the Diet.

Article 66.—The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law.

The Prime Minister and other Ministers of State must be civilians. . . .

Article 67.—The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.

If the House of Representatives and the House of Councillors disagree and if a joint committee of both Houses, provided for by law, cannot reach an agreement, or the House of Councillors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the Diet.

Article 68.—The Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet.

The Prime Minister may remove the Ministers of State as he chooses."

The special features of the cabinet organisation in Japan are as follows:

(i) The Emperor, who nominally appoints the Prime Minister, has not the least discretion in the matter. The selection is made by the Diet (or by the

House of Representatives in case of disagreement between the two Houses), by a formal resolution.

(ii) Though the power to appoint the other Ministers is given to the Prime Minister, he has no power to determine the size of the Cabinet. It is the Legislature which shall fix the number of Ministers, by law (Art. 66).

(iii) On the other hand, in the choice of his colleagues, the Japanese Prime Minister has got wider freedom than the Prime Minister of any other country. For, he is not bound to make all the appointments from amongst the members of the Legislature, and if he appoints a person from outside the Legislature, such person is not subject to any such limitation as is imposed by cl. (5) of Art. 75 of *our* Constitution, and is not obliged to seek election at any time. The only limitations imposed upon this power of the Prime Minister to select Ministers from outside the Legislature are—

(a) Military personnel are not eligible (Art. 66).

(b) Majority of the Ministers must be members of the Legislature.

There is, however, no rule for distribution of the appointments as between the two Houses, and appointments made by the Prime Minister do not require the approval of the Legislature.

INDIA

Appointment of Prime Minister.

The clause is silent as to how the President shall choose the Prime Minister. The convention of Cabinet Government is that the head of the Executive will call upon the leader of the majority party or a person capable of commanding majority in the Legislature, to be the Prime Minister and to form the Cabinet. Though *our* Constitution does not expressly require the President to call upon the leader of the majority party, the rule of responsibility in Cl. (3) of the present Article will restrict the choice of the President as in England, and it may be expected that it is only in marginal cases (as shown at p. 416, *ante*) that there will be any scope for the President's individual judgment.

It is also the duty of the majority party, when invited, to take up the responsibility of forming a Government, for, the basic principle of Parliamentary government is that the majority has not only the right but also the *duty* to govern, while it is the duty of the minority to criticise.¹⁵

Analogous Provision.—The provision of Art. 164 (1), relating to the State, are similar.

Council of Ministers and the Cabinet.

(A) *England.*—In *England*, the final development of the Cabinet system has resulted in a distinction between the 'Ministry' and the 'Cabinet'. The Cabinet is a smaller body, usually consisting of some twenty Ministers who shape the *policy* of the administration and include the heads of the major spheres of government, though all of these Ministers may not necessarily be the heads of Departments. Thus, the Lord Chancellor, the Lord President of the Council or the Lord Privy Seal, who are usually members of the Cabinet, are not heads of any Departments. Members of the Cabinet, in short, are those Ministers who are invited by the Prime Minister to join him in tendering advice to the King on the government of the country and to formulate the national policy.

The Ministry is a larger body comprising several categories of persons, who have this common characteristic that they loose their office with the fall of the government, *i.e.*, when the party in power looses its majority in the House of Commons. They, in short, form the *political* Executive as distinguished from the *permanent* Executive, consisting of the civil servants. Normally, the Ministry

(15) Cf. Jennings, *Cabinet Government*, 1951, pp. 50, 464.

includes some 60 to 70 persons belonging to the following categories—(i) the heads of the different Departments; (ii) some high official who are not heads of any Department, such as the Lord Privy Seal; (iii) Ministers of State, who act as deputies in those Ministries where the work is heavy; (iv) Parliamentary Under-Secretaries (as distinguished from the permanent Under-Secretaries).

The Ministry is thus the wider circle of which the Cabinet forms the inner circle. All heads of Departments who hold political appointments are not in the Cabinet, nor are all members of the Cabinet heads of Departments. It is for the Prime Minister¹⁶ to determine which of the Ministers shall be members of the Cabinet,¹⁷ but the powers and responsibilities of a Minister as the head of a Department are not affected by the question whether he is a member of the Cabinet or not.¹⁸ There is a third category, viz., Ministers who are regarded 'as of Cabinet rank'. Though they are not *members of the Cabinet*¹⁸ and cannot, of their right, attend Cabinet meetings, they may be invited to attend Cabinet meetings on special occasions, e.g., when matters relating to the Departments in their charge are being considered by the Cabinet.

We have thus three classes of Ministers in England—(a) Members of the Cabinet; (b) Ministers with Cabinet rank; (c) Ministers *without* Cabinet rank.

Apart from this difference in composition, the Cabinet and the Ministry differ from each other functionally:

The Ministry as such *never meets together* and have no voice in matters of policy. Deliberations on questions of policy belong to the Cabinet collectively.

(B) *Canada*.—In Canada also, the distinction between Cabinet Ministers and Ministers outside the Cabinet has come to be established. In a Ministry of 25 or 27, about 20 are members of the Cabinet, while the rest are outside the Cabinet. It is for the Prime Minister to decide which Minister should be taken into the Cabinet to participate in the determination of policy. (a) All the political heads of the different departments are usually taken into the Cabinet, and there may be some members of the Cabinet, who are without any portfolio, e.g., the leader of the Senate. (b) The parliamentary assistants who are appointed to relieve Ministers of some of their less important duties, form the larger part of the Ministry outside the Cabinet.¹⁹

(C) *Australia*.—In Australia there are about 22 Ministers, of whom about 12 form the Cabinet.²⁰

(D) *India*.—In India, the word 'Cabinet' is not used anywhere in the Constitution, and the expression 'Council of Ministers' is used both in relation to the Union and the States.

The Constitution does not lay down the number of members the Council of Ministers shall contain,—either the minimum or the maximum. The size of the Cabinet is left to the requirements of the occasion as determined by the Prime Minister, as in England.

Though there is no provision to guide the Prime Minister's choice of his colleagues, the convention so far followed seems to be that at the time of the choice, every Minister must be a member of either House of Parliament, and that there must be some members of the upper Chamber in the Council of Ministers, the number or proportion being left to the Prime Minister. In August, 1954, 4 out of the 14 'Cabinet Ministers' of the Union belonged to the Council of States, but in 1961, after the death of Pandit Pant, out of 12 Cabinet Ministers, only two belonged to the Council of States.

Though the Constitution does not suggest anything as to different categories of Ministers being included in the Council of Ministers, Prime Minister Nehru had, in his Council of Ministers formed after the General Election in 1952, made a three-fold distinction by naming 14 Ministers besides himself as 'Members of

(16) (1956) 548 H.C. Deb, 29-30

(17) The names of 'Cabinet' Ministers are notified as such in the London Gazette. The number of Cabinet Ministers is, on the average, 20 or thereabout.

(18) Their number also varies from 20 to 25.

(19) Dawson, Government of Canada, 1949, pp. 199-200.

(20) Hood Phillips, 1957, p. 715.

the Cabinet', 4 as 'Ministers of Cabinet rank' and 2 as 'Deputy Ministers'. The number of members of the two inferior categories was increased subsequently so that at the time of dissolution in 1957, the 1952 Cabinet had a strength of 44, of whom 14 were Cabinet Ministers, 16 Ministers of Cabinet rank and 14 Deputy Ministers.

By the Salaries and Allowances of Ministers Act (LVIII of 1952), Deputy Ministers, who are not mentioned in the Constitution, were given legislative recognition. It is stated that Deputy Ministers are also members of the 'Council of Ministers', but their salaries and allowances are inferior to those of 'Ministers'.

In the Council of Ministers which was formed in 1957, after the second General Election, the nomenclature 'Minister of State' was used instead of 'Minister of Cabinet rank'. Its total strength was 39, of whom 13 (including the Prime Minister) were 'Ministers' (or members of the Cabinet); 14 'Ministers of State' and 12 Deputy Ministers. In April 1961, the rank of Cabinet Ministers had been reduced by two, owing to deaths, while that of Deputy Ministers raised to 21, by subsequent appointments, so that the total membership of the 'Council of Ministers' came to be 47. The Ministries which were manned by these 47 members of the Council of Ministers were 19 in number, namely—

1. Commerce and Industry; 2. Community Development and Co-operation; 3. Education; 4. External Affairs; 5. Finance; 6. Food and Agriculture; 7. Health; 8. Home Affairs; 9. Information and Broadcasting; 10. Irrigation and Power; 11. Labour and Employment (and Planning); 12. Law; 13. Parliamentary Affairs; 14. Railways; 15. Rehabilitation (and Minority Affairs); 16. Scientific Research and Cultural Affairs; 17. Steel Mines and Fuel; 18. Transport and Communications; 19. Works, Housing and Supply.

Though the Constitution makes the 'Council of Ministers' collectively responsible to the House of the People [Art. 75 (3)], and Art. 78 (c) enjoins the Prime Minister, when required by the President, to submit for the consideration of the 'Council of Ministers' any matter on which a decision has been taken by a Minister but which has not been considered by the Council, in practice, the Council of Ministers seldom meets as a body. It is the 'Cabinet', an inner body within the Council, which, though unknown to the Constitution, shapes the policy of the Government. Here is a foremost example of the growth of conventions to supplement the provisions of our written Constitution (Vol. I, p. 23). In fact, it is a case of divergence from the letters of the Constitution, for, when Art. 78 (c) was drafted, it was obviously contemplated that the Council of Ministers should collectively meet at least to consider and to discuss the matters which might be required by the President to be placed before it.

It is the Cabinet, composed of the 'Cabinet Ministers',²¹ who formulate the policy decisions on behalf of the Council of Ministers. As in *England*, it is the Prime Minister who determines which of the Ministers shall be members of the Cabinet or 'Cabinet Ministers'. At the meetings of the Cabinet, it is the 'Cabinet Ministers' who have a right to attend. The Ministers of State have no such right but they may attend by special invitation and they carry on the internal administration of a Ministry usually under the leadership of the Cabinet Minister in charge of the Ministry, where the pressure of work justifies the appointment of a Minister 'holding Cabinet rank', that is to say, who may represent the Ministry at the meetings of the Cabinet, though not a member thereof, when invited. Some of the Ministers of State are, however, in independent charge of Ministries. Thus, in the 1961 Cabinet, as many as seven Ministries were in charge of Ministers of State, there being no Cabinet Minister at their head, viz., Ministers of Parlia-

(21) In May, 1964, the 14 Cabinet Ministers out of the 51 constituting the Council of Ministers were—1. Shri Nehru (Prime Minister)—External Affairs; 2. Shri Krishnamachari—Finance; 3. Shri Dasappa—Railways; 4. Shri Nanda—(Home Affairs); 5. Shri Shastri—Minister without portfolio; 6. Shri Swaran Singh—Food and Agriculture; 7. Shri Chavan—Defence; 8. Shri Sen—Law,

Posts & Telegraphs; 9. Shri Subramanyam—Steel, Mines & Heavy Engineering; 10. Shri Humayun Kabir—Petroleum & Chemicals; 11. Shri S. N. Sinha—Information & Broadcasting and Parliamentary Affairs; 12. Shri Chagla—Education; 13. Shri Sanjivjiya—Labour & Employment; 14. Shri Tivagi—Rehabilitation.

mentary Affairs, Information and Broadcasting, Health, Rehabilitation, Community Development, Education, Scientific Research and Cultural Affairs.

A Deputy Minister has no opportunity of coming into contact with the Cabinet. He assists the Cabinet Minister by doing such functions as he may delegate.

Though the Constitution does not classify the Members of the Council of Ministers into different ranks and all this has been done informally following the British practice, it has now got legislative sanction, so far as the Union is concerned, in s. 2 of the Salaries and Allowances of Ministers Act, 1952, which defines a 'Minister' as a "Member of the Council of Ministers, by whatever name called and includes a Deputy Minister". Since this Act fixes the pay of 'Ministers' and 'Deputy Ministers', it follows that the Council of Ministers referred to in Arts. 74-75 of the Constitution is composed of the three classes of Ministers, namely, Cabinet Ministers, Ministers of State and Deputy Ministers. Deputy Ministers get a salary of Rs. 1,750/- *per mensem*. All other Ministers get a salary of Rs. 2,250/-; in addition to this, by rules made under the Act, a sumptuary allowance of Rs. 500/- *per mensem* has been allowed to Cabinet Ministers.

Besides Ministers, some Parliamentary Secretaries have been appointed to assist Ministers in their Parliamentary duties. It is to be carefully remembered that these Parliamentary Secretaries are not named as 'Ministers' and do not, accordingly, come within the expression 'Council of Ministers' as understood in the Salaries and Allowances of Ministers Act, 1952 or the Constitution.

CLAUSE (2).

OTHER CONSTITUTIONS

(A) *England*.—"Ministerial responsibility", says *Dicey*, "means two utterly different things."

(A) Ordinarily it means the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons. The Ministers are *collectively* responsible to *Parliament* (or, more correctly, to the lower House of Parliament) for the general policy, of the administration, and this responsibility may be enforced by Parliament by a direct vote of censure or want of confidence, or by defeating a Government measure in the House of Commons. The obligation of a Cabinet to resign office when it loses confidence is however a rule of convention and neither House nor the two Houses together, possess any *legal* power to dismiss any of the King's Ministers. This aspect of ministerial responsibility may therefore be called *moral* or *political* responsibility.

This aspect of ministerial responsibility will be fully dealt with under Cl. (3), below.

(B) But the ministers are responsible in a stricter sense. Each Minister is *individually* responsible to the *law* for every act of the Crown in which he takes part. This is the *legal* responsibility of ministers which follows from two principles—(i) In order that an act of the Crown may be recognised as an expression of the Royal will it must be done through some Minister and all orders given by the Crown must be countersigned by him.²² (ii) The Minister who thus takes part in giving expression to the Royal will, is legally responsible for it and for any tortious or criminal act done in pursuance thereof, and he cannot get rid of his liability by pleading that he acted in obedience to royal orders. Thus, as *Dicey* observes, a Minister is not only morally but legally responsible for the legality of the act in which he takes part.

This aspect will be referred to again, under Art. 77 (2), *post*.

There is a third aspect of ministerial responsibility, namely, the *individual* responsibility of each minister to the Crown, which form the subject of the present

(22) Hood Phillips. *Constitutional Law*, 1952, p. 232; Wade and Phillips, pp. 60-61.

clause of Art. 75 of *our* Constitution. Theoretically, the Ministers are still the servants of the Crown and so responsible to him for their acts, and this responsibility may be enforced by the prerogative of veto, dissolution, or dismissal. But as regards the Ministers *collectively*, the King's power of dismissal may be said to be obsolete, the last instance of its exercise being 1783.²³ Constitutional writers agree²⁴ that a dismissal of the Cabinet by the Crown, would now be an unconstitutional act, except²⁵ in the abnormal case of a Cabinet refusing to resign or to appeal to the electorate upon a vote of no confidence in the Commons. The reason for the change in the constitutional position is thus explained by Keith²⁶—

"That a King should not dismiss a Ministry, which still commands the approval of the Commons, is no doubt strengthened by the fact that dismissal, real or virtual, last occurred in 1783 and 1807, before the Reform Act of 1832 gave power to the people, but it would be impossible to say that changed circumstances might not render exercise of such authority necessary."

As against *individual* Ministers for unconstitutional acts, the Crown's power may be used by the Prime Minister,—to get rid of unpopular or inefficient colleagues, without bringing about a fall of the entire Cabinet. This power of the Crown has thus passed into the hands of the Prime Minister, and has enhanced the control of the Prime Minister over his colleagues.¹

In modern times, however, the removal of a colleague at the instance of the Prime Minister does not take the form of a 'dismissal' by the Crown on the advice of the Prime Minister.² The Prime Minister asks his colleague *to resign* and when so asked, the latter has practically no alternative than to resign,³ though, of course, he may try to obtain the sympathy of the House by making a statement on his resignation. It may be stated that cases of such resignation in *England* are not infrequent, but before asking a colleague to resign, the Prime Minister has to carefully weigh the popularity or influence of such colleague both within and outside the House, and in cases of maladministration of any particular department, the Prime Minister usually avoids removal of the colleague by transferring him to some other department.

(B) *Australia*.—Sec. 62 of the Australian Constitution says—

"... the member of the (Executive) Council shall hold office during his (Governor-General's) pleasure."

A Federal Minister was, in fact, removed under the above provision, for refusing to carry out the obligations of Cabinet usage.²

(C) *Canada*.—The members of the Canadian Cabinet or 'Privy Council'—

"may from time to time be removed by the Governor-General" (S. 11. B. N. A. Act).

But, as in *England*, the collective dismissal of the Cabinet by the Governor-General has become obsolete, though the right legally remains.³⁻⁴

Similarly, the power to remove individual Ministers is exercised through the device of a request by the Prime Minister to resign.⁵

(D) *Fifth French Republic*.—Art. 8 of the French Constitution of 1958 says—

"At the proposal of the Premier, the President of the Republic shall appoint the other members of the Government and shall terminate their functions."

As in *England*, the power of dismissal of the Ministers individually belongs

(23) Keith, *British Cabinet System*, 1952, p. 279.

(24) Jennings, *Cabinet Government* 1959, pp. 408-11; Chalmers & Hood Phillips, *Constitutional Law*, p. 200.

To ask a Prime Minister who enjoys the confidence of Parliament to resign would also be treated similarly—the last instance of such a case having taken place in 1834.

(25) Cf. Keith, *Constitutional Law*, p. 162.

(1) Jennings, *Constitution of Ceylon*, p. 100.

(2) The last instance of a 'formal dismissal' took place in 1792.

(3) Keith, *British Cabinet System*, 1952, p. 77; Jennings, *Cabinet Government*, 1959, p. 214.

(2) Kerr, *Law of the Australian Constitution*, p. 218-n.

(4) Keith, *British Cabinet System*, 1953, pp. 280-1.

(3) Dawson, *Government of Canada*, 1949, pp. 190, 206.

to the head of the State, but he exercises this power at the instance of the Prime Minister.

(E) *West Germany*.—Art. 64 (1) of the West German Constitution of 1949 says—

"The federal ministers are appointed and dismissed by the federal President upon the proposal of the federal Chancellor."

This provision is similar to that of the French Constitution of 1958, just cited.

(F) *Japan*.—Art. 66 of the Japanese Constitution provides—

"The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet."

Arts. 69-71, further, elaborate the above principle—

"69. If the House of Representatives passes a no-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign *en masse*, unless the House of Representatives is dissolved within ten (10) days.

70. When there is a vacancy in the post of Prime Minister, or upon the first convocation of the Diet after a general election of members of the House of Representatives, the Cabinet shall resign *en masse*.

71. In the cases mentioned in the two preceding articles, the Cabinet shall continue its functions until the time when a new Prime Minister is appointed."

Art. 68, again, provides—

".....The Prime Minister may remove the Ministers of State as he chooses."

The special features of the above system are as follows:

(a) Instead of giving the power to dismiss individual Ministers to the head of the State (Emperor), the power is explicitly given to the Prime Minister. This power of the Prime Minister is not subject to any specific approval of the Legislature or any other limitation. He can exercise this power without any fetter so long as he is himself sure of retaining confidence of the Legislature.

(b) The Legislature has no power of enforcing the individual responsibility of a Minister.

(c) Though Art. 66 says that the collective responsibility of the Cabinet is to the Diet, it is only the vote of the House of Representatives which can enforce a Cabinet to resign (Art. 69).

(d) The power of the Cabinet to dissolve the House of Representatives on a vote of non-confidence is limited by a time-limit of 10 days.

(e) The constitutional obligation of the Cabinet to resign is restricted to the case of a direct vote of the House of Representatives expressing want of confidence. There is no constitutional obligation to resign on an adverse vote on any particular measure, as such. But it is expected, perhaps, that upon the failure of the Government on a major question of policy, the Cabinet itself would bring a resolution of confidence in the House.

(f) There is express provision as to what should happen when there is a vacancy in the post of Prime Minister. In such a case, the other members of the Cabinet must resign in a body, but carry on the functions of the Cabinet until a new Prime Minister is appointed (Art. 71).

(G) *Ceylon*.—Sec. 49 (1) of the Ceylon (Constitution) Order in Council, 1946, provides—

"Every Minister . . . shall hold office during His Majesty's pleasure: Provided that any Minister . . . may at any time resign his office by writing under his hand addressed to the Governor-General."

(H) *Government of India Act, 1935*.—Sec. 10 (1) provided—

"The Governor-General's Ministers shall . . . hold office during his pleasure."

Sec. 51 (1) made similar provision as regards Provincial Ministers.

INDIA

Cl. (2) : President's power of dismissal.

On this question, a distinction should be made between the power to dismiss individual ministers and the power to dismiss the Prime Minister (because the

dismissal of the Prime Minister who enjoys the confidence of the majority in Parliament would virtually mean the dismissal of the Council of Ministers).

I. *The power to dismiss the Prime Minister.*

(A) *England*.—As has been stated already (p. 445, *ante*), even though theoretically the Crown may be said to possess the power to dismiss the Cabinet collectively or to dismiss the Prime Minister who enjoys the confidence of the House of Commons, its use now would be regarded as obsolete. The dismissal of a Prime Minister, it should be noted, amounts a dismissal of the Cabinet as a body because he is the leader of the Cabinet and his resignation or dismissal would dissolve the Cabinet.

(B) *Government of India Act, 1935*.—Under the *Government of India Act, 1935*, the Governor was not bound to act according to the advice of the Ministers regarding matters in which his special responsibilities were involved. He had, therefore, the right to dismiss Ministers (including the Prime Minister), while having the confidence of the Legislature, if he considered that their policy was injurious to the public interests, affecting his special responsibilities.

Thus, the Sind Premier Alla Bux was dismissed on a personal ground, *viz.*, that of renunciation of honour, by reason of which he had lost the confidence of the Governor. Similarly, Premier Fazlul Huq of Bengal was forced to resign on 29th March, 1943, even though his Progressive Coalition Party had a majority in the Legislature. Again, the Punjab Minister Shaukat Hyat Khan was dismissed on 26th April, 1944, for bad conduct.

But even after the abolition of the special responsibilities of the Governor-General under the *Government of India Act, 1935*, as adapted in Pakistan, the Pakistan Premier Nazimuddin was dismissed by the Governor-General in 1953 on the ground that he was unable to solve the acute problems before the country,—without obtaining a verdict of the Legislature on the matter. There is no doubt that the dismissal of a Chief Minister on ground of policy, was a unique event.

(C) *India.*

(a) It is obvious that if the English precedent is to be followed under the Constitution, it would be improper for the President to dismiss a Council of Ministers or a Prime Minister, so long as the Prime Minister enjoys the confidence of the House of the People. This conclusion may be supported by the provisions of the Constitution itself, namely, that while cl. (2) makes the 'Ministers', individually, to hold at the pleasure of the President, under cl. (3), they are, collectively responsible to the House of the People. There would be a breach of cl. (3) if the President were to interfere with the collective responsibility of the Council of Ministers to the House of the People by dismissing them while they, collectively, retain the confidence of the House of the People. A dismissal of the Prime Minister would also amount to dismissal of the 'Council of Ministers' because Art. 74 (1) expressly states that the Prime Minister shall be 'at the head' of the Council of Ministers.

(b) But though it would be unconstitutional for the President to dismiss a Council of Ministers of the Union so long as they retain the confidence of the House of the People, or for the Governor of a State to exercise a similar power with respect to the Council of Ministers of the State, there are some cases where the *President* is empowered by *our* Constitution to exercise the power against a Council of Ministers in a *State*.

Art. 356 empowers the President to assume all the powers of a State Government to himself if he is satisfied from a report of the Governor that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. It is evident, therefore, that even though the Governor cannot directly dismiss his Council of Ministers while it still commands the confidence of the majority in the Legislative Assembly, it is competent for the Governor to secure a dismissal of the Ministry through the President if he can satisfy the latter that the Ministry in power is violating

the provisions of the Constitution. In July, 1959, thus, the Governor of Kerala secured the dismissal of the Namboodripad Ministry, by reporting to the President that the Government was misusing the governmental machinery and funds for party purposes and that the administration of the State could not be carried on in accordance with the provisions of the Constitution, without dismissing the Ministry and holding a fresh election after dissolving the Assembly.⁵⁻⁶

II. The power to dismiss other Ministers individually.

Under the present clause, the President shall have the power to dismiss the Ministers *individually*. According to English precedents (p. 439, *ante*), this power will be exercised by the President on the advice of the Prime Minister, to remove an undesirable Minister even though the latter may still command the support of the majority in the House of the People. In practice, a 'dismissal' is not necessary, for a Prime Minister's request to a colleague to resign, is regarded as an order.⁷

As Dr. Ambedkar explained in the Constituent Assembly, the normal mode of dismissal of a Minister or Ministry is by a vote of no-confidence in the House of the People. But it may sometimes happen that even though a Minister's administration be corrupt, he may still command the confidence of the majority of the House. In such cases, the President is given the power to dismiss a corrupt or otherwise undesirable Minister, notwithstanding the fact that he is not thought undesirable by the majority in the House of the People.

Resignation of Ministers.

The absence of any specific provision to the effect does not imply that a Minister cannot resign his office. Even the resignation of the Council of Ministers or of the Prime Minister on a defeat in the House of the People is not expressly provided for. The whole thing will be governed by convention, as in *England*. It follows, therefore, that an individual Minister may tender his resignation under a writing addressed to the Prime Minister⁸ but the resignation would be effective only if the President accepts the same, on the advice of the President because a Minister "shall hold office during the pleasure of the President". It has been stated in another context that the resignation of the Prime Minister is, by convention, followed by the resignation of his colleagues.⁹ It has also been pointed out that when a Prime Minister decides to replace a colleague, he simply requests the latter to resign and such request is, as a matter of rule, respected because it is more honourable than being dismissed by the head of the State, on the advice of the Prime Minister.⁸

(5) Delhi Hindusthan Standard, 18-8-1959, p. 1.

(6) We had another instance of dismissal of a Prime Minister when the Sadar-i-Rivasat of Jammu and Kashmir dismissed Premier Abdullah in August, 1953. Such action must, however, be regarded as a marginal instance and should not be cited for the purpose of interpretation of Art. 75 (2) of the Constitution of India, for the following reasons—(i) Though it was understood that the Sadar-i-Rivasat's position was similar to that of the Governor of a State, the provisions of the Indian Constitution relating to ministerial responsibility were not of their own force, applicable in Jammu and Kashmir. (ii) Secondly, Abdullah was dismissed on the ground that he was engaged in subversive activities against the security of the State. Here was an exceptional case where the interests of the nascent State of Jammu & Kashmir and its peculiar political situation called for such action as a matter of 'compelling necessity'.

While observing that the Crown's power to dismiss a ministry has become obsolete, Keith in his *British Cabinet System* has said—

"That a King should not dismiss a Ministry, which still commands the approval of the Commons, is no doubt strengthened by the fact that dismissal, real or virtual, last occurred in 1783 and 1807 before the Reform Act of 1832 gave power to the people, but it would be impossible to say that changed circumstances might not render exercise of such authority necessary."

The case in Jammu & Kashmir may be regarded as such an exceptional case.

(7) In 1963, Union Minister Malaviya resigned on account of certain allegations against him personally.

(8) Jennings, *Cabinet Government*, 1959, pp. 83-8.

(9) Munro, *Governments of Europe*, p. 96.

Position of Prime Minister in the Cabinet.

(A) *England*.—The Prime Minister is the leader of the Cabinet. He gains this position as the head of the party in majority in the House of Commons. When an existing Cabinet resigns, the King calls for the leader of the party then in majority in the Commons and asks him to form a new Cabinet, of which he becomes the Premier. The first function of the Prime Minister, thus, is the choice of colleagues or Ministers. Theoretically, the position of the Prime Minister is only *primus inter pares* (Lord Morley) or 'the first among equals'. But in practice, all members of the Cabinet must refer to the Premier, and when any one of them disagrees with him he ought in strictness to resign. He has thus been described as "the keystone of the Cabinet arch" (Sir William Harcourt). He is, in fact, the working head of the State. He not only selects Ministers and assigns to them their office,⁹ but can compel any one of them to resign.¹⁰ The other ministers virtually hold their office at the pleasure of the Prime Minister.

The Prime Minister exercises a general supervision over all the departments and nothing of moment that relates to the general policy can be transacted without his advice. He stands between the Crown and the Cabinet. Though individual members have the right of access to the Crown on matters concerning their own departments, any important communication can be made only through the Prime Minister. The Prime Minister presides over the Cabinet and summons its meetings. The actual position of the Prime Minister in relation to other members of the Cabinet would no doubt depend largely upon the personality of the Prime Minister, but he has a superior position by reason of his (i) chairmanship of the Cabinet; (ii) leadership of the House of Commons; (iii) leadership of the party in majority; (iv) power of patronage, granting honours,¹¹ etc.; (v) being the channel of communication with the Crown on all important issues; (vi) power to advise dissolution of Parliament; (vii) power of allocating business to his colleagues and of transferring them from one department to another and of finally securing their dismissal or resignation, individually, if circumstances so demand; in short, the power to construct or reconstruct the Cabinet; (viii) power to exercise a general supervision over the Departments and to settle inter-Departmental differences, and to secure the co-ordination and implementation of the Cabinet policy.

(B) *Canada*.—As Riddell¹² observes, the Prime Minister of Canada is not as free as the Prime Minister of England. One of the reasons is that the Canadian Cabinet is always too large to function well as a 'thought-organization'. Another is that under the Canadian Constitution, it is the Cabinet and not the Senate which represents the federal aspect in the Central Government.¹²⁻¹³

The Cabinet not only represents the Provinces but also all groups of sectional interests in the country and even in the Cabinet deliberations, the Ministers openly put forth the views of the interests which they represent. Owing to so many conflicting interests, the task of the Prime Minister becomes obviously more difficult to secure solidarity and unanimity in Cabinet decisions. It is only through the party organisation that the Prime Minister is able to perform this difficult task and in this the Canadian Prime Minister has so far been favoured by the fact that the two-party system still obtains in that country.

(C) *India*.—It is noticeable, in the first instance, that the office of the Prime Minister (and of the Chief Minister of a State), which was not mentioned in the corresponding provisions in the Government of India Act, 1935, has been formally specified in the Constitution [Arts. 74 (1); 163 (1)].

There is no doubt that it is the personality of the holder that shapes the actual status of any office. It is, therefore, not difficult to understand what Lord

(10) Cf. Chamberlain forcing Eden & Duff Cooper to resign. in 1938—Keith, *Constitutional Law*, p. 152.

(11) These are prerogatives of the Crown who exercises them on the advice of the Prime Minister.

(12) Riddell, *Some Aspects of the Theories and Workings of Constitutional Law*, 1932, pp. 108-9.

(13) Dawson, *Government of Canada*, 1949, pp. 211-2.

Oxford and Asquith meant when he said—"the office of the Prime Minister is what its holder chooses to make it".

As to the achievements of *our* first Prime Minister, Pandit Nehru, the Author observed at p. 444 of Vol. II of the previous Edition—

"Owing to the outstanding personality and qualities of *our* first Prime Minister, it may be said with confidence that the Prime Minister under *our* Constitution has been functioning as the keystone of the Cabinet arch as in England. He is not only the leader of the majority party and chairman of the Cabinet, but he is shouldering the responsibility of the key Ministry of External Affairs and is acting as the spokesman of the country in every international matter of moment".

There is, however, one aspect of the functions of a Prime Minister which should be considered impersonally, for no country can be assured of a perennial stock of leaders of outstanding personality.

Though in *England*, there have been Prime Ministers who have taken up important portfolios like Defence, Foreign Affairs or Chancellorship of the Exchequer, usually the Prime Minister takes no other office save that of the office of the first Lord of the Treasury which has only nominal duties attached to it, and, as a foreign critic has observed,¹⁴ whenever the charge of an onerous Department, such as Foreign Affairs, has been combined with Prime Ministership, it "has always worked to the disadvantage of both offices concerned".

The object of aloofness from departmental duties is to enable the Prime Minister to perform his primary function under the Cabinet system, *viz.*, the function of co-ordinating the policy of the Government.¹⁵ Before the evolution of the Cabinet system, this task of co-ordination belonged to the Crown who was the fountain of all authority and this continued to be the position during the early days of the Cabinet when the King used to preside over its meetings. But with the growth of the modern Cabinet and the retirement of the Crown from that body, the task of co-ordination naturally fell upon the Prime Minister.¹⁶

Though it is not possible for a modern Prime Minister to exercise such a close supervision over every department as it was possible for Sir Robert Peel to exercise, the ideal that the Prime Minister should be conversant with the affairs of the entire administration is still there. This does not mean that the Prime Minister must intermeddle with the day-to-day administration of every Department and overshadow the Minister in charge. It only means that he must know what is happening and whether the different Departments are working as an integrated whole.¹⁷

(14) Neumann, *European & Comparative Government*, 1960, p. 39.

(15) Morrison, *Government & Parliament*, 1954, pp. 37-8.

(16) Cf. Stout, *British Government*, 1953, p. 72; Jennings, *Cabinet Government*, p. 163.

(17) This need for co-ordination, pointed out at p. 475 of the Third Edition of this Commentary, has also been emphasised by Sri Chanda in his *Indian Administration* (1958, pp. 82, 91), but he suggests the solution that groups of inter-related Ministers should be placed "under the general supervision of senior Ministers, without portfolio". This suggestion, in fact, strengthens the view expressed in this Commentary that it is the Prime Minister himself who must be a Minister without portfolio, taking up the work of co-ordination. Even if a number of Ministers without portfolio be created, there would arise the need for placing somebody above them if unity and discipline amongst the Council of Ministers is to be secured, together with the leadership of the Prime Minister. If the business of co-ordination is not at present being satisfactorily

done by Cabinet Committees (as observed by Sri Chanda), is it because the Prime Minister is presiding over each of these Committees or because neither the Ministers constituting these Committees nor the Prime Minister have sufficient time to devote to the huge task of co-ordinating the affairs of such a colossal governmental structure? The remedy lies not in excluding the Prime Minister from the Cabinet Committees (in fact, it is difficult to reconcile the idea of excluding him with the responsibilities of the Prime Minister as the 'keystone of the Cabinet arch' and his responsibility to Parliament as the head of the Council of Ministers) but in allowing the Prime Minister to have more time to tackle the overall problem for which he alone is best fitted.

The truth, as Herbert Morrison (*Government & Parliament*, 1954, pp. 37-8) has observed, is that "the first and most important non-departmental Minister is the Prime Minister himself. He has many duties and plenty of work to do, but he has no departmental functions.....He is of course, eminently a co-ordinating Minister". As Atlee, himself a Prime Minister has said

While all major questions of policy are decided in the Cabinet, somebody has to see that all the major questions are brought before the Cabinet and that the Departments do not go their own way in implementing the decisions of the Cabinet. Then there must be some authority to settle the differences between the Departments or Ministers *inter se* which are inevitable inasmuch as the same problem is looked at from different standpoints by different Departments. This is the function which a Prime Minister must necessarily perform if the Cabinet system is to work successfully, and it is not possible for a Prime Minister to perform this function unless he is in touch with the affairs of every Department.

In a vast country like India with the extraordinary volume of governmental business to be transacted, the importance of this function can hardly be exaggerated. If, therefore, it becomes difficult for a Prime Minister, in the future, to act as the head of a Department as well as to act as the co-ordinator of policy, with proper justice to both the functions, it would be preferable for the Prime Minister to confine himself solely to the task of co-ordination¹⁷ and, if necessary, to convert the Cabinet Secretariat into a full-fledged Ministry of Co-ordination. Theoretically, of course, co-ordination is the task of the Cabinet itself (see p. 424, *ante*), but it is too much loaded with questions of policy to be able to attend to the work of co-ordination systematically and thoroughly."

It may be pointed that Pandit Lal Bahadur Shastri, who has succeeded Pandit Nehru as *our second* Prime Minister, in 1964, subsequent to the foregoing comments, has not taken up any portfolio. He would, therefore, be free to apply himself more fully to co-ordination.

Effect of the death or resignation of the Prime Minister.

While the resignation of other ministers merely creates a vacancy, his resignation or death dissolves the Cabinet.¹⁸ It follows that the Prime Minister can, by a personal resignation, force a dissolution of the Government.

But in either case, there is no vacuum. By constitutional practice, notwithstanding the formal dissolution of the Cabinet, the Prime Minister and his colleagues remain in office until a new ministry is constituted. If the new Prime Minister retains the Ministers of the previous Cabinet, no formal re-appointment takes place. If, on the other hand, he does not approve of any of them, he is asked to resign, failing which he is dismissed. The same thing happens with the rest of the Ministers when the Prime Minister dies.¹⁸

Thus, when Eden resigned, on grounds of health, in January 1957, his successor Macmillan replaced some of the members of the existing Cabinet, but not all.

The constitutional practice was thus explained by Baldwin when many of the Ministers of the Macdonald Cabinet were retained in the Ministry formed by him in 1933, without a formal re-appointment, and the constitutionality of the action was challenged in Parliament:

"... When a Prime Minister resigns the King, if he accepts the resignation, immediately sends for some one to carry on the Government. Everyone places his resignation in the hands of whoever is to form the Government, so as to give him a free hand to make any changes he may think desirable, but until any one or all of those resignations are *accepted* the office goes on without any break at all, and no Minister receives a seal afresh or is sworn in those circumstances, unless a change is invoked by a resignation having been accepted and some one else taking office. That is a summary of the constitutional position which has been the practice... for about 150 years or more".

In India, the position appears to be clearer. For, Arts. 74 (1) and 163 (1) provide that "there *shall* be a Council of Ministers" to advise the President and

(The Labour Party in Perspective, 1937, quoted in Herbert Morrison, *ibid.*), though the Prime Minister may, in the task of co-ordination, take the assistance of a small group of members of the Cabinet "whose specific function is co-ordinating policy and giving general direction", "the Prime Minister

is necessarily the responsible head of the Ministry", so that the Prime Minister can not relieve himself of the duty of effecting an overall co-ordination.

(18) Keith, Cabinet Government, 1952, p. 53; Jennings, Cabinet Government, 1951, pp. 72-3.

the Governor, respectively. There cannot, therefore, be any interregnum and the resigning Council of Ministers must carry on until it is replaced by another. The above provision, in effect, codifies the English principle that—

"It is essential to the parliamentary system that a Cabinet should be formed, and the Cabinet must remain until its successors have been appointed."¹⁹

The position of individual Ministers.

(A) *England*.—In *England*, though individual Ministers have a right of access to the Sovereign on matters concerning their individual departments, the convention is settled that all important communications must be made only through the Prime Minister; even on minor matters, the communications made by a Minister individually, should be made known to the Prime Minister either before or after such communication.²⁰ It would not be constitutional for the King also to deal with individual Ministers behind the back of the Prime Minister. In short, the Crown must not act in such a manner as to interfere with the collective responsibility of the Cabinet as a body to Parliament.²⁰

Though each individual Minister normally carries on the business of some Department or branch of the administration and makes decisions relating thereto; on matters of *policy*,²¹ he has to refer to the Cabinet through the Prime Minister, who exercises a general supervision over the work of all Departments. As Gladstone explained—

"The nicest of all adjustments involved in the working of the British Government is that which determines without formally defining the internal relations of the Cabinet. On the one hand, while each Minister is an adviser of the Crown the Cabinet is a unity, and none of its members can advise as an individual without or in opposition, actual or presumed, to his colleagues. On the other hand, the business of the State is a hundred-fold too great in volume to allow of the actual passing of the whole under the view of the collected Ministry. It is, therefore, a prime office of *discretion for each Minister* to settle what are the departmental acts in which he can *presume* the concurrence of his colleagues, and in what more delicate or weighty or peculiar cases he must positively ascertain it."

The individual Minister is obliged to refer matters of moment to Cabinet decision by reason of (a) the rule that important communications to the Crown can be made only through the Prime Minister; (b) the supervision of the Prime Minister, to secure the working of a unified policy through the different Departments. On this latter point, Gladstone said—

"In a perfectly organised administration, such for example was that of Sir Robert Peel in 1841-6, nothing of great importance is matured, or would even be projected, in any Department without his personal cognizance; and any weighty business would commonly go to him before being submitted to the Cabinet."

(B) *India*.—The principle of collective responsibility is embodied in *our* Constitution, in Art. 75 (3). The words 'a Council of Ministers with the Prime Minister at the head to aid and advise the President', read with the principle, shows that *our* Constitution seeks to follow the English convention, to lay down that the President is to act with the advice of the Council of Ministers as communicated through the Prime Minister, who is expressly described as the 'head' of the Council of Ministers [Art. 74 (1)], and not upon that of individual Ministers, at least in matters of importance. Of course, Art. 78 (c), *post*, suggests that an individual Minister may have access to the President on matters concerning his own department, but then, the President shall have the power of referring the question to the decision of the Council of Ministers only through the Prime Minister [see further under Art. 78, *post*]. In short, all matters of *policy* shall be an affair of the Council of Ministers and not that of individual Ministers and if an individual Minister seeks to develop a policy without approval of the Council and places the same before the President, the Prime Minister may force him to resign.²²

(19) Jennings, *Cabinet Government*, 1951, p. 50.

(20) Keith, *Constitutional Law*, p. 157.

(21) Lowell, *Government of England*, Vol. I, p. 74.

(22) Cf. Jennings, *Constitution of Ceylon* p. 82.

Analogous Provision.—Similar provision is made in Art. 164 (1) as regards Ministers in the States.

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England.*—Collective responsibility of the Cabinet to Parliament is a rule of convention. It means that the Ministers are, as a body, responsible to Parliament for the policy of the administration. The principle cannot be better explained than in the words of Lord Morley—

"As a general rule every important piece of departmental policy is taken to commit the entire Cabinet, and its members stand or fall together The Cabinet is a unit—a unit as regards the sovereign, and a unit as regards the Legislature. Its views are laid before the Sovereign and before Parliament, as if they were the views of one man."

Lord Salisbury similarly said, in 1878—

"For all that passes in Cabinet every member who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld."²³⁻²⁴

Collective responsibility does not mean that every member of the Cabinet must be present whenever a decision is taken; it means that when a decision has been taken by the Cabinet, every Cabinet Minister must vote for it *in* Parliament, and even defend it *outside* Parliament. Except when unavoidably absent, every Minister must vote for every Government proposal.²³⁻²⁴ On rare occasions, he may be allowed to abstain from voting (*e.g.*, questions relating to matters of conscience) but is never allowed to vote against a Government measure.²³⁻²⁴

In the words of Lord Salisbury, it means that—

"each member (of the Cabinet) who does not resign is absolutely and irretrievably responsible, and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues."²⁵

An essential condition of Cabinet *solidarity* is the maintenance of strict *secrecy* of what passes at a Cabinet meeting,¹ so that dissensions may not be brought to light.² The only exception is that a resigning Minister is allowed to make a personal explanation to the House without raising a debate.³

The normal convention that a Minister dissenting from the Cabinet decision on a matter of policy must resign¹ was, of course, allowed to be violated during the Coalition Government of 1932, by allowing the Liberal members of the Cabinet to disagree to the fiscal policy of the majority of the Coalition Cabinet; but the exception, which was allowed under national crisis, proved unworkable, and the dissentient members had to resign. This exception thus proves the generality of the normal convention.

While the Cabinet as a whole is responsible to Parliament for the policy of the government, the Ministers are also individually answerable to Parliament for the work of the Departments under their respective charge. When the action of a Department is criticised in Parliament, the Cabinet usually comes in support of it, so that it becomes a question of confidence in the Cabinet itself. It may happen, however, though rarely, that the Minister has acted contrary to the policy

(23-24) Keith, *British Cabinet System*, 1952, pp. 92, 95, 97.

(25) Lady Cecil, *Life of Marquis of Salisbury*, Vol. II, pp. 219-220.

(1) Jennings, *Cabinet Government*, 1951, p. 258.

(2) Keith, *Constitutional Law*, pp. 154, 156; Jennings, *Constitution of Ceylon*, p. 84.

(3) This exception is embodied in the Rules of Procedure and Conduct of Business

in our Parliament. Thus, r. 199, of the House of the People says—

"(1) A member who has resigned the office of Minister may with consent of the Speaker, make a personal statement in explanation of his resignation. . . . (4) There shall be no debate on such statement, but after it has been made, a minister may make a statement pertinent thereto."

of the Cabinet or that the conduct of the officials for which the Minister is held responsible is unjustifiable, in which case, the Cabinet *i.e.*, the Prime Minister, does not come in aid, and, as a result, the Minister concerned has to resign.⁴

It is also an established convention that the resignation of the Prime Minister entails a retirement of the entire Cabinet, though, of course, there is no bar against any individual Minister being taken into the successor Cabinet.²

(B) *Canada*.—It has already been pointed out (under Art. 74 (1), *ante*) that though the principle of Cabinet responsibility to the Legislature is not to be found anywhere in the British North America Act, it has been accepted in Canada and established by convention. Hence, on a defeat of the Cabinet in the House of Commons, the Cabinet must either resign in a body or advise the Governor-General to dissolve the House.³

The principles of Cabinet *solidarity* and secrecy are also adhered to in Canada. As soon as the Cabinet makes a decision on any question, it is the decision of every individual Minister whatever may have been his personal views on the question, and he cannot give out his views either in Parliament or to the public. While it is open to any Minister to resign at any time, yet so long as the Ministry lasts, there can be no expressed difference of opinion on any Government measure or action—there must be unanimity in the position taken in public—the Ministry must be one. Whenever a Minister disagrees with his brethren in a matter of governmental action he should resign; he cannot avoid his constitutional responsibility for every governmental action or measure taken while he is a Minister.⁶

As in England, an exception to the rule of Cabinet solidarity and secrecy is admitted when an individual Minister resigns owing to difference with his colleagues. In such a case, the practice in Canada, however, differs substantially from the English practice; for, in Canada, not only is the resigning Minister allowed to explain the reasons for his disagreement, but a *debate* is also allowed thereon, which inevitably leads to a disclosure of the inner working of the Cabinet.⁷

(C) *Fifth French Republic*.—Art. 20 of the French Constitution of 1958 provides—

"The Government shall be responsible to Parliament in the manner provided in Arts. 49 and 50."

The provisions of Arts. 49-50 are—

Art. 49—

"The Premier, after deliberation by the Council of Ministers, shall make the Government responsible before the National Assembly, for its programme or, should the occasion arise, for a declaration of general policy."

Passage of a motion of censure by the National Assembly shall automatically question the responsibility of the Government. Such a motion is admissible only if it is signed by at least one-tenth of the members of the National Assembly. The vote may not take place before forty-eight hours after the motion has been filed. Only the votes that are favourable to a motion of censure shall be counted; the motion of censure may be adopted only by a majority of the members comprising the Assembly. Should the motion of censure be rejected, its members cannot introduce another motion of censure during the same session, except in the case provided for in the paragraph below:

The Premier may, after deliberation by the Council of Ministers make the Government responsible before the National Assembly for the adoption of a particular text. In this case, this text shall be considered as adopted, unless a motion of censure, filed during the twenty-four hours that follow, is carried under the conditions provided for in the preceding paragraph.

The Premier shall have the right to request the Senate for approval of a declaration of general policy".

(4) A situation like this arose in India in 1957, when Sri Lal Bahadur Shastri, Minister for Railways, had to resign on account of Railway accidents.

(5) Dawson, Government of Canada, 1949, p. 202.

(6) Riddell. Canadian Constitution in Form and in Fact, 1923, p. 20.

(7) Dawson, Government of Canada, 1949, p. 221.

Art. 50—

"When the National Assembly adopts a motion of censure, or when it disapproves the programme or a declaration of general policy of the Government, the Premier must hand the resignation of the Government to the President of the Republic".

Under the new Constitution, thus, a Government is *obliged* to resign in one of three contingencies:

(a) When defeated by a simple majority in the National Assembly on the general programme or policy of the Government (Art. 50).

(b) Failure to carry out the passage of a Bill by the National Assembly on the text of the Bill as presented by the Government, when the Premier so insists (Art. 49, para. 3). An absolute majority is required for the success of the Government in this case.

(c) On a motion of censure on the Government's general policy, brought under the signature of at least one-tenth of the members of the Assembly (Art. 42, para. 2), and carried by an absolute majority of the members of the Assembly.

Though Art. 20 speaks of responsibility to Parliament, it is the vote of the lower Chamber, namely, the Assembly, that counts.

(D) *Eire*.—Art. 28 (4) of the Constitution of Eire, 1937, says—

"(4) 1. The Government shall be responsible to Dail Eireann. 2. The Government shall meet and act as a collective authority, and shall be collectively responsible for the Department of State administered by the members of the Government."

Art. 28 (10), again, provides—

"(10) The Taoiseach shall resign from office upon his ceasing to retain the support of a majority in Dail Eireann unless on his advice the President dissolves Dail Eireann and on the reassembly of Dail Eireann after the dissolution the Taoiseach secures the support of a majority in Dail Eireann.

(11) 1. If the Taoiseach at any time resigns from office the other members of the Government shall be deemed also to have resigned from office, but the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed."

(E) *Japan*.—The relevant Articles of the Japanese Constitution of 1946 provide—

"Article 66.—The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

Article 69.—If the House of Representatives passes a no-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign *en masse*, unless the House of Representatives is dissolved within ten (10) days.

Article 70.—When there is a vacancy in the post of Prime Minister or upon the convocation of the Diet after a general election, the Cabinet shall resign *en masse*.

Article 71.—In the cases mentioned in the two preceding articles the Cabinet shall continue its functions until the time when a new Prime Minister is appointed."

(F) *Ceylon*.—Sec. 46 (1) of the Ceylon (Constitution) Order in Council, 1946, says—

"There shall be a Cabinet of Ministers who shall be collectively responsible to Parliament."

INDIA

Cl. (3) : Collective responsibility of Council of Ministers.

This clause provides for the collective responsibility of the Council of Ministers to the popular chamber of Parliament.

(A) In *England*, each minister is responsible to Parliament for the acts and efficiency of his own department, and Parliament may sometimes insist on the resignation of an individual minister, rather than the resignation of the entire Cabinet.⁸ A motion of no-confidence against the Ministry should be distinguished from a motion of censure against a particular Minister. The former motion, if carried, leads to a resignation of the entire Ministry but the censure

(8) See instances of such individual resignation at the instance of Parliament, at p. 155 of Keith, Constitutional Law, 1939.

of an individual Minister may not necessarily be taken as a want of confidence against the entire Ministry.⁹ But, normally, a vote of censure on any one Department is regarded as a vote of censure on the entire Cabinet, unless, of course, it is a question of *personal* unpopularity, misconduct or incompetence of that particular minister.¹⁰

(B) There is no provision in *our* Constitution for the individual responsibility of Ministers to Parliament. In conformity with Art. 75 (3) of the Constitution, R. 198 of the Rules of Procedure and Conduct of Business in *our* House of the People refers to motion of no-confidence in the 'Council of Ministers' and not individual ministers. It says—

"(1) A motion expressing want of confidence in the Council of Ministers may be made subject to the following restrictions, namely:—

(a) leave to make the motion must be asked for after question and before the list of business for the day is entered upon;

(b) the member asking for leave must, before the commencement of the sitting of the day, leave with the Secretary a written notice of the motion which he proposes to make.

(2) If the Speaker is of opinion that the motion is in order, he shall read the motion to the House and shall request those members who are in favour of leave being granted to rise in their places, and if not less than fifty members rise accordingly, the Speaker shall intimate that leave is granted and that the motion will be taken on such day, not being more than ten days from the day on which leave is asked as he may appoint. If less than fifty¹¹ members rise, the Speaker shall inform the member that he has not leave of the House....."

Hence, a motion of no-confidence cannot be passed in *our* Parliament against an individual Minister. If the grant relating to a particular Ministry is refused by the House of the People or a motion of adjournment to discuss a matter of urgent public importance¹² relating to a Ministry or an ordinary motion¹² reflecting upon the conduct of a particular Minister is carried, the Council of Ministers should take it as a censure against the Council collectively, unless it reveals the personal misconduct or incompetence of a particular Minister, in which case the Prime Minister may ask that Minister to resign or advise the President to dismiss him.

'*To the House of the People*'.—These words expressly embody the *English* principle that the responsibility of the Ministry is to the lower House of the Legislature. Hence, a defeat of the Government on any measure in the Council of States shall have no effect on the tenure of the Council of Ministers and the Council shall have no power to table a motion of censure or want of confidence against the Council of Ministers.

When a Ministry is not bound to resign on adverse vote.

Sometimes, Government, while introducing a Bill, gives freedom to its own members to vote for or against the measure,¹³ because the measure is not one of *policy* to which the Government is pledged at the election. The defeat on such a measure does not lead to a resignation of the Ministry. The modern practice in England is towards a relaxation of the rigour of the old rule and the present rule may be stated to be that unless it is a question of policy, it is left to the Ministry itself whether they would consider themselves morally bound to resign upon their defeat on a motion.¹⁴ At the same time, the convention remains

(9) Cf. Keith, *Cabinet Government*, 1952, pp. 220-1.

(10) Lowell, *Government of England*, Vol. I, pp. 31, 73.

(11) The first motion of no-confidence against the Council of Ministers under the Constitution was brought in September, 1961 against the Nehru Cabinet by a Socialist Member. It was rejected because it failed to secure the support of 50 members. The Speaker observed that a vote of censure was not governed by r. 198 but a

motion of no-confidence could not be discussed unless the requirements of the Rule were satisfied.

(12) Rr. 56, 186 (iii) of the House of the People: Deb. of the Prov. Parliament, 21-3-50.

(13) In *our* Parliament, such freedom has sometimes been offered in connection with social legislation, e.g., reform of Hindu marriage laws.

(14) Keith, *Cabinet Government*, 1952, pp. 210, 215; Jennings, *Cabinet Government*, 1959, pp. 492-3.

unshaken that on a defeat on a *vital* issue,¹⁵ there are only two alternative open to a Ministry,—either to advise the Crown to dissolve Parliament or to resign.

"When it (the Cabinet) is said to be responsible to Parliament, what is meant is the convention that when their *policy*—which, as we have seen, must be joint and unanimous—is condemned by the House of Commons, they must resign. Such condemnation may be expressed in two ways: either a measure of *substantial* importance, introduced or adopted by the Government may be rejected, or a vote of censure may be carried against the Government. Resignation in the latter case is now invariable.

When a Government Bill is defeated, the modern tendency is to consider, before resigning, first whether the Bill is important or trivial, and secondly, whether the defeat registers a *considered judgment* of the Commons or is a mere accident. Where the measure is insignificant or, though important, is defeated on a 'snap' division, modern practice has to some extent relaxed the rigour of the old rule which required resignation to follow upon the defeat of any Government measure whatever."¹⁶

The fall of a Government may, however, be brought about by defeating an important Government Bill, involving a question of policy or by passing a motion of censure or want of confidence.¹⁷ Any such situation can, however, rarely happen if the Government belongs to a party which has a substantial majority.¹⁸

While a vote of no-confidence and a refusal of supply invariably leads to resignation¹⁹ and an amendment to the 'Opening speech' is regarded as a vote of no-confidence, it is not so in other cases. Though it is not possible to generalise, it may be said that it is at the option of the Government not to resign—

(a) Where the defeat takes place on a Private Member's motion, as distinguished from a Government motion;¹⁹

(b) Where the defeat relates to a matter which does not involve a substantial issue of policy;²⁰

(c) Where the defeat is on a 'snap vote'.²⁰⁻²¹

'*Snap Vote*'.—A snap vote is a vote against some Government measure which is adverse to the Government only because of some misunderstanding or accidental absence of Government supporters. By such a vote "the Government is caught napping", and the confidence of the House against the Ministry is not understood to be in question by such a vote and the Ministry does not resign on such an adverse vote.²⁰

Of course, if the Opposition realises its strength upon a 'snap' vote, it will lose no time to bring a direct motion of censure so as to cause a fall of the Ministry. On the other hand, if the Government is sure of its success, it may itself bring a resolution of confidence.²¹

(15) E.g., failure to pass the Finance or Appropriation Bill. (Instances of resignation on defeat on a vital issue are to be found in Keith, *Cabinet Government*, 1952, pp. 216-7).

(16) Chalmers & Hood Phillips, *Constitutional Law*, p. 198.

(17) As to the procedure in India on a motion of no-confidence, see under Art. 118, *post*.

(18) In 1940, Chamberlain resigned even after a vote of censure brought against his ministry had failed, because the majority in favour of the ministry was so small that he did not consider himself morally justified to carry on [Jennings, *Cabinet Government*, 1948, p. 445].

(19) Jennings, *Cabinet Government*, 1959, p. 493-7.

(20) An (29th March, 1950) example of the Government refusing to resign on an adverse vote is the refusal of Mr. Attlee to resign on the defeat of the Government on a motion to adjourn the House at the end of the debate on fuel and power (by 26 votes).

Commenting that it was not a 'major occasion' and that the Government would not regard it as a vote of censure, Mr. Attlee said—"Having regard to the present composition of the House, there would always be the possibility that the Government would be defeated in a particular debate. The Government would have to be on the watch all the time because the Opposition could always direct an attack. Everything had been admirably arranged by the Opposition, and their "troops" had been more or less in ambush. Not many of them, had been in the House early in the evening, but just before they decided to press for a vote large number turned up. Government members should have been present in full strength but they were not. The Opposition had scored a success"—[*Vide Statesman*, Calcutta 30-3-50]. The refusal of the Labour Government led by Mr. Wilson to resign, in July, 1965, after successive defeats on the finance Bill, is another instance where the Government treated the occasion as a 'minor' occasion.

(21) Munro, *Governments of Europe*, p. 106.

Duty to carry on after resignation.

Though a Cabinet has to resign immediately after defeat in the lower House on a vital issue (unless it is followed by a dissolution), it does not necessarily mean that they must go out of office at once, before another Ministry can be physically constituted and is ready to take over. "The King's service must be carried on", as the Duke of Wellington said, and a vacuum cannot be allowed to be created in the national administration. In practice, therefore, the outgoing Ministry remains in office until the new Cabinet is sworn in. In the case of death of a Prime Minister, the other Ministers thus carry on until the formation of the new Cabinet.²²

As to the application of this principle in India, see p. 451, *ante*.

Analogous Provision.—Corresponding provision for collective responsibility of State Ministers is made in Art. 164 (2).

CLAUSE (4).

Oath of Secrecy.

It has already been pointed out (p. 453, *ante*) that strict secrecy is an essential principle of the Cabinet system in *England* and also that the obligation to maintain secrecy binds even the members of previous Cabinets. The need for secrecy is obvious, *viz.*, that free and frank discussion of the policies at the highest level would not be possible unless the Ministers work as a team and their individual views are prevented from being given publicity. The principle also follows from the confidential nature of the advice given by Ministers to the head of the Executive [*cf.* Art. 74 (2)].

The need for secrecy has been felt also in other countries where the Cabinet system has been introduced. Thus, in the *Fourth French Republic*, it was provided by the Rules relating to the conduct of business in the Council of Ministers:

"Secrecy of the deliberations constitutes a state obligation which engages the honour of all present at meetings of the council of Ministers."²³

In *England*, the secrecy has got its formal sanction in the oath of secrecy which every Privy Councilor has to take—not to publish information 'obtained in the service of the Crown'.

Under *our* Constitution, the oath is to be taken by members of the Council of Ministers as such and the form is provided by the Third Schedule (II) of the Constitution (see *post*), which embodies the English principles. It covers the secrecy both of—

- (a) matters brought under the consideration of a Minister, and
- (b) information obtained by him as a Minister.

No such matter can be disclosed to any other person, 'except as may be required for the due discharge of my duties as a Minister'.

There is, of course, the Official Secrets Act (XIX of 1923), as in *England*, to provide legal sanction to prevent disclosure of 'official information', but it may not cover the disclosure of the *views* of individual Ministers, for which it is the *moral* sanction of the Oath which is operative. But as *Jennings* observes, it is the 'weight of tradition', more than any sanction, which ensures the strict observance of this principle of secrecy in *England*, and this tradition should be built up in *India*.

CLAUSE (5).

OTHER CONSTITUTIONS

(A) *England*.—There is no legal fetter upon the Crown's prerogative in the matter of selection of its Ministers.

(22) Keith, *British Cabinet System*, 1953, p. 53.

(23) *Finer, Theory and Practice of Modern Government*, 1954, p. 644.

It has been settled by usage that every member of the Cabinet must be a member of either House of Parliament.²⁴ There is, however, no rule of law²⁵ that a Minister, at the very time of his appointment, must be a member of Parliament, nor is there any definite time limit within which he is to become a member. So, sometimes a person is included in the Cabinet in the expectation that he will win a seat at the impending dissolution¹ or bye-election. A bye-election is sometimes created by inducing some member of the House of Commons to vacate his seat in order to make way for the newly appointed Minister.² The Minister may otherwise be created a peer and given a seat in the House of Lords.

(B) *Australia*.—The third paragraph of Sec. 64 of the Australian Constitution Act says—

“ no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.”

(C) *South Africa*.—Sec. 14 of the South Africa Constitution Act, 1909 made a provision exactly similar to that in Sec. 64 of the Australian Constitution Act.

(D) *Canada*.—There is no statutory prohibition against a non-member becoming a Minister. But by convention, he must, within a reasonable time, become a member of either House of Parliament, or resign.³

(E) *Eire*.—There is no scope for any provision corresponding to the present clause of *our* Constitution, in the Constitution of Eire, for Art. 28 (7) of the Constitution lays down that all Ministers must be members of either Chamber of Legislature.

(F) *Fifth French Republic*.—A rule contrary to that embodied in the present clause of *our* Constitution has been adopted in Art. 23 of the 1958 Constitution of France, which says—

“The functions of member of the Government shall be incompatible with the exercise of any parliamentary mandate
An organic law shall determine the conditions under which the holders of such mandates shall be replaced.”

As a result of this provision, as soon as a member of Parliament becomes a Minister, his seat in Parliament is vacated, for the remainder of the life of that Parliament. The provision also facilitates the appointment of a Minister from outside Parliament, including even a Government servant,⁴ for any length of time.

(G) *West Germany*.—Under the West German Constitution of 1949, the Prime Minister (Federal Chancellor) is elected by the *Bundestag* (lower House of Parliament), on the proposal of the President. It is not likely that *Bundestag* would accept one as the Chancellor who is not its member. But the other Ministers are appointed by the President on the proposal of the Chancellor (Art. 64). There being no condition in the Constitution that such Ministers must be members of Parliament, there is no bar to the Chancellor's selecting a Minister from outside Parliament.

Specific provision is made in Art. 68 (3) for continuance, after termination of the office of a Minister—

(24) Keith, *British Cabinet System*, 1952, p. 41; Jennings, *Cabinet Government*, 1948, p. 53.

(25) Thus, in 1940, when Ernest Bevin was appointed a Minister, he was not a member of Parliament, but a constituency was soon found to get him elected. Usually, the choice of a Minister from outside Parliament means the resignation of a sitting member to create a vacancy for the Minister to get himself elected. The choice of a Minister from outside Parliament is, therefore, resorted to in exceptional circumstances, to enlist the services of an out-

standing person. [For instances of persons being appointed from outside Parliament, see Jennings, *Cabinet Government*, 1959, p. 60].

(1) Lowell, *Government of England*, Vol. I, p. 61.

(2) Munro, *Governments of Europe*, 1947, p. 88.

(3) Riddell, *The Canadian Constitution in Form and in Fact*, 1923, pp. 22, 27; Dawson, *Government of Canada*, 1949, p. 302n.

(4) Of course, he shall have to give up his service after being appointed a Minister.

"At the request of the federal President, the federal Chancellor, or at the request of the federal Chancellor or of the federal President, a federal Minister is *bound* to continue to transact the business of his office until the appointment of a successor".

(H) *Ceylon*.—Sec. 49 (2) of the Order in Council provides—

"A Minister . . . who for any period of four consecutive months is not a member of either Chamber shall, at the expiration of that period, cease to be a Minister . . . as the case may be."

(I) *Government of India Act, 1935*.—Sec. 10 (2) of the Act of 1935 was exactly similar to Art. 75 (5) of our Constitution.

INDIA

Minister's Membership of Parliament.

This clause (taken from Sec. 10 (2) of the Government of India Act, 1935), provides that there is no bar to a person who is not a member of Parliament to become a Minister. But if he does not get a seat within 6 months from the date of his appointment as Minister, he shall cease to be a Minister. It enables an efficient man from outside the Parliament to enter into the Cabinet, and 6 months' time is given to enable him to get himself elected by the people from any constituency. Or, if he is an eminent man of art or science who is useful to the Government but is unwilling to take the trouble of facing an election, Government may nominate him to be a member of the Council of States [Art. 80 (1) (a)], in any vacancy that may take place within the period of 6 months.⁵

This provision also enables a Ministry to hold office after the Legislature is dissolved until the next election is held and the successor Ministry comes to office.⁶⁻⁷

Analogous Provision.—Similar provision is made in Art. 164 (4), as regards Ministers in the States.

CLAUSE (6).

OTHER CONSTITUTIONS

England.—Since 1964, the Prime Minister gets a salary of £14,000/⁸ per annum; the Lord Chancellor (as the head of the Judiciary and of the House of Lords) gets £10,000/- (but gets no remuneration as member of the Cabinet). The salaries of the other Ministers, under the Ministers of the Crown Act, 1937, varies from £1,000/- to £5,000/-, according to the departmental offices held by them.

INDIA

Salaries of Ministers.

Under the *Government of India Act, 1935*, the Legislature might determine the salaries of ministers from time to time, but the salary of a minister could not be varied during his term of office [Sec. 10 (3), proviso]. There is no bar to such variation under the Constitution, for, Ministers shall get only such salaries as Parliament may 'from time to time' determine.

Again, under the Act of 1935, the salaries of Ministers were non-votable, being charged on the revenue of India [Sec. 78 (3) (c)]. But under the Constitution, the salaries of Ministers are open to the vote of Parliament, not being included in the list in Art. 112 (3). In fact, ministerial responsibility to Parliament could not have been effective, had the Ministers been made immune from Parlia-

(5) This took place in the case of C. Rajagopalachari in making him the Chief Minister of Madras, after the general election in 1952.

(6) Art. 68 (3) of the West German Constitution specifically provides for this.

(7) An extreme application of this provision took place when Sardar Gian Singh Rarewala, Chief Minister of Pepsu, refused to resign after being unseated by the Election Tribunal [*Statesman*, Calcutta, 24-2-53, p. 1].

(8) *Statesman*, 18-11-64.

mentary cut and reduction,—which is a useful means of expressing disapproval of any action or administration of the department in charge of a particular minister.”

Legislation by Parliament.—Salaries of Ministers Act (LVIII of 1952) fixes the salaries and allowances of Ministers and Deputy Ministers. When a Member of Parliament is appointed Minister, he gets salary as ‘Minister’ under the Act; he cannot also claim the salaries and allowances payable to a member of Parliament.

Analogous Provision.—Art. 164 (5) makes similar provision as regards Ministers in the States.

INDEX TO COMMENTS.

ARTICLE 75.

Clause (1).

Other Constitutions :

(A) England, 438; (B) Canada, 439; (C) Eire, 440; (D) Fifth French Republic, 440; (E) West Germany, 440; (F) Japan, 440.

India :

Appointment of Prime Minister, 441; Analogous Provision, 441; Council of Ministers and the Cabinet: (A) England, 441; (B) Canada, 442; (C) Australia, 442; (D) India, 442.

Clause (2).

Other Constitutions :

(A) England, 444; (B) Australia, 445; (C) Canada, 445; (D) Fifth French Republic, 445; (E) West Germany, 446; (F) Japan, 446; (G) Ceylon, 446; (H) Government of India Act, 1935, 446.

India :

President's power of dismissal:

I. The power to dismiss the Prime Minister: (A) England, 447; (B) Government of India Act, 1935, 447; (C) India, 447.

II. The power to dismiss other Ministers individually, 448.

Resignation of Ministers, 448; Position of Prime Minister in the Cabinet: (A) England, 449; (B) Canada, 449; (C) India, 449; Effect of death or resignation of Prime Minister, 451; The position of individual Ministers, 452.

Clause (3).

Other Constitutions :

(A) England, 453; (B) Canada, 454; (C) Fifth French Republic, 454; (D) Eire, 455; (E) Japan, 455; (F) Ceylon, 455.

India :

Collective responsibility of Council of Ministers, 455; ‘To the House of the People’, 456.

When a Ministry is bound to resign on adverse vote, 456; ‘Snap vote’, 457; Duty to carry on after resignation, 458.

Analogous Provision, 458.

Clause (4).

Oath of secrecy, 458.

Clause (5).

Other Constitutions :

(A) England, 458; (B) Australia, 459; (C) South Africa, 459; (D) Canada, 459; (E) Eire, 459; (F) Fifth French Republic, 459; (G) West Germany, 459; (H) Ceylon, 460; (I) Government of India Act, 1935, 455.

India :

Ministers' membership of Parliament, 460; Analogous Provision, 460.

Clause (6).

Other Constitutions :

England, 460.

India :

Salaries of Ministers, 460; Legislation by Parliament, 461; Analogous Provision, 461.

The Attorney-General for India

76. (1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such

(9) Lowell, Government of England, Vol. I, p. 347.

other duties of legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

OTHER CONSTITUTIONS

(A) *England*.—The Attorney-General of England is the chief Law Officer of the Crown, the others being the Solicitor-General and the Law Officers for Scotland and Northern Ireland.

Usually, the Attorney-General is appointed from amongst members of Parliament, or, if an outsider is appointed, a seat is secured for him, but there have been exceptional cases of an Attorney-General having no seat.¹⁰ An Attorney-General is invariably a member of the Ministry but in exceptional cases, he has been taken into the Cabinet.¹¹⁻¹³

The appointment is *political* and is generally conferred on a successful barrister being a supporter of the party in power. Consequently, the office changes with every change in the Government.

He receives a high salary (£10,000 a year), but *is not allowed private practice*.¹¹ He represents the Crown in the Courts in all matters in which the rights of a public character come into question, and is, therefore, the representative and legal adviser of all public departments which have capacity to sue and be sued, as well as all departments which have no such capacity.

The Attorney-General is the head of the English Bar and as such has precedence over all King's counsel. But in the Courts, he is not entitled to any more authority than any other member of the Bar.¹⁴ Almost invariably, he is a member of the House of Commons and has charge in the House of Commons of legal measures and deals with legal questions on behalf of the Government. The Courts have no power to compel the Attorney-General to be examined as a witness.¹⁵

In relation to legal proceedings, the functions of the Attorney-General may be summarised as follows:

(i) He represents the Crown in legal proceedings. Admissions made by the Attorney-General bind the Crown as to matters of fact, but not on matters of law.

(ii) He prosecutes for the Crown in criminal and revenue cases. Though prosecutions are actually initiated by a Director of Public Prosecutions, he acts under the superintendence of the Attorney-General, who acts as a safeguard to the citizen that the Government's power to prosecute is not abused for political ends.¹⁶

(iii) The Attorney-General may stay a criminal prosecution, at his discretion, by *nolle prosequi*. It can be entered even after verdict.¹⁷

(10) Sir William Jowitt was Attorney-General in 1931, without having a seat until he resigned.

(11) Halsbury, 3rd Ed., Vol. 7, pp. 381, 385.

(12) E.g., Sir Rufus Isaacs (afterwards Lord Reading)—(1912); Sir Douglas Hogg (afterwards Lord Hailsham)—(1924).

(13) But views have been expressed, from time to time, that the Attorney-General should not be in the Cabinet or associated with the policy-making function and should

not, at least, be influenced by the dictates of the Cabinet in matters involving legal opinion, such as the institution or withdrawal of prosecution [vide MacDermott, *Protection from Power*, 1957, p. 32; Keeton, *Trial by Tribunal*, 1960, pp. 182, 188-9].

(14) *A. G. v. Crossman*, (1866) L.R. Ex. 381.

(15) *A. G. v. Brown*, (1818) 1 Swan 265.

(16) MacDermott, *Power to Prosecute*, 1957, pp. 25, 33.

(17) *R. v. Leatham*, (1861) 7 Jur. (N.S.) 674.

(iv) He is the chief legal adviser of the Crown. He advises the Government Departments on legal points; and any Government Department may call upon the Attorney-General to advise it on any legal question and the legal implications of policy programmes and to represent it in any litigation in which it may be involved.

(v) His fiat is necessary for commencement of certain legal proceedings where the public are concerned, e.g., proceedings under the Coinage Offences Act, Incitement to Disaffection Act, Public Order Act, Official Secrets Act, etc., proceedings for revocation of a patent.

(vi) He is a necessary party to the assertion of public rights even where the moving party is a private individual. The Attorney-General, as representing the Crown, can be sued in equity for a declaration of right.¹⁸

(vii) He may also intervene in legal proceedings where the Crown or the public are interested, e.g., in proceedings relating to the administration of charities, even though the mover is a private individual.¹⁹ He is the only person charged with the duty of representing the public interest where public rights are at stake.

(viii) He can apply for an injunction against misuse of trade union funds, under the Trade Disputes and Trade Unions Act, 1927.

(B) U.S.A.—The Attorney-General is the chief legal officer of the Federal government and performs functions similar to those of the Attorney-General of England, such as prosecution, supervision of enforcement of federal laws, furnishing of legal advice to Government²⁰ agencies, departments and the President. He represents the United States in matters involving legal questions, and appears in the Supreme Court in cases of importance.²¹

(C) Australia.—The office of the Attorney-General follows the British model. The Attorney-General of the Commonwealth is usually a member of the Cabinet.²²

(D) Canada.—The Attorney-General of the Dominion is a member of the Cabinet, being the Minister of Justice.²³ Since 1945, he combines in himself the office of the Solicitor-General. Ss. 2-5 of the Department of Justice Act are as follows—

"2. (1) There shall be department of the Government of Canada called the Department of Justice over which the Minister of Justice of Canada appointed by commission under the Great Seal of Canada shall preside.

(2) The Minister of Justice is *ex officio* Her Majesty's Attorney-General of Canada, holds office during pleasure and has the management and direction of the Department of Justice. R.S., c. 106, s. 2.

3. (1) The Governor in Council may also appoint an officer called the Deputy Minister of Justice to hold office during pleasure.

(2) The Deputy Minister of Justice is *ex officio* the Deputy Attorney General.

(3) Such other officers, clerks and servants as are necessary for the proper conduct of the business of the Department, shall be appointed in the manner authorised by law. R.S., c. 106, s. 3; 1949 (2nd Sess.), c. 4, s. 1.

4. The Minister of Justice shall

(a) be the official legal adviser of the Governor-General and the legal member of Her Majesty's Privy Council for Canada;

(b) see that the administration of public affairs is in accordance with law;

(c) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;

(d) advise upon the legislative Acts and proceedings of each of the legislatures of the provinces of Canada, and generally advise the Crown upon all matters of law referred to him by the Crown;

(e) have the superintendence of the penitentiaries and the prison system of Canada;

(f) be charged generally with such other duties as are at any time assigned by the Governor in Council to the Minister of Justice, R.S., c. 106, s. 4.

5. The Attorney-General of Canada shall

(a) be entrusted with the powers and charged with the duties that belong to the office of the Attorney-General of England by law or usage, so far as those powers and duties are

(18) Halsbury, Hailsham Ed., Vol. VI, pp. 666-8.

(19) *London C. v. A. G.*, (1902) A.C. 165.

(20) Ferguson, *American System of Government*, p. 783.

(21) Beard, *American Government and*

Politics, 1939, p. 194; Zink, *Government and Politics in the U.S.A.*, p. 430.

(22) *Official Year Book of Australia*, 1960, p. 75.

(23) *The Role of Crown Counsel*, (1962) 50 *Canadian Bar Review*, 439 (441, 444).

applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the British North America Act 1867, came into effect, so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada ;

(b) advise the heads of the several departments of the Government upon all matters of law connected with such departments ;

(c) be charged with the settlement and approval of all instruments issued under the Great Seal of Canada ;

(d) have the regulation and conduct of all litigation for or against the Crown or any public department, in respect of any subject within the authority or jurisdiction of Canada ;

(e) be charged generally with such other duties as are at any time assigned by the Governor-in-Council to the Attorney-General of Canada. R.S., c. 106, s. 5."

(E) *New Zealand*.—Under s. 12 of the Civil List Act, 1908, either a member of the Governor's Executive Council or an outsider may be appointed Attorney-General, provided he is a barrister:

"(1) It shall be lawful for the Governor, in the name and on behalf of His Majesty, from time to time to appoint, by Commission under the Seal of New Zealand, a fit and proper person, being a barrister of the Supreme Court, to be His Majesty's Attorney-General for New Zealand, and such person shall hold office during pleasure.

(2) Any such person may be appointed to the office of Attorney-General, whether he is not a member of the Executive Council, or is or is not the holder of a seat in either House of Parliament.

(3) If the Attorney-General is a member of the Executive Council, he shall be entitled to the salary and allowances of a member of the Executive Council holding Ministerial office.

(4) If the Attorney-General is not a member of the Executive Council, he shall be paid an annual salary at such rate as is from time to time appropriated by Parliament."

(F) *Government of India Act, 1915*.—S. 114 of the Act of 1919 was as follows:

"(1) His Majesty may by warrant under his Royal Sign Manual appoint an Advocate-General for each of the Presidencies of Bengal, Madras and Bombay.

(2) The Advocate-General for each of those Presidencies may take on behalf of His Majesty proceedings as may be taken by His Majesty's Attorney-General in England."

(G) *Government of India Act, 1935*.—S. 16 of the Act was as follows—

"(1) The Governor-General shall appoint a person, being a person qualified to be appointed a Judge of the Federal Court, to be Advocate-General for the Federation.

(2) It shall be the duty of the Advocate-General to give advice to the Federal Government upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Governor-General, and in the performance of his duties he shall have right of audience in all courts in British India and, in a case in which federal interests are concerned, in all courts in any Federated State.

(3) The Advocate-General shall hold office during the pleasure of the Governor-General and shall receive such remuneration as the Governor-General may determine.

(4) In exercising his powers with respect to the appointment and dismissal of the Advocate-General and with respect to the determination of his remuneration, the Governor-General shall exercise his individual judgment."

INDIA

Source of Art. 76.

This article corresponds to sec. 16 of the Government of India Act, 1935, changing the name 'Advocate-General' to 'Attorney-General', and omitting subsec. (4) which made the appointment and dismissal of the Advocate-General a matter of 'individual judgment' of the Governor-General.

History of the office of Attorney-General in India.

In order to appreciate the position of the Attorney-General for India under Art. 76 of our Constitution we should go back to the office of the Advocate-General for the Federation created by section 16 of the Government of India Act, 1935. That office, again, may be traced from the office of the Advocate-General which was created for each of the three Presidencies of Bengal, Madras and Bombay by section 114 of the Government of India Act, 1915.

I. Prior to 1915 there was no such office in India. The legislative business of the Government was in charge of a Law Member of the Governor-General's Executive Council.

II. It will appear from s. 114 of that Act (p. 464, *ante*) that the original idea of having an Advocate-General in each of the three Presidencies was only to have a lawyer to represent the Crown in the superior Courts and to perform connected functions, for example, to give sanction for prosecutions (or their withdrawal) and similar legal proceedings. Though the functions in connection with legal proceedings were to be the same as that of the Attorney-General in England, the other part of the functions of the Attorney-General was not envisaged in the Government of India Act, 1915, *viz.*, the function of giving *legal advice* to the Crown or the Governor of the Presidency to which the Advocate-General was appointed.

III. The Government of India Act, 1935, while retaining the office of the Advocate-General for a Province (s. 55), introduced the office of an Advocate-General for the Government of India (s. 16; see p. 464, *ante*).

III. It is in the Government of India Act, 1935, for the first time, that the Advocate-General was statutorily required to give *legal advice* to the Government. In this respect the functions of the Advocate-General of a Province were also enlarged by inserting sub-section (2) in section 55 which was similar to sub-section (2) of section 16, just quoted. The reason why this function was added was that in the three Presidencies, though the provisions of the Act of 1919 were somewhat restricted, the Advocate-General was being *in fact* consulted on matters requiring legal advice. The Act of 1935 gave a statutory recognition to that practice. In this context it would be profitable to reproduce the observations of the Report of the Joint Parliamentary Committee (paragraph 400)—

"We have been impressed by the desirability of making available to each Provincial Government the services of a Law Officer of *independence and standing*, who would occupy substantially the same position as that of the Advocate-General at present attached to the Governments of each of the three Presidencies of Bengal, Madras and Bombay. Section 114 of the Government of India Act, 1919 enables His Majesty to appoint by warrant an Advocate-General for each of those Presidencies, but defines his functions no more explicitly than by providing that each Advocate-General may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England. We are informed however, that *in practice*, the functions of the Advocate-General may be briefly described as being to *advise the Provincial Government of any legal problem* which may be referred to him, to represent the Crown in original causes in the High Court to which the Crown is a party, and also in any criminal appeals in the High Court which are regarded as of special importance; while instances of his power to take such proceedings as may be taken by the Attorney-General here are his power to enter a *nolle prosequi* or to grant a fiat for review of verdict in criminal cases tried by the High Court in its Original Jurisdiction and to protect public rights in such matters as public charities and public nuisances."

But though the function of advice was thus added to that of the Advocate-General, still the Act of 1935 did not make that office a *political* one as in England.

(a) The Advocate-General of a Province, thus, was not a member of the Council of Ministers and even in the matter of his appointment, though ministerial advice would be taken, the Governor had an overriding power inasmuch as he was required to exercise "his individual judgment" as regards the appointment or dismissal of the Advocate-General. As to why the office was not made a political office even after the introduction of the responsible system of Government, the Joint Parliamentary Committee observed as follows (Report, para. 401)—

"It is no part of our intention to suggest that the office of Advocate-General should, like that of the Law Officer here, have a *political side to it*; indeed our main object is to secure for the Provincial Government legal advice from an officer not merely well qualified to tender such advice but *entirely free from the trammels of political or party associations*, whose salary would not be votable and who would retain his appointment for a recognized period of years *irrespective of the political fortunes of the Government or Governments with which he may be associated during his tenure of office*. We think, in particular, that the existence of such an office would prove a valuable aid to a Ministry in deciding the difficult questions which are not infrequently raised by those prosecutions which require authority of Government after

initiation though we recognize that the responsibility for decision in these matters must of necessity rest in the last resort on the Government itself."

In the course of the debate on the Government of India Bill the non-political complexion was again referred to in justification of the Governor's individual judgment with regard to the appointment and dismissal of the Advocate-General—"It is because we are alive to the importance of the Joint Select Committee's recommendations that this matter should not have a political complexion and, therefore, should be a matter within the competence of successive Governors that we have provided that the Governor shall have the final word". (Parl. Deb. Vol. 299, c. 1288).

(b) The two aspects referred to above were also explained in Parliament in connection with the office of the Advocate-General for the Federation thus—

"No doubt he will perform functions performed by Law Officers here, but he will *have no political affiliation with the Ministry*, and so far as Ministers require a Law Officer in the political sense, that is to say, a man who will assist them in their Bills and political work, *he will not be an Advocate-General* but a different individual who will assist them in the Parliamentary work. Both Hon'ble Members are right in saying that the Advocate-General will be the Adviser of the Federal Government but, of course, *the Federal Government includes the reserved departments and therefore he will advise Governments and councils on those reserved departments with which the Ministry will not be concerned*.

There is another matter which is of importance. It being provided that this office will go on even though responsible Government may change, it is, of course, of the utmost importance that the person selected for it should be a person who will command *the confidence of successive Governments*. We do not anticipate that conflict will always or necessarily ever arise but having regard to those two facts. First, it will advise as to the reserved departments, and, secondly, that it is of vital importance that we should have a man who will command the confidence of successive Ministries, we have provided that the *Governor-General will have the controlling voice in the unfortunate circumstances of any difference arising as to who should be appointed to the office.*"

From the preceding excerpts it is abundantly clear that the major consideration which guided the framers of the Act of 1935 in making the office of the Advocate-General a non-political one, was that he was to be a legal adviser not only in the ministerial field but also as regards the reserved department of the Governor-General, or functions which a Provincial Governor might have to perform in his discretion or individual judgment. It was also said that there were some political prosecutions for which an independent advice should be available to the Governor, uninfluenced by political considerations. All this led the framers of the Act of 1935 to conclude that the Advocate-General should not only be outside the Council of Ministers but also independent of control by Ministers as regards his tenure.

But even though the makers of the Government of India Act, 1935 departed from the English model in divorcing the office of the Advocate-General from the Government of the day and the Legislature, the need for the presence of the Advocate-General in the Legislature was, nevertheless, felt from the earliest times. In the Government of India Act, 1919, there was no direct provision in this behalf but, in practice, the Advocate-General was nominated to the Assembly so that his services might be available there. This practice, again, was codified by the framers of the Act of 1935, in s. 21 (and s. 64 as regards Provincial Advocate-General) as follows:—

"Every Minister, Counsellor and the Advocate-General of India shall have the right to speak in, and otherwise to take part in the proceedings of either Chamber, any joint sitting of the Chambers, and any committee of the Legislature of which he may be named a member, *but shall not by virtue of this article be entitled to vote.*"

The Act of 1935 thus made a compromise by advancing a step forward towards the British model by making the Advocate-General available in the Legislature and allowing him to participate in the debate.

IV. When the Constitution was drafted, the provisions regarding the office of the Attorney-General were borrowed from section 16 of the Government of India Act, 1935, with some alterations. As regards functions, it is to be noted that clause (2) of Article 76 practically reproduces sub-section (2) of section 16 of

the Government of India Act, 1935 and so does Article 88 reproduce s. 21 of the Act of 1935.

Substantial difference is, however, to be seen in the omission of sub-section (4) of s. 16 of the Act of 1935 which empowered the Governor-General to act in the exercise of his individual judgment in the matter of appointment or dismissal of the Advocate-General. [A similar provision has also been omitted from Art. 165 which relates to the Advocate-General of a State, even though Art. 163 (1) envisages some functions of the Governor to be exercised 'in his discretion'].

It thus appears that it can no longer be said that the Attorney-General or an Advocate-General is independent of ministerial control as an Advocate-General was before the Constitution. Since there is no function which the President may under the Constitution exercise in his individual judgment, it is evident that in appointing the Attorney-General under Art. 76 (1) the President will act on ministerial advice and so also in the matter of removal under cl. (4) of Art. 76.

The qualifications for the office of Attorney-General are the same as those for appointment as a Judge of the Supreme Court [see Art. 124 (3)].

Cl. (2) : Duties of the Attorney-General.

The President has, under the present clause, made the following rules as to the remuneration and duties of the Attorney-General (as well as of the other Law Officers):²⁴

"1. These rules may be called the Law Officers (Appointment and Conditions of Service) Rules, 1961.

2. In these Rules:—

(a) "Attorney-General" means the person appointed under clause (1) of article 76 of the Constitution to be the Attorney-General for India, and includes any person appointed to act as the Attorney-General for India during the period of leave of the permanent incumbent of that office.

(b) "Law Officer" means the Attorney-General, the Solicitor-General for India or the Additional Solicitor-General for India.

(2) A person who holds office as a Law Officer will, on the expiration of his term, be eligible for reappointment to that office.

4. (1) The headquarters of a Law Officer will be at New Delhi.

(2) A Law Officer may leave his headquarters during the vacations of the Supreme Court, provided that he shall make himself available for duties whenever required by the Government of India.

5. It shall be the duty of the Law Officer—

(a) to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Government of India;

(b) to appear, whenever required, in the Supreme Court or in any High Court on behalf of the Government of India in cases (including suits, writ petitions, appeals and other proceedings) in which the Government of India is concerned as a party or is otherwise interested;

(c) to represent the Government of India in any reference made by the President to the Supreme Court under article 143 of the Constitution; and

(d) to discharge such other functions as are conferred on a Law Officer by or under the Constitution or any other law for the time being in force.

6. (1) For the performance of the duties mentioned in rule 5, a Law Officer will be paid—

(a) a retainer—

(i) in the case of the Attorney-General of rupees four thousand per month;

(ii) in the case of the Solicitor-General for India of rupees three thousand and five

hundred per month; and

(iii) in the case of the Additional Solicitor-General for India, of rupees three thousand per month.

(b) an office allowance of rupees thirty-five per month except during the period of his leave;

(c) a daily fee of rupees nine hundred and sixty (rupees nine hundred in the case of the Additional Solicitor-General for India) for the days of his absence from the headquarters in connection with appearance in any High Court on behalf of the Government of India (irrespective of the number of cases in which he may have to appear on any day), including the days of departure from, and arrival back at, the headquarters; and

(24) Notification of 1961, replacing the Rules Made in 1950.

- (d) costs awarded to the Government of India in respect of fees payable to a Law Officer in cases before the Supreme Court in which the Law Officer appears on behalf of the Government of India, if recovered.

Explanation:—For the purposes of clause (c), days of appearance before the Circuit Bench of the Punjab High Court at Delhi shall be deemed to be days of absence from the headquarters.

(2) Where a Law Officer is required, otherwise than under clause (c) of sub-rule (1), to leave headquarters in the performance of his duties for the Government of India, travelling and other allowances on the scale admissible to a Judge of the Supreme Court on tour will be paid to the Law Officer for journeys necessary to perform in the course of such duties.

7. The services of personal staff, office accommodation and telephones at the office and residence of a Law Officer will be provided by the Government of India free of cost.

Explanation:—For the purposes of this rule "personal staff" means—

(i) in the case of the Attorney-General, a Private Secretary, a stenographer and a Jamadar;

(ii) in the case of the Solicitor-General for India, a Private Secretary and a Jamadar; and

(iii) in the case of the Additional Solicitor-General for India, a Stenographer and a Jamadar.

8. (1) A Law Officer shall not—

(a) advise or hold briefs against the Government of India;

(b) advise or hold briefs in cases in which he is likely to be called upon to advise, or appear for, the Government of India;

(c) defend accused persons in criminal prosecutions without the permission of the Government of India; or

(d) accept appointment as Director in any company or corporation without the permission of the Government of India.

(2) In the event of a conflict between a private brief and a brief of the Government of India in the Supreme Court, the Law Officer shall give preference to the brief of the Government of India."

It appears from rule 8, above, that, unlike in England,²³ private practice is not prohibited in India, but *our* Attorney-General is only prohibited to do any of the acts enumerated in rule 8, which are adverse to the interests of the Government of India. The Attorney-General and after him the Advocate-General of a State shall have precedence over all other Advocates. The Supreme Court has the right to issue¹ notice of any proceedings to the Attorney-General and the latter may also apply to be heard in any proceedings.

"The Attorney-General for India or the Advocate-General of any State may apply to be heard in any proceedings before the Court, and the Court may, if in its opinion the Justice of the case so requires, permit the Attorney-General for India or the Advocate-General so applying to appear and be heard, subject to such terms as to costs or otherwise as the Court may think fit."

Other functions of the Attorney-General under the Constitution.

Under Art. 88, *post*, the Attorney-General has the right to speak (but not to vote) in either House of Parliament or in any Committee of which he may be named a member, and, by virtue of his office, he is entitled to the privileges of a member of Parliament [Art. 105 (4), *post*].

Other functions under ordinary law.

O. XXVIA of the Civil Procedure Code now provides that in any suit if it appears to the Court that any substantial question as to the interpretation of the Constitution is involved (*i.e.*, such a question as is referred to in Art. 132 (1) read with Art. 147), the Court shall not proceed to determine that question until after notice has been given to the Attorney-General if the question concerns the Central Government.

Cl. (4) : Tenure of the Attorney-General.

According to the 1961 Rules, the Attorney-General of India shall hold office for a term of five years. This provision differs from the *English* practice,

(25) Wade and Phillips, *Constitutional Law*, 1960, p. 210; Hood Phillips, 1957, p. 275.

(1) O. XLI, rr. 1-2, Supreme Court Rules,

1950; see Author's Acts, Rule & Orders under the Constitution p. 357.

(2) As to the previous system, see C4, Vol. II, p. 461.

under which the office of the Attorney-General is regarded as a fully political one, and the office changes with each change in the Government. It may not necessarily be so under *our* Constitution.

There is no age limit for appointment or retirement.

Solicitor-General and Additional Solicitor-General.

While the Constitution mentions only the office of the Attorney-General as the legal adviser of the Union, the offices of a Solicitor-General and an Additional Solicitor-General have been created by the Government for assisting the Attorney-General in his legal duties (p. 467, *ante*). These law officers, not being recognised by the Constitution, have no political status or right such as that conferred on the Attorney-General by Art. 88, *post*. But their legal duties are the same as those of the Attorney-General, under the 1961 Rules (p. 467, *ante*). In effect, they act as deputies of the Attorney-General.

Analogous Provisions.—Cl. (1) of the present Article is to be read with Art. 124 (3), *post*, which lays down the qualifications for being appointed a Judge of the Supreme Court.

Art. 165 makes parallel provisions in respect of the office of the Advocate-General for the State, who exercises some of the functions discharged by the Attorney-General in England.

But there is no provision in Art. 165, corresponding to cl. (3) of Art. 76.

See also Art. 88 which provides that the Attorney-General shall have a right of speaking in either House of Parliament, even though he is neither a member of the Cabinet nor of Parliament.

INDEX TO COMMENTS

ARTICLE 76.

Other Constitutions :

(A) England, 462 ; (B) U.S.A., 463 ; (C) Australia, 463 ; (D) Canada, 463 ; (E) New Zealand, 464 ; (F) Government of India Act, 1915, 464 ; (G) Government of India Act, 1935, 464.

India :

Source of Art. 76, 464 ; History of the Office of Attorney-General in India, 464.

Clause (2).

Duties of the Attorney-General, 467 ; Other functions of the Attorney-General under the Constitution, 468 ; Other functions under the ordinary law, 468.

Clause (4).

Tenure of the Attorney-General, 468.

Solicitor-General and Additional Solicitor-General, 469 ; Analogous Provisions, 469.

Conduct of Government Business

77. (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

Conduct of business of the Government of India.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

CLAUSES (1)-(2).

OTHER CONSTITUTIONS

(A) *England*.—The Crown is not bound by any personal acts of the Sovereign. A public act can be done by the Sovereign only on the advice of a Minister responsible to Parliament. This is secured not only in the matter of coming to a decision but also in the matter of expression and authentication of such decision.

A public act of the Crown can be expressed only in one of three ways: (a) Order in Council; (b) Order, Commission or Warrant under the Sign Manual; (c) Proclamation, Writs, Letters or other documents under the Great Seal.

(a) An Order in Council is issued by the King-in-Council, i.e., by the Sovereign through the Privy Council, and is authenticated by the signature of the Clerk to the Council. An Order in Council can be issued only where there is a valid legal authority for it, e.g., where an Act of Parliament authorises the making of rules and regulations by Order in Council. It may also be issued for the exercise of a power which the Crown possesses by virtue of Prerogative, which, again, can be exercised only on the advice of the Minister responsible for the Department to which the Order relates and where it is usually drafted.

(b) A Commission, Order or Warrant under the Sign Manual must bear the signature of one or more responsible Ministers.

(c) Documents under the Great Seal can be issued by the Lord Chancellor only in compliance with a Royal Warrant countersigned by a Minister.

(B) *West Germany*.—Art. 58 of the West German Constitution lays down that except in three specified cases (e.g., appointment and dismissal of the Chancellor).

"Orders and decrees of the federal President require for their validity the countersignature of the federal Chancellor or the appropriate federal Minister".

(C) *Fifth French Republic*.—Art. 13 of the Constitution of 1958 says—

"The President shall sign the ordinances and decrees decided upon by the Council of Ministers".

Art. 22 provides—

"The acts of the Premier shall be countersigned, when circumstances so require, by the ministers responsible for their execution".

Art. 19, again, provides—

"The acts of the President of the Republic, other than those provided for under Arts. 8 (first paragraph), 11, 12, 16, 18, 54, 56 and 61, shall be countersigned by the Premier, and should circumstances so require, by the appropriate ministers".

(D) *Government of India Act, 1935*.—Cls. (1) to (3) of Sec. 17 of that Act were in the same language as Cls. (1)-(3) of Art. 77 of our Constitution, substituting Governor-General for President, and taking out the discretionary sphere of the Governor-General from the purview of Cl. (3).

INDIA

Cl. (1) : Formal expression of Executive Action.

As the *formal* head of the Executive, the President shall have no executive function to be discharged personally. But all *executive action* of the Government of India must be expressed to be taken in his name.

The Constitution, however, does not require any particular formula of words for compliance with Art. 77 (1). What the Court has to see is whether the *substance* of its requirements has been complied with, because the provision is only directory.⁴

(3) *State of Bombay v. Purushottam*, (1952) S.C.R. 674 (678).

(4) *Chitrallekha v. State of Mysore*, A. 1964 S.C. 1823 (1829).

Again cl. (1) does not prescribe how an executive action of the Government is to be *performed*; it only prescribes the *mode* in which such act is to be *expressed*. While cl. (1) relates to the mode of *expression*, cl. (2) lays down the ways in which the order is to be *authenticated*.

Cl. (1) has been held to be *directory* and not mandatory in character. Hence, failure to comply with Art. 77 (1) does not nullify the order but only takes away the constitutional immunity from proof. The order would be upheld if the State can *otherwise* prove that the order was, in fact, made by the President.⁵

Thus, where an inter-departmental letter, though not issued in the name of the President, stated that an order had been made by the Government, which is also affirmed by the affidavit of a responsible officer, and that statement is not specifically denied in the affidavit of the person who challenges the validity of the letter because of non-compliance with Art. 77 (1), the contention cannot be upheld.⁴ The fact of the order having been made by the President may also be proved by producing the relevant Government records.⁶

'Executive Action'.

1. Cl. (1) is confined to cases where the executive action is required to be expressed in the shape of a formal order or notification or any other instrument.²² Usually executive decision is taken on the office files by way of notings or endorsements made by the appropriate Ministers or officer. If every executive decision has to be given a formal expression the whole governmental machinery will be brought to a standstill. But when an executive decision affects an outsider or is required to be officially notified or communicated, it should be normally expressed in the form mentioned in Art. 166 (1).⁵

2. The expression has been held to be wide enough to include statutory functions vested in the head of the State, even though they are quasi-judicial in nature.⁷

3. On the other hand, the following have been held *not* to constitute 'executive action of the Government' and need not, therefore, be expressed or authenticated according to this article—

(i) Noting by a Minister on the file.⁸

(ii) The filing of a memorandum of appeal against an order of acquittal.⁹

(iii) A corrigendum issued merely to correct a clerical mistake or omission in a notification issued in conformity with this Article.¹⁰

Analogous Provision.—Similar provision is made in Art. 166 as regards the conduct of business of the Government of a State.

Art. 299 lays down the formalities for *contracts* made by the Government of India or of a State.

Bar to Judicial inquiry.

The validity of an order or instrument which is expressed in the name of the President according to clause (1), and is duly authenticated according to rules made by the Governor on this behalf, shall not be called in question in any Court on the ground that it is *not made or executed by the President*.

This provision is, however, subject to the following limitations—

(a) It does not bar the jurisdiction of the Court to examine the validity of the order or instrument on *any other* ground, e.g.—

(5) *Dattatraya v. State of Bombay*, (1952) S.C.R. 612 (624, 631).

(6) *State of Rajasthan v. Sripal*, A. 1963 S.C. 1323 (1326).

(7) *Nagaseewara v. APSRTC*, A. 1959 S.C. 308 (325).

(8) *Jayarama Iyer, in re.*, A. 1958 A.P. 643 (645).

(8a) *Bachhittar v. State of Punjab*, A. 1963 S.C. 395.

(9) *John v. State of T. C.*, (1955) 1 S.C.R. 1011 (1019).

(10) *Naunihalsingh v. Kishorilal*, A. 1961 M.P. 84 (87).

That a *condition precedent* for the making of the order has not been fulfilled.¹¹⁻¹² Thus, when the satisfaction of a particular authority is necessary under the law to make the order, the Court can enquire whether the order was based on such satisfaction.¹³ Of course, in the normal case, a recital in the order to this effect will raise a presumption that the necessary condition has been fulfilled, and throw a difficult onus on the person who wants to challenge the validity of the order; but the Court is not powerless to determine the validity of the order, on taking proper evidence.¹¹ But where the liberty of the subject is concerned, the Court may not act upon such a presumption.¹³

But unless the statute specifically so requires, it is not necessary that an order must contain a recital as to the satisfaction of the condition precedent. Though it may be desirable for the authority to make such a recital, the absence of the recital does not render the order void *ab initio*.¹⁴ In the absence of such recital, of course, the authority or other person relying on the order will not have the advantage of the presumption in favour of the validity of the order but it is open to the authority to satisfy the court by other means that the condition precedent was fulfilled.¹⁴

(b) Strict compliance with the requirements of Art. 77 (1) gives immunity to the order that it cannot be challenged in a Court of law on the ground that it is an order of the President. If, therefore, the requirements of the Article are not complied with, the resulting immunity cannot be claimed by the State, but this will not nullify the order itself, if it appears from other materials that such a decision was in fact taken by the Government.^{14a} Thus,—

(i) Where an order was duly signed by the officer authorised by the Rules made by the Governor under the corresponding Art. 166 (2), but the order was not expressed to be made in the name of the Governor, *affidavit* to the effect that the matter had been placed before the Government was received to hold that the order was that of the Government of Bombay.^{14a}

But the order cannot be saved where it is not duly authenticated and it is established or conceded that it was *not* made or concurred in by the competent authority.¹⁵ Thus, under the corresponding provision in Art. 166, where the document relied upon was an inter-departmental letter addressed by an Under Secretary to another officer that he had been "directed to say that the Chief Commissioner is pleased to approve . . . the grant of license to . . .", it was held that the letter could not be held to be the order of the Chief Commissioner sanctioning the license, for the reasons—

(a) that the letter did not purport to be the order of the Chief Commissioner but simply *communicated* to another officer that such order had been made;

(b) that the letter did not say that the Under Secretary had been directed by the Chief Commissioner nor did he sign the letter 'by order of the Chief Commissioner'; he simply signed as 'Under Secretary' to the State Government.¹⁵

Cl. (2) : Authentication of President's Orders, etc.

Authentication is a mere formal manner of promulgation to the public of the orders and other instruments made and executed in the name of the President, that is to say, all executive action of the Government of India [Cl. (1)]. The authentication invests these orders and instruments with authenticity, so that the public may know that these are the executive action of the Government of India.

Where the Rules made by the Governor lay down that orders made and executed by the Governor shall be authenticated by the signature of a Secretary,

(11) *King-Emp. v. Sibnath*, (1950) 50 C.W.N. 25 (32); A. 1954 P.C. 156.

(12) *Shombhu v. B. L. Cotton Mills*, A. 1959 Cal. 552 (556).

(13) *Shyamagha v. State*, A. 1952 Orissa 200.

(14) *Swadeshi Cotton Mills v. S. I. Tribunal*, A. 1961 S.C. 1381 (1387).

(14a) *Dattatraya v. State of Bombay*, (1952) S.C.R. 612 (624).

(15) *Cf. Ghaio Mal v. State of Delhi*, (1959) S.C.R. 1424.

no note or order of a Minister which is not so authenticated, can operate as an order of the Government of the State.¹⁶⁻¹⁷

2. Where several notifications are published in the Gazette together, there is nothing wrong if the signature of the authenticating officer appears at the foot of all the notifications.¹⁸

'In such manner as may be specified'.—In exercise of this power, the President has made the Authentication (Orders and other Instruments) Rules, 1958.¹⁹

The general mode of authentication of orders and other instruments made and executed in the name of the President is that—

"it shall be authenticated by the signature of a Secretary, Special Secretary, Additional Secretary, Joint Secretary, Deputy Secretary, Under Secretary or Assistant Secretary to the Government of India".

Besides, in the case of different Ministers, such as the Ministers of Defence, Railways etc., other officers are specifically authorised to execute such orders and instruments.²⁰

Effect of authentication.

When an order or instrument is *expressed* in the name of the President and also *authenticated* in the manner provided by cl. (2), it will not be open to anybody to challenge the order or instrument on the ground that it was not made or executed by the President.

This, of course, refers to the *form* of the order, and has no reference to the *validity* of the order on point of its subject-matter as limited by Article 73 which defines the extent of the executive power of the Union, or the correctness of the *recitals* in the order.²¹

Effect of non-conformity with cls. (1) and (2).

The Supreme Court has held that cl. (1) is *directory* and not mandatory in character, and that non-compliance with it does not render the order a nullity.²² Further, neither cl. (1) nor cl. (2) precludes proof by other means that the order or instrument was made by the President.²³

For further comments, see under Art. 166, *post*.

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England*.—Not only the selection of colleagues, but also the distribution of portfolios amongst them, is a business of the Prime Minister; the King has, under modern conditions, no voice in these matters.²⁴

(B) *Japan*.—The Japanese Constitution contains certain novel provisions as to the business of the Cabinet and the individual Ministers. Arts. 72-74 are as follows:

"72. The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches.

73. The Cabinet, in addition to other general administrative functions, shall perform the following functions:

Administer the law faithfully; conduct affairs of state.

Manage foreign affairs.

Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet.

(16) *Balaraju v. Hyderabad Municipality*, A. 1960 A.P. 234 (243).

(17) *Cf. Ghaio Mal. v. State of Delhi*, (1959) S.C.R. 1424.

(18) *Iftikhar v. State of M. P.*, A. 1961 S.C. 140.

(19) S.O. 2297, d. 3-11-58.

c2—60

(20) Vide pp. 6-12 of the General Rules and Orders under the Constitution, L.D. 105.

(21) *King Emp. v. Sibnath*, (1945) 50 C.W.N. 25 (32) P.C.

(22) *State of Bombay v. Purushottam*, (1952) S.C.R. 674.

(23) Munro, *Governments of Europe*, 1947, pp. 90-1.

Administer the civil service in accordance with standards established by law.

Prepare the budget, and present it to the Diet.

Enact cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet order unless authorized by such law.

Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights.

74. All laws and cabinet orders shall be signed by the competent Minister and countersigned by the Prime Minister."

It will appear that the functions of individual Ministers are circumscribed by the powers of the Prime Minister and of the Cabinet as a whole. Thus, very little important work is left to be done by a Minister for Finance, Foreign or Home Affairs. It hardly escapes attention that even the preparation of the Budget is a business of the Cabinet in a body (see also Arts. 86, 87, 91).

(C) *West Germany*.—The provisions of Art. 65 of the West German Constitution of 1949 are also novel—

"The federal Chancellor (Prime Minister) determines, and is responsible for, general policy. Within the limits of this general policy, each federal minister conducts the business of his department autonomously and on his own responsibility. The federal government (*i.e.*, the Prime Minister and all the Ministers collectively) decides on differences of opinion between the federal ministers. The federal Chancellor conducts the business of the federal government in accordance with the rules of procedure adopted by it and approved by the federal President."

(D) *Fifth French Republic*.—Under the French Constitution of 1958, the other Ministers exercise powers only by delegation from the Premier.

Art. 20.—"The government shall determine and conduct the policy of the nation....."

Art. 21.—"The Premier shall direct the operation of the government.....He may delegate certain of his powers to the ministers....."

INDIA

Cl. (3) : Allocation of business among Ministers.

Since the President has no discretionary authority, the present power shall also be a power to be exercised on ministerial advice, which in this context, will mean the advice of the Prime Minister, as in *England* (see p. 470, *ante*).

Rules and Orders made by the President.

Under the present Clause, the President has adopted the Rules which were in force at the commencement of the Constitution as the rules for the transaction of business of the Government of India, unless altered, repealed or amended by the President.

Alterations have been made by issuing Orders under this Clause,²⁴ from time to time, whenever a new Ministry has to be created or the distribution of portfolios amongst existing Ministers has to be altered. Thus,—

(i) The Department of Atomic Energy was created by S.R.O. 2534/2-8-54.

(ii) The Ministry of States was combined with the Ministry of Home Affairs, by S.R.O. 60/3-1-55.

(iii) The administration of the Hindusthan Housing Factory was transferred from the Ministry of Production to the Ministry of Works, Housing and Supply, by S.R.O. 2119/27-9-55.

(iv) The administration of the Working Journalists (Conditions of Service) & Miscellaneous Provisions Act, 1955 was transferred from the Ministry of Information & Broadcasting to the Ministry of Labour, by S.R.O. 1133/15-5-56.

INDEX TO COMMENTS

ARTICLE 77.

Clauses (1)-(2).

Other Constitutions :

(A) *England*, 470 : (B) *West Germany*, 470 : (C) *Fifth French Republic*, 470 : (D) *Government of India Act, 1935*, 470.

(24) Vide Rules and Orders under the Constitution, L.D. 105, 1959, pp. 12-60.

India :

Cl. (1): Formal expression of executive action, 470; 'Executive action', 471; Analogous Provision, 471; Bar to judicial inquiry, 471.

Cl. (2): Authentication of President's Orders etc., 472; 'In such manner as may be specified', 473; Effect of authentication, 473; Effect of non-conformity with cls. (1) and (2), 473.

Clause (3).

Other Constitutions :

(A) England, 473; (B) Japan, 473; (C) West Germany, 474; (D) Fifth French Republic, 474.

India :

Allocation of business among Ministers, 474; Rules and Orders made by President, 474.

Duties of Prime Minister as respects the furnishing of information to the President, etc.

78. It shall be the duty of the Prime Minister—

(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation ;

(b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for ; and

(c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

OTHER CONSTITUTIONS

(A) *England*.—Though the Crown no longer possesses any constitutional right²⁵ to take part in the Cabinet deliberations or to be present at its meetings, and the Crown is bound to act on the advice of the Cabinet,—the Cabinet being still in theory a body of advisers of the Crown, is bound to keep the Crown informed "of any departures in policy, of the general march of political events, and in particular of the deliberations of the Cabinet, which may not be disclosed to anyone else".¹⁻¹⁰ Since World War I, the British Cabinet has a Secretary to record all its deliberations. It is the duty of the Prime Minister, as the presiding officer of the Cabinet, to communicate to the Sovereign all resolutions of the Cabinet, together with the fullest information on all important points, and in time to enable him to come to a proper decision.¹¹

(B) *Fourth French Republic*.—Art. 32 of the French Constitution of 1946 provided—

"The President of the Republic shall preside over the Council of Ministers....."

In fact, however, the President only presided over *formal* meetings of the council of ministers while policy decisions were made at *informal* meetings of the council of ministers, presided by the Prime Minister.

(C) *Fifth French Republic*.—Art. 9 of the Constitution of 1958 reproduces Art. 32 of the Constitution of 1946, just quoted.

INDIA

Cls. (a)-(b) : President's right of information.

These two clauses embody the rules of the *English* system governing the relation between the Crown and the Cabinet. It shall be the duty of the Prime Minister, as the head of the Cabinet, to communicate to the President not only

(25) This is another right which has become obsolete by disuse (see Hood Phillips, 1957, p. 242; Keith, p. 156).

(1-10) Chalmers and Hood Phillips, p. 199.

(11) Keith, Constitutional Law, p. 157.

all decisions of the Cabinet but also any other information that the President may himself call for, relating to administration as well as legislation. Like the English King, the Indian President shall have no right to sit in Cabinet meetings, but he shall have a right to be informed of everything relating to public affairs, so that he may exert his influence, as the impartial head of the Executive, upon the Council of Ministers.

CLAUSE (c).

OTHER CONSTITUTIONS

England.—Though recent examples are rare, there are instances of the 19th century¹² where the Sovereign, of her own initiative, asked the Prime Minister to submit questions relating to different Departments to be placed before meetings of the Cabinet. Theoretically, the power still remains, but it has to be exercised with the consent of the Prime Minister.

INDIA

President's power to refer questions for collective deliberation.

This appears to be a safeguard intended to ensure the collective responsibility and solidarity of the Council of Ministers. Under the complicated conditions of modern government, it is not possible for every matter relating to the different departments to be discussed and determined in Cabinet meetings.

As has been stated earlier, in *England*, it entirely rests on convention and usage what matters should be placed before the Cabinet or should be left to the individual responsibility of the Minister in charge and the final word is that of the Prime Minister. If the Sovereign wants to interfere, he or she can only suggest to the Prime Minister.

Our Constitution seeks to ensure collective deliberation of important matters by a more positive device. It empowers the President to intervene if he finds that an individual Minister has taken a decision regarding his Department which is of such importance that it should have been placed before the collective decision of the Council of Ministers. So, even though an individual Minister shall have the liberty of placing his own decision regarding his Department to the President, the latter shall have the power to refer them to the consideration of the Council, so that no important executive action may be taken by the President on the advice of a single Minister. As Dr. Ambedkar explained in the Constituent Assembly this provision seeks to follow the practice that existed on the eve of the commencement of the Constitution. Weekly summaries prepared by each Ministry containing the decisions taken by it used to be sent to the Cabinet as well as to the Governor-General. If, the Governor-General, on seeing the weekly summaries, found that the Ministry had taken a decision on a particular subject which he thought was not good, the Governor-General might place that matter for a re-consideration by the Cabinet. It is obvious that all the powers under Art. 78 will be exercisable by the President at his discretion and as the word 'duty' signifies, the Prime Minister is *bound* to comply with the direction of the President to place a particular matter before the Council of Ministers. It does not appear that the President has ever used this power so far.

Analogous Provision.—The provisions of Art. 167 as regards the Council of Ministers of a State are exactly similar to those of the present Article.

INDEX TO COMMENTS

ARTICLE 78.

Other Constitutions:

(A) England, 475; (B) Fourth French Republic, 475; (C) Fifth French Republic, 475.

(12) Cf. Jennings, *Cabinet Government*, 1959, p. 364.

India :

Cls. (a)-(b): President's right of information, 475.

Cl. (c).

Other Constitutions : England, 476.*India :*

President's power to refer questions for collective deliberation, 476 ; Analogous Provision, 476.

CHAPTER II.—PARLIAMENT

*General***Functions of a Parliament under the Parliamentary system of government.**

It has already been explained (p. 333) that the fundamental feature of the English Parliamentary system of Government is a harmonious blending of the legislative and executive organs of the State inasmuch as the executive power is wielded by a group of members of the Legislature who command a majority in the popular Chamber of the Legislature and remain in power so long as they retain that majority. The functions of Parliament under this system follow from this essential feature and are, accordingly, more or less the same wherever the English system has been transplanted. We may analyse these functions in order to see how far they have been adopted by *our* Constitution.

I. *Providing the Cabinet.*—It follows from the above that the first function of Parliament is that of providing the Cabinet and holding them responsible. Though the responsibility of the Cabinet is to the popular Chamber (see p. 422, *ante*), the membership of the Cabinet is not necessarily restricted to that Chamber and some of the members are usually taken from the upper Chamber, though the responsibility of the Cabinet in a body is only to the popular Chamber. Though under the English system the Prime Minister is chosen by the Crown informally, subject to the condition of his commanding a majority in the popular Chamber, there are some modern Constitutions, such as *Eire, Japan*, (p. 440, *ante*) which provide that the Prime Minister shall be a person formally nominated by the popular Chamber.

Our Constitution follows the English system and leaves the choice of the Prime Minister and his Cabinet to convention, subject to the collective responsibility of the Council of Ministers to the popular Chamber.

II. *Control of the Cabinet.*—It is a necessary corollary from the theory of ministerial responsibility that it is a business of the popular Chamber to see that the Cabinet remains in power so long as it retains the confidence of the majority in that House. The devices through which the House can express its want of confidence in the Cabinet have already been discussed (pp. 434-5, *ante*).

III. *Criticism of the Cabinet and of individual Ministers.*—In modern times both the executive and legislative policies are initiated by the Cabinet, and the importance of the legislative function of Parliament has, to that extent, diminished from the historical point of view. But the critical function of Parliament has increased in importance and is bound to increase if Cabinet government is to remain a 'responsible' form of government instead of being an autocratic one.¹ In this function, both the Houses participate and are capable of participating, though the power of bringing about a downfall of the Ministry belongs only to the popular Chamber.

While the Cabinet is left to formulate the policy, the function of Parliament is to bring about a discussion and criticism of that policy on the floor of the Houses, so that not only the Cabinet can get the advice of the deliberative body and learn about its errors and deficiencies, but the nation as a whole can be apprised of an alternative point of view, on the evaluation of which representative democracy rests in theory.

(1) Cf. Ilbert, *Parliament*, 1950, p. 103.

Opportunity for criticism of the policy is offered not only by the 'Opening Address' (p. 523, *post*), and the Budget (Art. 112, *post*), but also by the debate during the second reading of important Bills and by occasional motions of adjournment on matters of public importance.

An opportunity for discussion of policy is sometimes offered by the Ministers themselves, by making a statement on an important question of policy.² In *England*, there is also a strong feeling that if Ministers want to make any important announcement on policy, they must do it on the floor of the House, in the first instance, so that the House may have an opportunity of discussing it.

IV. *An organ of information.*—As an organ of information, Parliament is more powerful than the Press or any other private agency, for Parliament secures the information *authoritatively*, from those in the know of things. The information is collected and disseminated not only through the debates but through the specific medium of 'Questions to Ministers' (see, more fully, under Art. 118, *post*).

V. *A medium of public opinion.*—Parliament stands between the Cabinet and the people. It serves the double purpose of keeping the Government in touch with public opinion and also to keep public opinion in touch with the problems of government.³ Its deliberations constitute a most enlightened means of public education, not only on political but almost on all questions of public importance for the time being.

VI. *Legislation.*—The next function of a Legislature is the function of making laws which belongs to the Legislature equally under the Presidential and Parliamentary forms of government. This will be separately dealt with under Art. 107, *post*.

VII. *Financial control.*—As *Ilbert* points out⁴ this is the 'earliest function' of Parliament in *England*, viz., to provide money for the use of the State. It has the sole power not only to authorise expenditure for the public services, to specify the purposes to which that money shall be appropriated, but also to provide the ways and means to raise the revenue required, by means of taxes and other impositions and also to ensure that the money that was granted has been spent for the authorised purposes. Under the English system, this power has passed into the hands of one House of the Legislature, viz., the lower House (for this function, see under Art. 112, *post*).

Functions of the Opposition in Parliamentary Government.

It is hardly possible to say anything about the nature or functions of the Opposition in the Legislature in India since owing to the peculiar array and strength of parties, an Opposition in the English sense has not yet been built up in this country during the short working of the Parliamentary system under its independent Constitution. The primary reason for the absence of a united Opposition is the marked difference in ideologies between the various minority parties which range 'from the extreme left to the extreme right'.⁵

The need for an organised Opposition has, however, been felt by many political leaders, including those of the majority party.⁶ This is not surprising because, as we shall see, the existence of an Opposition is an essential ingredient of the British Parliamentary system which we have imported. It is, accordingly, worth while to examine the functions of the Opposition in the British House of Commons and the essential principles upon which it works so that we may understand what are the indispensable requirements for building up a 'healthy' Opposition in our Legislatures.

(2) Cf. r. 372 of the Rules of the House of the People; r. 251 of the Rules of the Council.

(3) Jennings, *Parliamentary Reform*, p. 19.

(4) *Ilbert*, *Parliament*, 1950. p. 76.

(5) *H. P. Deb.*, (1952), Vol. I, p. 379.

(6) In 1954, under the leadership of Acharya Kripalani, a united Opposition Party was formed in the House of the People; with a strength of 42 members (*Hindusthan Standard*, d. 23-8-54). But it does not appear to have gathered sufficient cohesion to secure official recognition [Cf. *Morrison*, *Parliament in India*, 1957, p. 105].

I. Parliamentary government, it is needless to say, is a government by party. In the words of *Bagehot*, "Party government is a vital principle or representative government". *Lowell*⁷ added "it also requires as a condition of success that there shall be *only two parties*". Conditions have changed since he wrote and there is hardly any Parliament to-day, which literally possesses only two parties. But though modern Parliaments have to work with multiple parties, the truth of *Lowell's* observation remains, viz., that for the success of the Parliamentary system it is essential that where there are more than one parties, the parties not in power must be united as a body as against the party in power,⁸ so as to form 'the Opposition'.

Criticism and control of the Cabinet, the two most important functions of Parliament (p. 477, *ante*) can be effectively discharged only if while one party is in power, there is a united Opposition, particularly when individual members are more and more lacking strength and initiative under modern party organisations. As *Campion*⁸ observes—

"While admitting the loss to parliamentary life resulting from the sacrifice of the independent private Member, it cannot be denied that under modern conditions the concerted action of the Opposition is the best means of controlling Government—by criticising defects in administration loudly enough for the public to take notice".

II. The most essential function of the Opposition is its *readiness to form a government* if and when the Government or the party in power loses the confidence of the majority in the House. The Cabinet is responsible to the House and when a Cabinet is defeated and resigns, there would be a deadlock unless another Ministry, commanding majority in the House, can be readily formed. The Opposition keeps an alternative group of leaders with an alternative programme or policy which would replace the defeated Cabinet and this group of leaders in the Opposition are popularly known as the 'Shadow Cabinet', having as amongst themselves, similar discipline and cohesion as exists amongst the members of the Cabinet in power.

III. More than this, it is the *duty* of the Opposition to take office, if the Government resigns on being defeated, for, 'the King's service must be carried on'. The attack of the Opposition against the Government cannot, therefore, be an irresponsible act. It has to be tempered by the consideration that it will be called upon to form a Government, if the Ministry resigns.

IV. Though it is the right of the Opposition to criticise the Government and to secure its downfall by winning over the votes on any issue, in many matters, the Opposition has to *co-operate with the Government*, in the interest of democracy itself. In a Parliamentary form of Government, the Opposition believes in an alternative creed but does not believe in chaos or disorder. It will seek to bring about the downfall of the Government, only if it can do so by constitutional means, i.e., by the method of persuasion in favour of its own policy and programme and that is possible only if there is an orderly course of proceedings in the House. Hence, in the matter of arranging the business of the House the Opposition has to co-operate with the Government, instead of creating a deadlock by taking up an attitude of obstruction. Again, in matters of emergency or national danger from external or internal causes, the Opposition has not only to co-operate but also to pledge its support to the Government, unless the Opposition is to act against the interests of the nation itself.

The Government has also to accommodate the Opposition in many matters. Thus, in *England*, the Government seldom goes violently against the wishes of the Opposition in arranging the weekly business of the House, and traditionally finds time for the discussion of a vote of censure and frequently of other subjects on which the Opposition feels strongly. The Opposition also has its own opportunities of raising matters independently of Government wishes e.g., in the matter of discussion of the Estimates in the Committee of Supply. In matters of out-

(7) *Lowell*, Government of England, 1914.

(8) *Campion*, Parliament, p. 30.

standing importance, such as foreign policy or defence, the leaders of Government and Opposition go into consultation to arrange parliamentary business.

It is these essential functions of the Opposition as a limb of the Parliamentary system that have secured even official or legal recognition for the Opposition in *England*. Apart from the fact that the Opposition is referred to as 'His Majesty's Opposition',—by the Ministers of the Crown Act, 1937, a salary has been granted to the Leader of the Opposition,⁹ which is even charged on the Consolidated Fund and is thus immune from any challenge in Parliament, unlike the salaries of Ministers. For the purposes of this Act, the Speaker's decision as to which party is to be deemed the 'Opposition' and who is their Leader, is final.

In *Canada* too, the Senate and House of Commons Act, 1927 has provided for an annual salary to be paid to the Leader of the Opposition \$15,000 in addition to his indemnity as a Member of the House.

In *India*, no such question has arisen owing to the absence of any united Opposition as yet.

79. There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.

Constitution of Parliament.

OTHER CONSTITUTIONS

(A) *U. S. A.*—Under the Presidential system of the United States, the President is not a member of the Legislature, even though he possesses some legislative power such as that of veto, sending messages. Art. 1, Sec. 1 says—

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

(B) *England*.—The Crown is a 'constituent part' of Parliament which goes by the name 'King-in-Parliament' consisting of the Crown and the two Houses of the Legislature.

At the present day, the Crown has the following prerogatives in reference to Parliament:

(i) Summoning, proroguing and dissolving Parliament: appointing time and place of its meeting, directing commencement of its proceedings.

(ii) Speech from the Throne, *i.e.*, the speech at the opening of each session.

(iii) Assent to legislation.

Subject to the Parliament Acts of 1911 and 1949 (see under Art. 80, *post*), an 'Act' of Parliament can be made *only* with the concurrence of the three sections of Parliament, *viz.*, the Crown and the two Houses. Though the Sovereign does not sit in Parliament, she attends personally at the opening of each session, to read the opening speech.

(C) *Australia*.—Sec. 1 of the Australian Constitution Act says—

"The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Representatives, and which is hereinafter called 'the Parliament', or 'the Parliament of the Commonwealth'."

(D) *Canada*.—Sec. 17 of Br. North America Act, is—

"There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled 'the Senate' and the House of Commons."

(E) *Eire*.—Art. 15 (1) of the Constitution of Eire, 1937, provides—

"(1) 1. The National Parliament shall be called and known, and is in this constitution generally referred to, as 'the Oireachtas'. 2. The Oireachtas shall consist of the President and two Houses, *viz.*, a House of Representatives to be called "Dail Eireann" and a Senate to be called "Seanad Eireann"."

(9) Since 1957, it is £3,000 *per annum*, in addition to his salary as member.

(F) *Fourth French Republic*.—Art. 5 of the Constitution of 1946 provided—

"The Parliament shall be composed of the National Assembly and the Council of the Republic."

(G) *Fifth French Republic*.—Art. 24 of the Constitution of 1958 renames the Upper Chamber as the Senate.

Though France adopts the Parliamentary system, it does not make the President a component part of the Legislature and the President has no power to veto or to suspend the promulgation of laws passed by the Parliament.

(H) *West Germany*.—Under the West German Constitution of 1949, the federal Legislature consists of two Houses—the *Bundestag* (Federal Assembly) and the *Bundesrat* (Federal Council).

(I) *Japan*.—The relevant provisions of the Japanese Constitution of 1946 are—

"Article 41.—The Diet shall be the highest organ of state power, and shall be the sole law-making authority of the State.

Article 42.—The Diet shall consist of two houses, namely, the House of Representatives and the House of Councillors."

Though the promulgation of laws is to be made by the Emperor with the advice of the Cabinet (Art. 7), the Japanese Constitution does not describe the Emperor as a component part of the Legislature.

(I) *Ceylon*.—Sec. 7 of the Ceylon (Constitution) Order in Council, 1946, provides—

"There shall be a Parliament of the Island which shall consist of His Majesty, and two Chambers to be known respectively as the Senate and the House of Representatives."

INDIA

Art. 79 : Constitution of Parliament.

Departing from the American precedent and following the English, the Indian Constitution makes the President a member of the Legislature.¹⁰ The Parliament of the Union, is thus, a composite body consisting of the President and the two Houses. Consequently, 'law of Parliament' means a law passed by the two Houses, followed by the assent of the President,¹¹—subject, of course, to the provisions in Arts. 108-9.

Resolutions of either Houses of Parliament are not equivalent to laws made by Parliament,¹² nor can they preclude the Courts from examining into the legality of acts done under the authority of such resolutions.¹³

Hindi names.—The Hindi names adopted by the Houses of the People and the Council of States are '*Lok Sabha*' and '*Rajya Sabha*' respectively.¹⁴

Analogous Provision.—Compare Constitution of State Legislature in Art. 163.

INDEX TO COMMENTS

ARTICLE 79.

Other Constitutions :

(A) U.S.A., 480 ; (B) England, 480 ; (C) Australia, 480 ; (D) Canada, 480 ; (E) Eire, 480 ; (F) Fourth French Republic, 481 ; (G) Fifth French Republic, 481 ; (H) West Germany, 481 ; (I) Japan, 481 ; (J) Ceylon, 481.

India :

Art. 79 : Constitution of Parliament, 481 ; Hindi names, 481 ; Analogous Provision, 481.

(10) See List of the legislative powers of the President under our Constitution, at p. 365, ante.

(11) Cf. *Ex parte Rashleigh*, (1875) 2 Ch. D. 9 (12) ; *Umaychal v. Lakshmi*, 1945 F.C. 25 (31).

(12) *Stockdale v. Hansard*, (1839) 9 A. & E. 1.

(13) *Jatindra v. Province of Bihar*, (1949) F.L.J. (F.C.) 225 (249).

(14) L.S.D. (II), 14-5-54 ; R.S.D. (II), 23-8-54.

80. (1) The Council of States shall consist of—

Composition of the
Council of States.

(a) twelve members to be nominated by the President in accordance with the provisions of clause (3); and

(b) not more than two hundred and thirty-eight representatives of the States *and of the Union Territories*.¹⁵

(2) The allocation of seats in the Council of States to be filled by representatives of the States *and of the Union Territories*¹⁷ shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.

(3) The members to be nominated by the President under sub-clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art and social service.

(4) The representatives of each State * * * *¹⁶ in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The representatives of the *Union Territory*¹⁷ in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

Amendment.—The changes made by the **Constitution (Seventh Amendment) Act, 1956** are indicated in italics.

Effects of Amendment.

(a) In the original Constitution, representation in the Council of States was confined to the States in Parts A, B and C. It has now been extended to all the Union territories which include the Islands which were included in Part D of the First Schedule.

(b) Consequential changes in the allocation of seats have been made in the Fourth Schedule, maintaining in tact the original formula of "one seat per million for the first five millions and one seat for every additional two millions or part thereof exceeding one million".¹⁸

OTHER CONSTITUTIONS

(A) *U. S. A.*—Originally, members of the Senate used to be elected, indirectly, by the State Legislature [Art. I, Sec. 3 (1)]. But the above provision has been superseded by the 17th Amendment to the Constitution (1913) which provides that—

"the Senate of the United States shall be composed of two Senators from each State, elected by the people thereof."

Hence, members of the Senate are now chosen by direct election of the people, two Senators being elected from each State, *equally*. There are thus 100

(15) Inserted by the Constitution (Seventh Amendment) Act, 1956.

(16) The words and letters "specified in Part A or Part B of the First Schedule" have been omitted by the Constitution (Seventh Amendment), Act, 1956.

(17) Substituted for the words 'States specified in Part C of the First Schedule', by the Constitution (Seventh Amendment) Act, 1956.

(18) Statement of Objects & Reasons of the Constitution (Ninth Amendment Bill), 1956.

members in the American Senate (the States being 50¹⁹ in number). The American Senate represents the federal principle of the Constitution, by providing equality of representation of the States in the Chamber, irrespective of their size or population (see Vol. I, p. 17). But at the same time, members of the American Senate are delegates not of the State Governments, but of the *people*, voting by States. This fact of direct election, together with its extraordinary powers, makes the American Senate the most effective second Chamber in the world.²⁰

It has got certain exceptional powers which are not possessed by many other second Chambers:

(a) It has got equal powers with other Chamber (the House of Representatives) in ordinary legislation.

(b) In respect of money bills also, its powers are equal except as to initiation. It is free to amend or reject any money bill.

This power to amend financial legislation is so effectively exercised that the absence of the power to initiate does not make the Senate poorer in any real sense. In the words of Prof. *Finer*:²¹

"Its authority to amend financial legislation which, by the Constitution, must commence in the House, has been constructed by it to be a plenary power to *remake* the budget sent up to it. By substitution for original proposals made by the House, it is as much master of the financial provision of the nation as the House. And owing to its composition and operation, it is even more powerful."

This is a situation which is unthinkable under the *English* system.

(c) Its consent is necessary for appointments made by the President. This control over all high appointments is not an insignificant factor towards its powers and prestige.

(d) It has the power to try impeachments.

(e) Its consent^{21a} is necessary for the making of treaties by the President. The reality of the power of the Senate in this respect is illustrated by the fact that so far the American Senate has refused its assent to over 60 treaties proposed by the President. A climax was reached when at the end of World War I, President Wilson signed the Peace Treaties and the Covenant of the League of Nations on behalf of the United States, but the Senate refused to ratify any of these treaties and covenants and thus nullified the mighty work of the President so far as the United States was concerned. It is this which leads *Laski*²² to observe—

"No legislative assembly of the world rivals the Senate of the United States in its influence in the international sphere."

The other factors that contribute towards the strength and prestige of the American Senate are—(i) It is a small and compact body, compared with the British House of Lords. (ii) It affords a better opportunity for hearing to individual members than the House of Representatives. (iii) Absence of responsibility of the Executive to the Lower House (such as exists under the Parliamentary system) accounts, in part, for the failure of the House of Representatives to dominate the Senate. (iv) The personnel of the Senate is superior to that of the House of Representatives. Thus, in the 80th Congress, while over 1/3 of the members of the House of Representatives had never before held any public office,—in the Senate the number of such members did not exceed 1/8. (v) It is directly elected by the people just as the House of Representatives is; at the same time, it has a longer term. (vi) There is no provision in the Constitution to

(19) The original number 48 has been increased to 50 by the admission of Alaska and Hawaii in 1959.

(20) According to Sir Henry Maine, "It is the one thoroughly successful institution which has been established since the tide of modern democracy began to run."

(21) *Finer, Theory & Practice of Modern Government*, 1954, p. 420.

(21a) Consent of "2/3 of the Senators

present" is required under Art. II, s. 2 (2) [See *Author's Select Constitutions of the World*, p. [6], which means 2/3 of the quorum of the Senate [Fourteen Diamond Rings v. U. S., (1901) 183 U.S. 176 (180)]. This power includes the power not only to reject but also to modify or amend treaties negotiated by the President [*Haver v. Yaker*, (1870) 9 Wall. 32 (35)].

(22) *Laski, American Presidency*, p. 172.

remove a deadlock between the two Houses, as a result of which it can be solved only by conferences between the two Houses [see further under Art. 108, *post*]. The position of the Senate is thus in no way inferior to the House of Representatives.

The object of having a second Chamber, in the United States, was professedly to *check* the popular Chamber and, in this, the American Senate has well succeeded.²³

(B) *England*.—The English House of Lords is now the only second Chamber amongst the known Constitutions of the world which contains a major hereditary element. It consists of over 800 temporal and 26 spiritual Lords. The majority of the former category are hereditary peers. By the Life Peerages Act, 1958, the Crown has now been empowered to confer life peerages, with the right to sit and vote in the House of Lords, upon any person, including a woman.²⁴ The Act does not fix any maximum limit as to the number of such life peers.

Not only because of its hereditary composition which results in a lack of democratic contact, but also because of its inferior powers in comparison with the House of Commons, the English House of Lords has come to occupy a subordinate position in the English polity; and Parliamentary sovereignty, which is the primary characteristic of the English political system, has come to mean the supremacy of the lower House. The predominance is no doubt primarily due to the nature of the Cabinet system itself. For, the Cabinet represents the majority in the lower House and is responsible only to that House. As *Bagehot* pointed out,—the legislative function of Parliament, *i.e.*, the mere making of laws, is less significant under the British system than the power of determining, maintaining and rejecting the Ministry.

As regards legislative powers, prior to 1911, the House of Lords was on a footing of equality with the House of Commons and possessed absolute power to reject any Bill passed in the Commons. But the Parliament Act, 1911, practically deprived the House of Lords of any power over 'Money Bills' (having no power to amend a Money Bill, and no power to prevent its being an Act of Parliament beyond a month from the date when it is sent from the House of Commons). As regards *other* Bills, the House of Lords had, under the Act of 1911, only a suspensory veto, *i.e.*, the power to effect a delay in the passing of such a Bill, not exceeding two years and one month from the initial second reading of the Bill in the House of Commons. In other words, if a Bill was passed by the Commons and rejected by the Lords in *three* successive sessions, the Bill *being presented to the House of Lords at least one month before the end of each such session*, and two years had elapsed from the date of the second reading of the Bill in the House of Commons during the first of those sessions and the date on which it passed the House of Commons in the third of such sessions, the Bill might be presented to the Crown and become an Act of Parliament with the Royal assent, over the head of the Lords.²⁵

Now, this period of suspensive veto has been further reduced by the Parliament Act of 1949,²⁵ to *two* sessions and a period of *one year* only dating from the second reading of the Bill in the Commons in the first session. So, though the House of Lords can discuss and amend Bills other than Money Bills, they shall no longer be able to prevent the enactment of any Bill¹ for more than one year and one month since its second reading in the House of Commons in the first of two successive sessions. It is curious to note that the Parliament Act, 1949, itself, has thus been enacted over the head of the House of Lords and against its refusal to pass the Bill. The Royal assent was given to this Bill by a special Royal Commission.

But though the period has been limited, and ultimately the will of the popular

(23) Luce, *Legislative Assemblies*, pp. 36-9, 70.

(24) (1958) Public Law, pp. 287, 399. [The number of life Peers in 1960 was 25].

(25) Phillips, *Constitutional Law*, 1952, pp. 126-8; see the formula in which Royal

Assent is expressed in an Act which is so passed without the assent of the Lords, at p. 128, *ibid*.

(1) The Act does not apply to a Bill to extend the duration of Parliament itself.

House must have its way, the House of Lords may still prove its utility as a revising Chamber to point out the defects of hasty legislation.² This is illustrated by the fact that the Attlee Government accepted, in the House of Lords, not less than 230 amendments to the Bill nationalising transport, 360 amendments to the Bill controlling limited liability companies and similar amendments in regard to the Town and Country Planning Bill, and so on. Similarly in 1947, the House of Lords rejected a Commons motion to suspend the death penalty and forced the Government to issue a Royal Commission to investigate the means of limiting death penalty in Britain.³

Apart from this useful function of offering improvements by way of amendments to controversial measures, successive Governments since 1911 have found the time and facilities available in the Second Chamber of value. Legislation of an intricate, but non-controversial nature, for example, is frequently introduced and fully discussed in the House of Lords before being sent to the Commons, who can then deal with it more speedily. In general, proceedings in the House of Lords impose a second stage on the legislative process which gives time for reflection and is in itself worth while for eliciting new points of view.

From the point of personnel, the House of Lords does not fail in comparison with the House of Commons,⁴ and owing to the larger freedom of debate, the utility of the House of Lords as a criticising and revising body is still acknowledged notwithstanding the curtailment of its powers. In the words of Jennings⁵—

"Legislation is not the sole or even the more important function of the House of Lords. That House is rather an assembly for the debate of the technical and, in the party sense, less 'political' issues of Government. Because the fate of the Government does not depend on its votes and because of the preponderance of one party, the House of Lords can debate in a less obviously partisan manner the principles of foreign and imperial policy; and because the peers have no constituents to placate, no meetings to address, and, often, no speeches to make, they can devote more time to the less spectacular but often useful technical functions of legislative control."

The prestige of the House of Lords has been sought to be further enhanced by the enactment of the Life Peerages Act, 1958 (just referred to), which enables persons of eminence to be members of the House even though it was not possible for them to accept hereditary peerages. The House of Lords thus provides a place in Parliament for persons whose counsel is useful to the State, but who do not wish to immerse themselves in party politics. Its rules of procedure are very flexible and this, together with the fact that its members are not dependent for their seats on party support and the popular vote, makes possible the full and frank expression of individual views.

Two other measures which have been introduced, in the same year, to improve the efficiency of the House of Lords are—

(a) Payment of an attendance allowance up to three guineas a day during sittings of the House (except judicial sittings), making attendance easier for those who are willing to come.

(b) Adoption of a Standing Order (no. 21), according to which those members who do not wish to attend may be granted leave of absence and such members shall not, before the expiry of the leave, attend without notice. The object of this Order is to prevent the unexpected appearance of members who do not usually take part in the deliberations of the House and are likely to be out-of-date and reactionary,—the number of such members being about 1/3 of the House.

(c) *Australia*.—Like the American Senate, the Australian Senate represents the federal principle. There are now 60 Senators, 10 being elected for each State, *directly* by the electors. The Commonwealth Parliament may increase or decrease the representation of any State but not so as to reduce the representation of the original States below six members each or to affect their equal representation in the Senate.

(2) Lord Chorley, 'The House of Lords Controversy', in (1958) Public Law, pp. 221-5.

(3) See (1949) 4 D.L.R. Jour. 22; Phillips, Constitutional Law, 1952, p. 126.

(4) Munro, Government of Europe, 1947, p. 153.

(5) Jennings, Parliament, 1948, p. 4.

They are elected for six years, half their number retiring every three years. The Australian Senate, however, differs from the American Senate on the following points: (i) No power exists in the United States Constitution to dissolve its Senate; but the Australian Senate may be dissolved by the Governor-General to prevent a deadlock between the two Houses (Sec. 57). (ii) Owing to this power of dissolution, the Australian Senate cannot have a continuity of life which characterises the American Senate, notwithstanding the partial retirement of members. For, if the Governor-General dissolves the Senate to remove a deadlock between the two Chambers, a wholly new Senate would be elected. (iii) The Australian Senate has failed to draw to it people of that calibre and experience of which the American Senate can be proud. (iv) The American Executive being responsible to neither House of the Legislature no question of inferiority of the Senate to the House of Representatives on that account arises, but in Australia, the Government being responsible only to the lower House, the Senate obviously suffers in importance.

Nevertheless, the Australian Senate is regarded by some⁶ as the most powerful second Chamber in the British Dominions inasmuch as—(a) It possesses equal power with the House of Representatives in respect of legislation save as regards Money Bills; (b) even as regards Money Bills, it has the power of rejection (but no power to amend), and by the exercise of this power, it may force a dissolution of both Chambers (Sec. 57).

(D) *Canada*.—The Canadian Senate is a *nominated* second Chamber, now consisting of 102 members, nominated by the Governor-General (acting on the advice of his Cabinet), for life, the nomination being distributed amongst the Provinces according to a certain ratio (not equally, as in the U.S.A.). Owing to the looseness of the Canadian federation, equality of State representation in the second Chamber is not maintained in Canada: while four Provinces have 24 members each, the number of members from other Provinces varies, down to a minimum of four. [See Vol I, p. 17].

The Canadian Senate does not possess either the glamour of an aristocratic and hereditary chamber (such as the House of Lords) or the strength of an elected assembly (Australia) or the utility of a Senate representing the federal as opposed to the national idea (as in the U. S. A.). It is a nominated body composed of members who are so rewarded for service to some party organisation. Although Senators are appointed to represent the Provinces, they are spokesmen neither of the Provincial governments nor of the electorates, for they are appointed by the Governor-General for life, that is to say, by the Dominion Cabinet as a reward for partisanship.

"The Senate is the one *conspicuous failure* of the Canadian Constitution. The failure springs from the unchanging partisanship of the appointees; the Senate has been called the Ministry's 'pocket-borough' For some thirty years the public have scarcely been aware of the Senate's existence, for its proceedings are rarely reported in the Press Its primary use is to provide a dignified seclusion for retired politicians"

The political insignificance of the Senate, however, seems to be inexplicable on the face of the Constitution itself; for, there is formal equality of powers in the Constitution for the two Chambers. Though Money Bills must originate in the House of Commons, all bills including Money Bills, require passage by both Chambers, before presentation to the Governor-General. Further, there is no provision in the Constitution for resolving a deadlock between the two Chambers. In spite of this formal equality, the inferiority and inefficiency of the Canadian Senate is due to two facts—

(a) The principle of Cabinet responsibility which has been introduced outside the letters of the Constitution, rests on the English convention that the Cabinet is responsible to the lower Chamber alone. The Canadian Senate has, therefore, no means of control over the government. Usually, not more than one Minister *without portfolio* is taken from the Senate.

(6) Cf. Strong, *Modern Political Constitutions* (1949), p. 205.

(b) Secondly, the very mode of appointment of the Senators tends to the inferiority of the Senate; the Senators are conscious of this inferiority and they have no initiative to attempt to exert their full legal authority. Except proposing a few minor amendments, the Canadian Senate has never effectively delayed any constitutional or social reform.⁷

An illuminating estimate of the position of the Canadian Senate is given by Strong⁸—

"The Senate in Canada attempts the impossible. The Constitution tried to model the Senate on the House of Lords, adopting the plan of nomination for life in place of the hereditary principle. At the same time, it wished to do what it could not do consistently with the system of choice by the central power, namely to maintain the federal idea. This can only be done on the basis of equality among the States framing the federation, each choosing its own Senators These cross purposes have had their effect on the prestige of the Senate in Canada, which has neither the power which attaches to an elective second Chamber nor the usefulness of an upper House which properly enshrines the federal idea."

(E) *Fifth French Republic*.—Art. 24 of the Constitution of 1958 says—

"The Senate shall be elected by indirect suffrage. It shall ensure the representation of the territorial units of the Republic. Frenchmen living outside France shall be represented in the Senate".

A federal element has thus been introduced into the upper Chamber of France. The Senators shall be elected by an electoral college consisting of the sitting members of the Assembly, of the Senate, representatives of local authorities as well as of Frenchmen living abroad.

The power and prestige of the Senate *vis à vis* the Assembly have also been improved by a number of new provisions—

(i) Legislation will normally require the consent of both Houses (Art. 34).

(ii) In case of disagreement between the two chambers in the matter of legislation, the will of the National Assembly shall no longer prevail as a matter of course. The new Constitution provides for a meeting of a joint Committee of both Chambers. Even where the joint Committee fails, the Bill cannot be passed by the vote of the Assembly alone, unless the Government so desires (Art. 45) [see under Art. 108, *post*].

(iii) In the event of a casual vacancy in the office of the President of the Republic, it is the President of the Senate (Art. 7, para. 4), and not the President of the Assembly (as under the preceding Constitution), who shall officiate.

(iv) The President of the Republic has to consult the President of the Senate as to (a) the exercise of the emergency power under Art. 16; (b) the desirability of a dissolution of the National Assembly itself. (Art. 12).

(v) If the Assembly seeks to have a Bill submitted to referendum, it must have the concurrence of the Senate (Art. 11).

(F) *Eire*.—Art. 18 of the Constitution of 1937 provides—

"(1) Seanad Eireann shall be composed of sixty members, of whom eleven shall be nominated members and forty-nine shall be elected members.

(2) A person to be eligible for membership of Seanad Eireann must be eligible to become a member of Dail Eireann.

(3) The nominated members of Seanad Eireann shall be nominated by the Taoiseach with their prior consent.

(4) The elected members of Seanad Eireann shall be elected as follows:—(i) Three shall be elected by the National University of Ireland. (ii) Three shall be elected by the University of Dublin. (iii) Forty-three shall be elected from panels of candidates constituted as hereinafter provided.

(5) Every election of the elected members of Seanad Eireann shall be held on the system of proportional representation by means of the single transferable vote, and by secret postal ballot.

(6) The members of Seanad Eireann to be elected by the Universities shall be elected on a franchise and in the manner to be provided by law.

(7) 1. Before each general election of the members of Seanad Eireann to be elected from panels of candidates, five panels of candidates shall be formed in the manner provided by law

(7) Clotie, Canadian Government and Politics, p. 120; see also Marriott, Second Chambers, p. 147.

(8) Strong, Modern Political Constitutions, (1949), pp. 194-5.

containing respectively the names of persons having knowledge and practical experience of the following interests and services, namely:—

(i) National language and culture, literature, art, education and such professional interests as may be defined by law for the purpose of this panel. (ii) Agriculture and allied interests and fisheries. (iii) Labour, whether organised or unorganised. (iv) Industry and commerce, including banking, finance, accountancy, engineering and architecture. (v) Public administration and social services, including voluntary social activities.

2° Not more than eleven and, subject to the provisions of article 19 hereof, not less than five members of Seanad Éireann shall be elected from any one panel.

(8) A general election for Seanad Éireann shall take place not later than 90 days after a dissolution of Dail Éireann, and the first meeting of Seanad Éireann after the general election shall take place on a day to be fixed by the President on the advice of the Taoiseach.

(9) Every member of Seanad Éireann shall, unless he previously dies, resigns, or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Éireann next held after his election or nomination.

(10) 1° Subject to the foregoing provisions of this article elections of the elected members of Seanad Éireann shall be regulated by law. 2° Casual vacancies in the number of the nominated members of Seanad Éireann shall be filled by nomination by the Taoiseach with the prior consent of persons so nominated. 3° Casual vacancies in the number of the elected members of Seanad Éireann shall be filled in the manner provided by law."

The Senate of Eire, thus, is a partially elected and partially nominated body,—the election, again, being on the basis of functional representation. The Irish Senate, like the English House of Lords, has a subordinate position in law-making. As regards money Bills, its powers are similar to those of the House of Lords. As regards *other* Bills, the Dail may override Senatorial opposition and the Senate's power to interpose delay is limited to 3 months only (Art. 23). But it has the extraordinary power of requesting the President to submit a Bill to a referendum of the people if it can get the support of 1/3 of the members of the Dail to that proposal (Art. 27).

The present Article of *our* Constitution draws from the above Irish precedent in having the Second Chamber composed of elected as well as nominated members and in providing for proportional representation by means of the single transferable vote.

(G) *West Germany*.—Under the West German Constitution of 1949, the second Chamber, called the *Bundesrat*, represents the federal principle. It is a small body of 41 members, who are delegates of the *Länder* (federated provinces) Governments who appoint and recall them. Each *Land* may delegate as many votes as it has at the meetings of the *Bundesrat*. The voting power of each *Land* in the *Bundesrat* varies with its size (with weighting in favour of the smaller units). Each *Land* must vote *en bloc*.

Federal Government bills first go forward to the *Bundesrat* for its views, and after the bills have been read in the *Bundestag*, the House of the people's representatives, the bills are finally read in the *Bundersat* on the basis of what is called "recurrence". There are certain laws on which the representatives of the people have the last word, but there are also those on which the *Bundersat* has a veto. The concurrence of the *Bundesrat* is also necessary for any amendment to the Constitution.

The *Bundesrat* not only co-operates in the legislative process but also has a decisive say in many matters which, by their very nature, originate in the executive sphere—principally matters connected with emergency situations. Again, though the federal government is responsible only to the lower House, the consent of the *Bundesrat* has to be taken by the Government for various administrative actions, e.g., concerning railroads, refugees, dismissal of certain public officials. The *Bundersat* is entitled to take part in the selection of the Federal judges and those of the Federal Constitutional Court. The President of the *Bundesrat* also represents the Federal President, when the latter is prevented from carrying out his duties.

The Second Chamber in West Germany has thus got the distinction of being a council of the representatives of the State Governments, themselves being members of the State Government and of having both legislative and administrative powers.

(H) *Japan*.—The Japanese Constitution provides an example of both Chambers being similiary composed. Art. 43 says—

"Both Houses shall consist of elected members, representative of all the people. The number of the members of each House shall be fixed by law."

The Japanese Parliament has thus the distinction of having an elected Second Chamber.

According to the Constitution itself, thus, there is nothing to distinguish between the two Houses save that the term of office of members of the House of Councillors is 6 years while that of members of the House of Representatives is 4 years. The Constitution does not provide any different basis for the election of the Councillors. The election law made in pursuance of the Constitution has, however, provided that of the 250 members of the House of Councillors, 150 shall be elected in local districts while the remaining 100 shall be elected on a national basis.¹¹ Even then there is not much of structural difference between the two Houses except that the House of Councillors is drawing better talents owing to its relative permanence and immunity from dissolution.¹¹

Even though the Japanese Second Chamber (House of Councillors) is elected by the direct vote of the people just like the other House (*i.e.*, the House of Representatives), it must not be supposed that the Second Chamber shares equal powers with the other House. The following provisions make the position of the House of Councillors inferior to that of the House of Representatives:

(a) If a bill, passed by the House of Representatives, is not passed by the House of Councillors or no action is taken by the latter House within 60 days after receipt of the bill from the House of Representatives, the bill will nevertheless become law if the House of Representatives passes the bill a second time by a majority of two-thirds or more of the members present (Art. 59). [See under Art. 108, *post*].

(b) The budget must first be presented to the House of the Representatives. If the House of Councillors makes a decision different from that of the House of Representatives or does not take any action within 30 days, the decision of the House of Representatives shall be deemed to be the decision of the Legislature (Diet). (Art. 60). This rule applies also in the matter of approval required for the conclusion of treaties (Art. 61).

(c) In case of disagreement between the two Houses in the matter of designation of the Prime Minister, the choice of the lower House shall prevail (Art. 67).

(d) The Cabinet is responsible only to the lower House (Art. 69).

There is, however, a special function assigned by the Japanese Constitution to its second Chamber. As in *our* Constitution (Art. 85), it is only the lower House that is dissolved while the upper House remains a permanent body; further, the Japanese upper House is capable of performing legislative functions during dissolution of the House of Representatives, if the Cabinet so desires (Art. 54). If there is a national emergency while the House of Representatives is dissolved, the Cabinet may convoke an 'emergency session' of the House of Councillors and get legislative measures passed by the Council. Such legislation, however, gets a provisional character, and becomes null and void unless "agreed to by the House of Representatives within a period of 10 days after the opening of the next session of the Diet". (Art. 54).

(I) *Ceylon*.—The Senate of Ceylon is partially elected and partially nominated.

Sec. 8 (1) of the (Constitution) Order in Council, 1946, provides—

"(1) The Senate shall consist of thirty Senators of whom fifteen (hereinafter referred to as 'elected Senators') shall be elected by the House of Representatives and fifteen (hereinafter referred to as 'appointed Senators') shall be appointed by the Governor-General."

(9-10) Hertzog, Some Political Aspects of the Japanese Constitution.

Sec. 9 says—

“(1) After the first election under Sec. 17 of this Order the House of Representatives shall, before proceeding to any other business, elect fifteen Senators; and thereafter, as soon as may be after the occurrence of a vacancy among the elected Senators, the House of Representatives shall elect a person to fill such vacancy. (2) The election of Senators shall, whenever such election is contested, be according to the principle of proportional representation, each voter having one transferable vote

The powers of the Senate of Ceylon in legislation are analogous to those of the House of Lords under the Parliament Act, 1949 (Secs. 33-34 of the Order in Council). Hence, it will have no co-ordinate authority with the House of Representatives and no utility than to interpose some delay upon hasty legislation. But the provision (Sec. 48) that not less than 2 ministers must be members of the Senate and be *responsible* to that body for the action of the entire ministry, enhances the prestige of the Senate. Further, under the system of nomination, it is expected to draw eminent and experienced men.

INDIA

Art. 80: Composition of the Council of States.

The framers of *our* Constitution have combined certain features of the Constitution of *Eire* (nomination and representation of experience and services) and of *South Africa* (indirect election by State Assemblies), in providing for the composition of the Upper Chamber of the Union Parliament. The principle of partial nomination is intended to secure for distinguished persons a place in the Upper Chamber. Election of the major portion of the members by the State Assemblies is intended to give a federal character to this House. But the American principle of equality of State representation¹¹ is not followed, for the number of representatives of the States to our Council of States varies (*vide* Sch. IV, *post*) from 1 (*e.g.*, Manipur) to 34 (Uttar Pradesh).

Cl. (4): Proportional Representation by means of the single transferable vote.—See p. 377, *ante*.

Cl. (5): Election of representatives of the Union Territories.

In conformity with cl. (5) of this Article, Parliament has prescribed the mode of election of representatives of the Union Territories to the Council of States, by inserting Part IVA in the Representation of the People Act (LXXII of 1950).¹² The mode of election, in short, is indirect. The Act provides for the constitution of an electoral college in each Union Territory which shall elect members to the Council of States.

(i) The electoral college for the Union Territory of Delhi shall consist of—

- (a) The Councillors of the Delhi Municipal Corporation; and
- (b) 10 persons to represent the areas within the New Delhi Municipal Committee and the Delhi Cantonment Board to be chosen by direct election on the basis of adult suffrage.

(ii) The electoral college for each of the Union Territories of Himachal Pradesh, Manipur and Tripura shall consist of the members of the Territorial Council constituted for that territory under the Territorial Councils Act, 1956 but shall not include any of the members nominated by the Central Government under that Act.

Election to the Council from the Union Territories is thus entirely *indirect*. While the representatives of a *State* are elected by the elected members of the

(11) For arguments in favour of the principle of equality of State representation in a federal upper house, see Wheare, *Federal Government*, 1951, p. 93.

(12) See Author's Acts, Rules & Orders under the Constitution, Bk. I, p. 87.

Legislative Assembly of that State, the representatives of a Union Territory are elected by an electoral college (which is chosen by direct election).

The maximum number of seats in the Council, according to Art. 80 (1), is 250, of whom 12 are to be nominated. After the reorganisation of States and the Constitution (Seventh) Amendment Act, 1956, the strength of the Council has come to be 238, of whom 12 are nominated. [For the distribution of the 226 elected seats, see the Fourth Schedule, *post*].

Utility of a Second Chamber in a Modern Democracy.

Though it is beyond the scope of this work to enter into the theoretical controversy that has centred round the bicameral system of legislature, it is necessary to refer to certain salient points as to the composition and functions of a Second Chamber in a representative democracy since India has adopted the bicameral system notwithstanding such a long-standing controversy over the system.

History has belied the radical view of the French revolutionary thinker *Abbe Sieyes* that—

"if a Second Chamber dissents from the first, it is mischievous; if it agrees with the first, it is superfluous",

for, notwithstanding this dictum pronounced as far back as the eighteenth century, all the leading countries of the world, including France (as has been shown by the foregoing survey), still possess a Second Chamber. Of the notable examples of a country having discarded its Second Chamber may be mentioned New Zealand (which abolished its Legislative Council in 1951). In England, though there has been a strong movement for a reform in the composition of the House during the last half century, culminating in the Life Peerages Act, 1958 (see p. 485),¹³ the advocates of its total abolition are still in an insignificant minority. A statesman like Sir Winston Churchill defended the second Chamber in Britain in these words—

..... The United States, the Swiss, the Dutch, the Belgians, the French, even in their latest constitutions, have a Second Chamber. Eire has created its own Senate. Our Dominions, the most democratic countries in the world, all have, with the exception of Queensland, I am reminded, sought and preserved two-Chamber Government—what clever people would call bicameral Government. All feel that between the chance vote of an election on universal suffrage and the permanent alteration of the whole slowly built structure of the State and nation there ought to be some modifying process. Show me a powerful, successful free democratic constitution of a great sovereign State which has adopted the principle of single Chamber Government."

(i) Whatever may be said as to the utility of a Second Chamber in a unitary Constitution, there is a virtual agreement amongst publicists and political scientists, that it is a necessity in a federal Constitution, in order to give proper representation to the units of the federation, while the lower House is elected on a territorial and population basis. It is agreed that the Second Chamber checks the centrifugal sentiments by offering the representatives of the States to have their say in the national Legislature. As Gopalaswami Ayyangar put it in the Constituent Assembly—

"The need has been felt (for a second Chamber) practically over all the world wherever there are federations of importance."¹⁴

India, having a federal Constitution, could not, accordingly, dispense with a Second Chamber.

(ii) Next in importance to the federal function is the revising function of a Second Chamber.

It has already been pointed out (p. 485, *ante*) how this function has been admirably performed by the House of Lords in England, and how the popular

(13) A Joint Select Committee of both Houses has again been constituted, in 1961, to consider the reform of the House of

Lords to maintain its efficiency as a second Chamber [(1961) Public Law, 307].
(14) C. A. D., Vol. IV, p. 927.

House has accepted the amendments made in the upper House, notwithstanding its power to override that latter. The composition of almost every Second Chamber in the world ensures a more aged and experienced personnel for the Second Chamber so that

"all legislative measures may receive a *second* consideration by a body different in character from the primary representative assembly, and, if possible, superior or supplementary in intellectual qualification."¹⁵

So far as the Second Chamber in *our* Parliament is concerned, the makers of *our* Constitution expected that the different mode of election and nomination would secure in it men of better bearing and experience than in the House of the People, elected on adult suffrage.¹⁶

(iii) Another important function of a Second Chamber is the interposition of so much delay (and not more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it.¹⁷

The importance of this function becomes greater in matters of highly controversial nature on which the views of the electorate are doubtful and it is necessary to allow sufficient time for public opinion to crystallize and express itself.

This point was emphasised by Gopalaswami Ayyangar in defence of the Second Chamber in *our* Draft Constitution when he said—

"..... the most that we expect the second chamber to do is perhaps to hold dignified debates on important issues and to delay legislation which might be the outcome of the passions of the moment."¹⁸

(iv) While as a revising Chamber, the upper House serves to eliminate the errors of the lower House it does a complementary function by initiating bills of a comparatively non-controversial matter and sending to the lower House a fully discussed measure so that it may have an easier or quicker disposal in the lower House.¹⁸

In this respect, the Council of States resembles the House of Lords. In India, the Council of States has equal power to initiate any Bill other than Money or financial Bills. As a result, a large number of Bills, including controversial measures such as the reform of the Hindu law of succession, marriage and the like, have been initiated in the Council.^{18a}

(v) A Second Chamber serves an important function by enabling full and free discussion of large and important questions, at times when the lower House is otherwise occupied. It is also possible to have a freer discussion of such questions in the Second Chamber where, as in England or India, a defeat of the Government does not lead to a fall of the Cabinet. At the same time, a debate in the Second Chamber would often oblige the Government to make a statement as to its policy upon some particular matter, to defend its action.

In fine, it should be observed that the utility of a second chamber in a democratic system ultimately depends upon its composition. In this respect, though the composition of *our* Council of States is not of the same level as that of the American Senate, it may be said that, on the whole, a bulk of its Members consists of seasoned men whose views may profitably be received before finally deciding questions of national importance.

Constitutional position of our Council of States as compared with that of the House of the People.

Though *our* Council of States does not occupy as important a place in the constitutional system as the American Senate (p. 483, *ante*), its position is not so

(15) Sidgwick, *Elements of Politics*.

(16) C. A. Deb, Vol. IV, p. 927.

(17) Report of the Bryce Conference, 1918.

(18) Lord Chorley, 'The House of Lords

Controversy,' in (1958) Public Law 216 (227).

(18a) During the quinquennium 1952-56, the Council dealt with 363 Bills of which 101 had been initiated in the Council.

inferior as that of the House of Lords^{18b} as it stands to-day. Barring the specific provisions which provide for differentiation, it may be said that *our* Constitution proceeds on a theory of equality of status of the two Houses.^{18c}

This equality of status has been explained by Prime Minister Nehru,^{18d} in these words—

"Under our Constitution Parliament consists of two Houses, each functioning in the allotted sphere laid down in that Constitution. We derive authority from that Constitution. Sometimes we refer back to the practice and conventions prevailing in the House of Parliament of the United Kingdom and even refer erroneously to an Upper House and a Lower House. I do not think that is correct. Nor is it helpful always to refer back to the procedure of the British Parliament which has grown up in the course of several hundred years and as a result conflicts originally with the authority of the King and later between the Commons and the Lords. We have no such history behind us, though in making our Constitution we have profited by the experience of others.

"Our guide must, therefore, be our own Constitution which has clearly specified the functions of the Council of States and the House of the People. To call either of these Houses an Upper House or a Lower House is not correct. Each House has full authority to regulate its own procedure within the limits of the Constitution. Neither House, by itself, constitutes Parliament. It is the two Houses together that are the Parliament of India That Constitution treats the two Houses equally, except in certain financial matters which are to be the sole purview of the House of the People. In regard to what these are, the Speaker is the final authority".

The Constitution also makes no distinction between the two Houses in the matter of selection of Ministers. In fact, during a part of the quinquennium from 1952-57, there were several Cabinet Ministers amongst the Members of the Council of States, such as the Ministers for Home Affairs, Law, Railways and Transport, Production, Works, Housing and Supply and Minister without Portfolio in the Ministry for External Affairs.

The exceptional provisions which impose limitations upon the powers of the Council of States, as compared with the House of the People are:

(1) A Money Bill shall not be introduced in the Council.¹⁹ Even a Bill having like financial provisions cannot be introduced in the Council.¹⁹

(2) The Council has no power to reject or amend a Money Bill. The only power it has with respect to Money Bills is to suggest 'recommendations' which may or may not be accepted by the House of the People, and the Bill shall be deemed to have been passed by both Houses of Parliament, without the concurrence of the Council, if the Council does not return the Bill within 14 days of its receipt or makes recommendations which are not accepted by the House.²⁰

(3) The Speaker of the House has got the sole and final power of deciding whether a Bill is a Money Bill.²¹

(4) Though the Council has the power to discuss, it has no power to vote money for the public expenditure and demands for grants are not submitted for the vote of the Council.²²

(5) Apart from this, the Council suffers, by reason of its numerical minority, in case a joint session is summoned by the President to resolve a deadlock between the two Houses.²³

On the other hand, the Council of States has certain special powers which the other House does not possess and this certainly adds to the prestige of the Council:

(a) Art. 249 provides for temporary Union legislation with respect to a matter in the State List, if it is necessary in the national interest, but in this matter a special role has been assigned by the Constitution to the Council. Parliament can assume such legislative power with respect to a State subject only if the Council of States declares, by a resolution supported by not less than two-thirds of

(18b) Thus, *our* Council cannot be overridden by the House in the matter of ordinary legislation (i.e., as regards *other than Money Bills*) simply by lapse of time as under the English Parliament Acts (see p. 477, *ante*).

(18c) Cf. Arts. 107 (2), 108 (1), 111.

(18d) Statement in the Rajya Sabha,

d. 6-5-53. Similar views were reiterated in the other House [H. P. Deb., 12-5-53].

(18e) Art. 109 (1).

(19) Art. 117 (1).

(20) Art. 109 (4)-(5).

(21) Art. 110 (3).

(22) Art. 113 (2).

(23) Art. 108 (4).

its members present and voting, that it is necessary or expedient in the national interest that Parliament should make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force (see *post*).

(b) Similarly, under Article 312 of the Constitution, Parliament is empowered to make laws providing for the creation of one or more All-India Services common to the Union and the States, if the Council of States has declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do.

In both the above matters, the Constitution assigns a special position to the Council because of its federal character and of the fact that a resolution passed by two-thirds of its members would virtually signify the consent of the States.

Relation between the two Houses in practice.

Even though the Constitution assigns some specific functions to the Council of States and though, in contrast to Art. 169 relating to the upper Chamber in the States, there is no corresponding provision enabling an abolition of the upper Chamber in Parliament, there has been, since the inauguration of the Constitution, a feeling in the House of the People that the Council serves no useful purpose and is nothing but a 'device to flout the voice of the people'²⁴⁻²⁵ which has led even to the motion of a Private Member's Resolution for the abolition of the Council,²⁴ which was stayed for the time being by the Prime Minister on the ground that two years' working was too short a period for adjudging the usefulness of the Council.

It is evident that in such a situation the relations between the two Houses cannot be happy and incidents of friction have not been rare. Some of these have been due to the fact that notwithstanding the theory of equality of status propounded by the Prime Minister (p. 493, *ante*), in many vital matters the Council has not got equal powers under the Constitution and these give rise to a feeling in the lower House that the Council is inferior in status and that the Council must yield in the long run. This may be illustrated with reference to some of the instances of conflict between the two Houses.

(i) The question arose whether the Council can prevent a Minister, who is its member, from appearing before the House of the People if the Minister is directed by the House to attend in connection with a matter of privilege or otherwise. There was an instance where the Council passed a formal resolution that the Law Minister should not be present in the House when such a matter was brought before that House.¹ The question could not be decided since the Law Minister eventually appeared² before the House in spite of the resolution of the Council.

The weakness of the Council of States in this matter lies in the fact that the Council of Ministers is responsible not to itself but to the House of the People. The Council of Ministers, can, therefore, ill afford to allow the question of non-attendance of a particular Minister a case for a motion of no-confidence against the entire Ministry. Of course, the Minister who, being a member of the Council violates a formal resolution of the Council enjoining him not to do an act, may be hauled up for contempt of the Council, but he is likely to be saved if the Government has a majority in the Council.

(ii) Another source of weakness of the Council is the constitutional provision that it has no power to vote the demand for grants (Art. 133 (2)). But it has the power to discuss the estimates (Art. 113 (1)) when the Annual financial statement is laid before it. But this function can hardly be performed by the Council unless it has its Estimates Committee to examine the estimates. But the Council has not so far set up any such Committee and it seems it has conceded its weakness in this matter because the Government is not responsible to it, though

(24) H. P. Deb., 2-4-54.

(25) A member of the House once went to the length of describing the Council as a 'pack of urchins', which led to a joint meet-

ing of the Privileges Committees of the two Houses.

(1) C. S. Deb., 1-5-53.

(2) H. P. Deb., 1-5-53.

in the allied matter of having a Public Accounts Committee, the Council has fought, with some success, presumably because its constitutional position in that behalf is somewhat stronger. Art. 151 (1) clearly lays down that "the reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall . . . be laid before *each* House of Parliament".

Laying before each House would be meaningless unless each House has the power to examine it and the Constitution does not in any way limit the powers of the Council of States to deal with the reports after they are laid before it. It was, accordingly, suggested at p. 468 of the 2nd Ed. of this Commentary that after they are laid before each House, the reports shall be scrutinised "by the Committee of Public Accounts of *each* House."

Subsequent to the above suggestion of the Author, the Council took up the matter in 1954. But instead of asserting its right to have a separate Public Accounts Committee, it suggested to the House that there should be a *Joint* Committee of the two Houses on Public Accounts. The Rules Committee of the House refused to accede to such proposal on the ground that the House had special responsibilities in financial matters which it could not share with the Council. Ultimately, the Prime Minister brought a motion before the House, not to set up a Joint Committee, but "to recommend to the Council of States that they nominate seven members to *associate* with the Public Accounts Committee of *this* House". It was evidently a compromise which acknowledged the inferiority of the Council (see, further, under Art. 151, *post*).

(iii) Another source of weakness of the Council is its smaller numerical strength which gives the House an upper hand at a joint meeting of the two Houses in case of a deadlock [Art. 108 (4)] or at meetings of joint Committees of the two Houses, where the decision is that of a majority of the aggregate number of the two Houses present.

Analogous Provision.—Compare composition of the Legislative Council of a State in Art. 171.

INDEX TO COMMENTS

ARTICLE 80.

Amendment, 482; Effects of Amendments, 482.

Other Constitutions:

(A) U.S.A., 482; (B) England, 484; (C) Australia, 485; (D) Canada, 485; (E) Fifth French Republic, 487; (G) Eire, 487; (H) West Germany, 488; (I) Japan, 489; (J) Ceylon, 489.

India:

Composition of the Council of States, 490.

Cl. (4). Proportional Representation by means of the single transferable vote, 490.

Cl. (5). Election of representatives of the Union Territories, 490.

Utility of a Second Chamber in a Modern Democracy, 491; Constitutional position of the Council of States as compared with that of the House of the People, 492.

Before 1-11-56

81. (1) (a) Subject to the provisions of clause (2) and of articles 82 and 331, the House of the People shall consist of not more than five hundred members directly elected by the voters in the States.

(b) For the purpose of sub-clause (a), the States shall be divided, group-

After 1-11-56

81. (1) Subject to the provisions of article 331, the House of the People shall consist of—

(a) not more than five hundred members chosen by direct election from territorial constituencies in the States, and

(3) Substituted by the Constitution (Seventh Amendment) Act, 1956.

ed or formed into territorial constituencies and the number of members to be allotted to each such constituency shall be determined as to ensure that there shall be [not less than one member for every 750,000 of the population and] not more than one member for every 500,000 of the population.

(c) The ratio between the number of members allotted to each territorial constituency and the population of that constituency as ascertained at the last preceding census of which the relevant figures have been published shall, so far as practicable, be the same throughout the territory of India.

(2) The representation in the House of the People of the territories comprised within the territory of India but not included within any State shall be such as Parliament may by law provide.

(3) Upon the completion of each census, the representation of the several territorial constituencies in the House of the People shall be readjusted by such authority, in such manner and with effect from such date as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.

(b) not more than twentyfive⁴ members to represent the Union territories, chosen in such manner as Parliament may by law provide.

(2) For the purposes of sub-clause (a) of clause (1),—

(a) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(b) each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State.

(3) In this article, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

Adaptation.—By the Constitution (Removal of Difficulties) Order No. VIII (as amended by the Constitution (Seventh Amendment Act, 1956), the President has made the following adaptation to Art. 81—

"For the period during which the tribal areas specified in Part B of the Table appended to Para. 20 of the Sixth Sch. to the Constitution or parts thereof are administered by the President by virtue of sub-Para. (2) of Para. 18 of the said Sch., . . .

(a) in sub-clause (b) of cl. (1), after the words "Union territories", the words, letters and figures "and the tribal areas specified in Part B of the Table appended to paragraph 20 of the Sixth Schedule" shall be inserted; and

(b) to cl. (2), the following proviso shall be added, namely:—

"Provided that the constituencies into which the State of Assam is divided shall not comprise the tribal areas specified in Part B of the Table appended to paragraph 20 of the Sixth Schedule."

See, further, under Para. 18 of the Sixth Schedule, *post*.

Amendments.—I. The words "not less than one member for every 750,000 of the population and", occurring in cl. (1) (b) were omitted by the **Constitution (Second Amendment) Act, 1952**.

II. The Article was substituted by the **(Seventh Amendment) Act, 1956**, for the original Article.

(4) Substituted for the word 'twenty' by the Constitution (Fourteenth Amendment) Act, 1962.

III. The member of representatives of Union Territories has been raised from 20 to 25 by the *Constitution (Fourteenth Amendment) Act, 1962*, with effect from the 28th December, 1962.

Effects of Amendments.

(a) The provision for the grouping of States for the purpose of forming territorial constituencies, in cl. (1) (b), has been omitted, since after reorganisation each of the States will be large enough to be divided into a number of constituencies and will not permit of being grouped together with other States for this purpose or being "formed" into a single territorial constituency.⁵

(b) The principle of uniformity of representation amongst the States *inter se* and as amongst territorial constituencies of the same State has been substituted for the numerical minimum prescribed in the original cl. (1) (b).

(c) The provision for readjustment of constituencies after each census, which was in cl. (3) of the original Art. 81, has been transferred to Art. 82.

(d) Provision has been made for representation of the Union territories, to the extent of 25 members.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art. 1, Sec. 2 (1) of the Constitution provides—

"The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

The 14th Amendment (1868) further provides—

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State"

The number of votes in each State is determined by federal census [Art. I, Sec. 2 (3)]. The Constitution does not fix the number of members of the House but leaves it to the determination of Congress, subject to two limitations, *viz.*, that each State must have one member and that the total shall not exceed one for every 30,000 inhabitants [Art. 1, Sec. 2 (3)]. At present the House of Representatives has 437 members, elected by the people, directly by single-member territorial constituencies. Each member represents about 350,000 of the people.

(B) *England*.—The House of Commons at present consists of 630⁶ members, elected by single-member territorial constituencies of England, Scotland, Wales and Northern Ireland. Some redistribution of the constituencies has been effected by the Representation of the People Acts, 1945-1949, but the suggestion of introducing Proportional representation for the House of Commons has so far been resisted. Each member represents about 80,000 of the people.

(C) *Canada*.—The House of Commons is elected by the people of the Provinces in proportion to population, with provision for decennial adjustments (Secs. 37, 51-52), subject to the condition that—

'a Province shall always be entitled to a number of members in the House of Commons not less than the number of Senators representing such Province' (Sec 51-A).

The membership is 265 since 1952.

(D) *Australia*.—The House of Representatives is elected by the people voting, directly, in the States in proportion to the population of each State. The number of representatives to be elected in each State is ascertained by fixing a quota, *i.e.*, by dividing the population of the Commonwealth by twice the number of Senators, and then dividing the population of the State by the quota so ascertained, subject

(5) Statement of Objects and Reasons to the Constitution (Ninth Amendment) Bill, 1956.

(6) Britain, 1961, p. 33.

to the right of every original State to a minimum number of five members' (Secs. 24-27). The number of members of the House since the election of 1951 is 123.

(E) *Eire*.—Art. 16 (2) of the Constitution of 1937 provides—

'a Province shall always be entitled to a number of members in the House of Commons not less than the number of Senators representing such Province' (Sec. 51-A).

"(2) (i) Dail Eireann shall be composed of members who represent constituencies determined by law.

(ii) The number of members shall from time to time be fixed by law, but the total number of members of Dail Eireann shall not be fixed at less than one member for each 30,000 of the population, or at more than one member for each 20,000 of the population.

(iii) The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as it is practicable, be the same throughout the country.

(iv) The Oireachtas shall revise the constituencies at least once in every 12 years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of Dail Eireann sitting when such revision is made.

(v) The members shall be elected on the system of proportional representation by means of the single transferable vote.

(vi) No law shall be enacted whereby the number of members to be returned for any constituency shall be less than three."

The Constitution of Eire makes the innovation of electing the popular House by Proportional representation,—the movement for which has not yet succeeded in England or America.

(F) *Fifth French Republic*.—Art. 24 of the Constitution of 1958 says—

"The deputies to the National Assembly shall be elected by direct suffrage".

Art. 25 provides—

"An organic law shall determine the term for which each Assembly is elected, the number of its members, their emoluments, qualifications and disqualifications".

By an organic law made under the above article, it has been provided that members of the Assembly shall be elected for five years by the system of single-member constituencies. The total membership now is 503.

(G) *West Germany*.—Art. 38 of the West German Constitution of 1949 provides that members of the lower House of the federal Parliament (*Bundestag*) shall be elected by universal adult suffrage and that details shall be regulated by federal law. By such legislation, the *Bundestag* consists of 497 elected members. Besides, there are 22 'non-voting' members for Berlin.*

(H) *Japan*.—Art. 43 has already been referred to (p. 482, ante). By the Election Law of 1947, the membership of the House of Representatives has been fixed at 466 (increased to 467 in 1953), elected by universal suffrage in territorial constituencies. Art. 44 provides—

"The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income."

The only qualification laid down by the Election Law of 1947 for being an elector is 6 months' residence in the constituency.

(I) *Ceylon*.—Sec. 11 of the Constitution Order in Council, 1946, provides—

"(1) Subject to the provisions of Sec. 74 of this Order, the House of Representatives shall consist of the members elected by the electors of the several districts constituted in accordance with the provisions of this Order, and the members, if any, appointed by the Governor-General under Sub-sec. (2) of this section.

(2) Where after any general election the Governor-General is satisfied that any important interest in the Island is not represented, he may appoint any persons not exceeding six in number, to be members of the House of Representatives.

(3) When the seat of a member appointed under this section falls vacant the Governor-General may appoint a person to fill the vacancy"

Sec. 74 says—

"Notwithstanding anything in sec. 11 of this Order, the first House of Representatives shall consist of 101 members, 95 of whom shall be elected in accordance with the law in

(7) Nicholas, *Australian Constitution*, 1948, p. 54.

(8) Neumann, *European & Comparative Government*, 1960, p. 430.

force relating to the election of members of Parliament, and 6 of whom shall be appointed by the Governor-General."

The House of Representatives of Ceylon shall thus have a small nominated body to represent 'any important interest' as the Governor-General may deem fit, and the rest of the members shall be directly elected by the people in territorial constituencies.

INDIA

Cl. (1): Allocation of seats.—The *maximum* number of seats authorised by the Constitution for the House of the People is now 527, including—

(a) 500 members elected from the States;⁹

(b) 25 members from the Union Territories¹⁰;

(c) 2 members nominated to represent the Anglo-Indian community.¹¹

After the First Election in 1952, the total number of members in the House of People was 499.¹²

After the Second Election of 1957, the total number of members was 505 and at the end of 1957 it came up to 506.

After The Third General Election of 1962, and the Nagaland Act, 1963, the membership is as follows—

Representatives of States (including Nagaland, Jammu & Kashmir)	488
Representatives of the Union Territories of Delhi, Himachal Pradesh, Manipur, Tripura, Goa, Daman & Diu and Pondicherry	16
Nominated members for N.E.F. Tract; the Andaman, Laccadive, Minicoy and Amindivi Islands, Dadra and Nagar Haveli ¹³	4
Islands, Dadra and Nagar Haveli ¹³	5
Nominated Anglo-Indians	2
	<hr/> 510

'Subject to the provisions of Art. 331'.—These words mean that if the President exercises his power to nominate not more than two members from the Anglo-Indian community, under Art. 331, the number of such members shall be in addition to the maximum membership prescribed in Art. 81 (1). The same result is reinforced by the opening words of Art. 331—"notwithstanding anything in Art. 81".

The President has nominated two members to represent the Anglo-Indian community (see *above*), and that is how the maximum membership has come to 527 in place of 525 as mentioned in Art. 81 (1).

Sub-cl. (a): Territorial Constituencies.

While for the purpose of election of the representatives of the States to the Council of States under Art. 80 (4), each State serves as a constituency, for the purpose of election to the House of the People under Art. 81 (a), each State is to be divided into territorial constituencies in such manner as to comply with the condition laid down in Art. 81 (2) (b). This division into territorial constituencies is to be made by law, under s. 2 (f) of the Representation of the People Act, 1950.

The Delimitation Acts, 1952 and 1962 have been enacted for this purpose and a Delimitation Commission has been set up to delimit the territorial constituencies and also to readjust them, as required by Art. 82. The Delimitation of Parliamentary

(9) Art. 81 (1) (a).

(10) Art. 81 (1) (b).

(11) Art. 331.

(12) For particulars, see C. 3, Vol. I, p. 513.

(13) Dadra and Nagar Haveli has been constituted a Union Territory, by the Constitution (Tenth Amendment) Act, 1961 and allotted one nominated seat, by the Dadra and Nagar Haveli Act, 1961.

and Assembly Constituencies Order, issued by this Commission constitutes the law for delimitation,¹⁴ subject to the Two-Member Constituencies (Abolition) Act, 1961 (I of 1961), which has provided for the splitting up of two-member constituencies into single-member constituencies.

Special provision for Jammu and Kashmir.

Para. 2 (5) (c) of the Constitution (Application to Jammu & Kashmir) Order, 1954 (see under Art. 370, *post*) provides—

"Art. 81 shall apply subject to the modification that the representatives of the State in the House of the People shall be appointed by the President on the recommendation of the Legislature of the State."

The result is that six (6) seats allocated to the State of Jammu & Kashmir, fixed by the Representation of the People Act, 1950, shall be filled up, not by direct election as in the other States, but by appointment by the President *on the recommendation of the Legislature of Jammu and Kashmir*.

Sub-cl. (b): Representation of Union Territories.

The 25 members to represent the Union Territories are to be chosen in such manner as Parliament may by law provide. This has been provided by s. 4 (1) of the Representation of the People Act, 1950 to be nomination by the President:

"The seats allotted under s. 3 to the State of Jammu and Kashmir (see above), to the Andaman and Nicobar Islands, to the Laccadive, Minicoy and Amindivi Islands to *Dadra and Nagar Haveli* and to the Part B tribal areas shall be seats to be filled by persons nominated by the President".

The result is that while all the other seats in the House of the People shall be filled by persons elected by direct election, the seats for Jammu & Kashmir and the specified Union Territories shall be filled by nomination.

INDEX TO COMMENTS

ARTICLE 81.

Adaptation, 496; Amendments, 496; Effects of Amendments, 497.

Clause (1).

Other Constitutions:

(A) U.S.A., 497; (B) England, 497; (C) Canada, 497; (D) Australia, 497; (E) Eire, 498; (F) Fifth French Republic, 498; (G) West Germany, 498; (H) Japan, 498; (I) Ceylon, 498.

India:

Allocation of seats, 499; 'Subject to the provisions of Art. 331', 499.

Sub-cl. (a): Territorial Constituencies, 499; Special provision for Jammu & Kashmir 499.

Sub-cl. (b): Representation of Union Territories, 500.

Before 1-11-56

82. Notwithstanding anything in clause (1) of article 81, Parliament may by law provide for the representation in the House of the People of any State specified in Part C of the First Schedule or of any territories comprised within the territory of India but not included within any State on a basis or in a manner other than that provided in that clause.

Special provision as to representation of States in Part C and territories other than States.

After 1-11-56

¹⁵**82.** Upon the completion of each census, the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.

(15) Substituted by the Constitution (Seventh Amendment) Act, 1956.

(14) See Rep. of the Second General Elections in India, (ECI. I.I. 57, pp. 69-70).

Amendment.—Art. 82 was substituted for the original Article by the Constitution (Seventh Amendment) Act, 1956.

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art. 1, Sec. 2 (3) of the Constitution provides for an enumeration or census at the interval of every ten years, in such manner as Congress may by law direct. At the end of each enumeration, Congress is expected to make a new appointment of representatives amongst the States. But this function of Congress, viz., delimitation of constituencies and redistribution, has been held to be political, and, hence, non-justiciable. Courts cannot compel Congress to perform it.¹⁶ Owing to such census and redistribution, the membership of representatives has come up to 437 from 65.¹⁷

(B) *Canada.*—Sec. 51 of the British North America Act provides—

"On the completion of the Census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial Census, the representation of the four Provinces shall be readjusted by such Authority, in such manner, and for such time, as the Parliament of Canada from time to time provides....."

As already stated (p. 497, *ante*), the Canadian House of Commons has no fixed number of membership (Sec. 52). The size of the House fluctuates with variations in the changes in population in the various provinces, there being a readjustment and redistribution after each decennial census. While the principles upon which the apportionment is to be made are laid down by the Constitution Act (Secs. 51-51A), the actual subdivision of the Provinces into constituencies is left to the Canadian Parliament, with power to increase the number of members of the House of Commons if required (Sec. 52).

(C) *Eire.*—Art. 16 (2) (iv) (quoted, at p. 498, *ante*) provides for similar readjustments.

INDIA

Amendment.—This Article was substituted by the Constitution (Seventh Amendment) Act, 1956. The objects of the Amendment are explained under the next head.

Scope of Art. 82 : Readjustment of Representation.

Art. 82, as it stood *before* the Constitution (Seventh Amendment) Act, 1956, empowered Parliament to make special provision for the representation in the House of the People of a Part C State and any territory outside the States (*e.g.*, the Andaman and Nicobar Islands).¹⁸

The Article, *as it now stands*, empowers Parliament to provide for the readjustment of the representation of the States and the territorial constituencies thereof in the House of the People, after each census. This provision has been transferred from Cl. (3) of original Art. 81 (see p. 482, *ante*).

The Proviso lays down that the representation shall be readjusted, not immediately after publication of the results of the census, but upon the dissolution of the then existing House.

Similar provision is made in Art. 170 (4) as regards the Legislative Assembly of a State.

Legislation by Parliament.—The Delimitation Commission Act (81 of 1952), enacted prior to the substitution of the present Article, provided for the delimitation of the constituencies and the readjustment of their representation on the basis of the latest census figures. Such delimitation was made in 1952, 1957.

(16) *Colegrove v. Greene*, (1945) 328 U.S. 549; *Pacific Tel. Co. v. Oregon*, (1912) 223 U.S. 118.

(17) The number has become 437 since

the admission of Alaska and Hawaii as new States.

(18) Vide C3, Vol. I, p. 516. [This matter is now provided in Art. 81 (1) (b), p. 496, *ante*].

The Act set up a Delimitation Commission, having the duty—

“to readjust the representation of the several territorial constituencies in the House of the People and of the several territorial constituencies in the Legislative Assembly of each State other than Jammu and Kashmir, on the basis of the latest census figures and to delimit the said constituencies.”

The Act of 1952 has been replaced by the Delimitation Commission Act, 1962 (61 of 1962).^{18a}

INDEX TO COMMENTS

ARTICLE 82.

Amendment, 501.

Other Constitutions :

(A) U.S.A., 501 ; (B) Canada, 501 ; (C) Eire, 501.

India :

Scope of Art. 82: Readjustment of representation, 501 ; Legislation by Parliament, 501.

83. (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *U.S.A.*—Members of the Senate are elected for a term of six years (17th Amendment). One-third of the Senators retire at the end of every two years, and in their place there is an election of $\frac{1}{3}$ of the Senators every second year. This system was introduced by dividing the Senators into three classes after the first election held after inauguration of the Constitution, of which the first class was to retire at the end of the second year and so on [Sec. 3 (2), Art. I], and that system is continuing since then.

(B) *Australia.*—Senators are elected for a term of six years and half of them retire, by rotation, every third year.

Sec. 13 of the Australian Constitution Act, as amended in 1907, provides how members of the Senate shall retire by rotation:

“As soon as may be after the Senate first meets and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of 3 years and the places of those of the second class at the expiration of 6 years, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of 6 years from the beginning of their term of service.

The election to fill vacant places shall be made within one year before the places are to become vacant.”

(18a) See Author's, Acts, Rules & Orders under the Constitution of India. Book I,

A Senator may also lose his seat by incurring disqualification under ss. 19, 20, 44 or 45 of the Act.

(C) *West Germany*.—As stated earlier (p. 488, *ante*), the members of the *Bundesrat* under the West German Constitution of 1949 are delegates of the *Land* (i.e., federal Units) Governments. They are subject to recall by those Governments, hence there is no fixed tenure or other provision for retirement.

(D) *Fifth French Republic*.—See Art. 25 reproduced at p. 505, *post*. By an organic law made under that Article, the term of a Senate has been raised to *nine* years, one-third of the members being renewed every three years. The Assembly has a term of 5 years (see under Art. 81, *ante*).

(E) *Canada*.—S. 29 of the Br. North America Act, 1867 provides—

"A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life."

The Canadian Senate is thus a permanent body and those who are appointed hold their membership until death or resignation or incurring a disqualification under s. 31.

(F) *Japan*.—Arts. 45-6 of the Constitution of Japan, 1946 provide—

"Art. 45. The term of office of members of the House of Representatives (lower Chamber) shall be four years. However, the term shall be terminated before the full term is up in case the House of Representatives is dissolved.

Art. 46. The term of office of members of the House of Councillors shall be six years, and election for half the members shall take every three years."

(G) *Ceylon*.—Sec. 8 (2)-(4) of the Ceylon (Constitution) Order in Council, 1946, provides—

"(2) The Senate shall be a permanent body and the term of office of a Senator shall not be affected, and the seat of a Senator shall not become vacant, by reason of a dissolution of Parliament. (3) One-third of the Senators shall retire every second year. (4) Subject to the provisions of sec. 73 of this Order, the term of office of a Senator shall be six years from the date of his election or appointment"

Sec. 73 says—

"For the purpose of securing that one-third of the Senators shall retire every second year, at the first meeting of the Senate under this Order, the Senate shall by lot divide the Senators into three classes, each class consisting of five elected Senators and five appointed Senators, and the term of office of the Senators of the first class shall terminate at the expiry of a period of two years, the term of office of the Senators of the second class shall terminate at the expiry of four years, and the term of office of the Senators of the third class shall terminate at the expiry of six years, from the date of election or appointment as the case may be. For the purposes of this section, appointed Senators shall be deemed to have been appointed on the day on which elected Senators are elected."

Senators, so retiring, are eligible for re-election or re-appointment, from time to time (s. 8).

A Senator may lose his seat on becoming subject to any disqualification under s. 13 or 23 of the Order.

(H) *Government of India Act, 1935*.—Sec. 18 (4) of the Act provided—

"The Council of States shall be a permanent body not subject to dissolution, but as near as may be one-third of the members thereof shall retire in every third year in accordance with the provisions in that behalf contained in the first Schedule."

INDIA

Cl. (1) : Periodical retirement of members of Council of States.

The provision for periodical retirement of a portion of the members of the Upper Chamber follows the American model. The merit of this plan is to prevent it from being turned into a stale body and to have into it a continual flow of fresh talents. The retirement of some of the members according to this provi-

sion would not cause the continuing Chamber to be a different Chamber in the eye of law.¹⁹

The Council of States is not subject to dissolution but as nearly as possible one-third of its members retire on the expiration of every second year. The term of office of a member of the Council other than a member chosen to fill a casual vacancy is six years. Upon the initial constitution of the Council of States, the term of office of some members then chosen was curtailed in accordance with the provisions of the Council of States (Term of Office of Members) Order, 1952,²⁰ made by the President in order that as nearly as may be one-third of the members holding seats of each class would retire every second year. Accordingly, one-third of the members of the Council retired in April, 1954, and another one-third in April, 1956, and on each occasion elections were held and nominations made to fill the seats vacated by one-third of the members.

Legislation by Parliament.—Under the power conferred by the present clause, Parliament has, by s. 154 of the Representation of the People Act (XLIII of 1951), provides as follows:—

“(1) Subject to the provisions of sub-sections (2) and (2A), the term of office of a member of the Council of States, other than a member chosen to fill a casual vacancy, shall be six years.

(2) Upon the first constitution of the Council of States the President shall, after consultation with the Election Commission, make by order such provision as he thinks fit for curtailing the term of office of some of the members then chosen in order that, as nearly as may be, one-third of the members holding seats of each class shall retire in every second year thereafter.

(2A) In order that, as nearly as may be, one-third of the members may retire on the second day of April, 1958, and on the expiration of every second year thereafter, the President shall, as soon as may be after the commencement of the Constitution (Seventh Amendment) Act, 1956, after consultation with the Election Commission, make by order such provisions as he thinks fit in regard to the terms of office of the members elected under sub-section (2) of section 147.

(3) A member chosen to fill a casual vacancy shall be chosen to serve for the remainder of his predecessor's term of office.”

In pursuance of sub-sec. (2) of the above section, the President made the Council of States (Term of Office of Members) Order, 1952²⁰, prescribing a system of lottery for dividing the members of the Council of States into three categories, each of which was eliminated every second year.

CLAUSE (2).

OTHER CONSTITUTIONS

(A) *U.S.A.*—In the United States, the lower Chamber, the House of Representatives, has a term of two years fixed by the Constitution and election is held every second year. The executive or any other authority cannot dissolve the House of Representatives earlier, or extend its two-year term, for a day. There must be a Congressional election every second year whether in war or peace.²¹

The period of two years is regarded by many as too short to formulate a programme.²²

(B) *England.*—Under the Parliament Act, 1911, the duration of Parliament is limited to 5 years, so that there must be an election of the House of Commons once in 5 years. The Executive, however, possesses, the power to dissolve it earlier [see under Art. 85 (2), *post*]. On the other hand, the 5 year term can be extended by an Act of Parliament itself (without any limit), and such Acts, prolonging its own life, were passed by Parliament during World Wars I and II [e.g., the Parliament that was dissolved in 1945, had been elected in 1935].

(19) Cf. *Umayal v. Lakshmi*, A. 1954 F.C. 25 (39).

(20) S.R.O. 1669, d. 26-9-52 (Gaz. of India, Extraordinary, Part II, Sec. 3, d. 30-9-52); see Author's Acts, Rules & Orders under the Constitution, p. 156.

(21) Even in the midst of World War II, America had her elections.

(22) *Vide*, West, American Government 1946, p. 85.

(C) *Australia*.—Sec. 28 of the Constitution Act says—

"Every House of Representatives shall continue for 3 years from first meeting of the House, and no longer but may be sooner dissolved by the Governor-General."

The Australian Constitution prohibits extension of the duration of the House of Representatives.

(D) *Canada*.—Sec. 50 of the Br. North America Act, 1867 provides—

"Every House of Commons shall continue for 5 years from the day of the return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General), and no longer."

(E) *Fifth French Republic*.—Art. 25 of the French Constitution of 1958, similarly, leaves the term of the two Houses of the Parliament to be determined by an organic law. Under the current law, the term is 5 years, unless dissolved earlier by the President.

(F) *West Germany*.—Under Art. 39 of the West German Constitution of 1949, the term of the *Bundestag* (lower House) is 4 years from the date of its first meeting, unless dissolved earlier.

(G) *Japan*.—See p. 503, *ante*.

(H) *Government of India Act, 1935*.—See s. 18 (5) and Sch. IX, s. 63-D (1) (b) of that Act.

INDIA

Cl. (2) : Duration of House of the People.

This Clause follows the English precedent by laying down a normal term (5 years) for the lower House, subject to earlier dissolution [Art. 85 (2) (c)] by the President, as may be necessary.

It is clear that unless there is an extension of the term in the manner referred to in the Proviso, there is an automatic dissolution of the House, by efflux of time, at the end of the period of five years from the date appointed for its first meeting²³ even if no formal order of dissolution is issued by the President.

The Proviso also engrafts the English rule of Parliamentary competence to extend the above term, but subject to the following conditions: (i) The extension may be made by an Act of Parliament only while a Proclamation of Emergency (Art. 352), made by the President is in operation. In normal times, Parliament shall have no power to extend its own life. (ii) Each Act of extension shall not provide for more than 1 year's extension. (iii) There shall be no further extension beyond 6 months after the Proclamation has ceased to operate. But, apart from this, there is no limit to the maximum period of extension, so that if a war takes place, there may not be any election while it continues, if Parliament legislates to that effect.

'Year', 'Month'.—As to the meaning of these words, see sec. 3, General Clauses Act (X) of 1897.

'First Meeting of the House'.—The first meeting of the House takes place on the day on which the opening address under Art. 86 (1) is delivered, and not on any earlier day on which members were summoned to take their oath, for the session is not 'opened' and no public business can be transacted in the House until the opening address is made.²⁴

(23) The first meeting of the House of the People elected by the first general election, was held on the 13th May, 1952; hence, the life of this House would have expired on the 12th May, 1957, but for the President's order of dissolution, which dissolved it with

effect from the 5th April, 1957. The second general election was held in February-March, 1957.

(24) *Saradhakar v. Orissa Legislative Assembly*, A. 1952 Orissa 234 (236).

INDEX TO COMMENTS

ARTICLE 83.

Clause (1).

Other Constitutions: (A) U.S.A., 502; (B) Australia, 502; (C) West Germany, 503; (D) Fifth French Republic, 503; (E) Canada, 503; (F) Japan, 503; (G) Ceylon, 503; (H) Government of India Act, 1935, 503.

India:

Periodical retirement of members of Council of States, 503; Legislation by Parliament, 504.

Clause (2).

Other Constitutions: (A) U.S.A., 504; (B) England, 504; (C) Australia, 505; (D) Canada, 505; (E) Fifth French Republic, 505; (G) West Germany, 505; (H) Japan, 505; (I) Government of India Act, 1935, 505.

India:

Duration of the House of the People, 505; 'Year', 'Month' 505; 'First meeting of the House', 505.

Qualification for membership of Parliament. **84.** A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;²⁵

(b) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

Amendment.—Cl. (a) was substituted by the Constitution (Sixteenth Amendment) Act, 1963. The original clause was—

"(a) is a citizen of India."

The obvious object is to provide for an oath to maintain the sovereignty and integrity of India.

CLAUSES (a)-(b).

OTHER CONSTITUTIONS

(A) *England.*—The qualifications for membership of Parliament may be stated simply.

(a) *Prior to 1958*, was only the Lords Temporal and Spiritual who could be members of the House of Lords. Secondly, a woman, even though she became a peeress by descent, was not entitled to sit or vote in the House of Lords.¹

The Life Peerages Act, 1958 has altered the situation in both respects. A peer may now be created for life and a woman may be made a life peeress,² and all life peers and peeresses are entitled to sit in the House of Lords. But the disqualification of peeresses by descent to sit in the House of Lords continues.

(b) Any person of full age, qualified to be a voter, who is not a peer^{2a} and who is not disqualified by any statute, may become a member of the House of Commons. [As to disqualifications, see under Art. 102, *post*].

(B) *Canada.*—The qualifications for memberships of either House are not laid down in the Constitution Act. They are provided by statute. Persons of either sex are eligible.³ But the minimum age qualification is 21 years for the House

(25) Cl. (a) was substituted by the Constitution (Sixteenth Amendment) Act, 1963.

(1) Viscount Rhondda's Case, (1922) A.C. 339.

(2) In 1960 there were 5 women out of 25 life peers [Britain, 1961, p. 32].

(2a) (1961) 640 H. C. Deb., 34-173 [Case of Viscount Stansgate].

(3) Edwards v. Att.-Gen., (1930) A.C. 124.

of Representatives while it is 30 years for the Senate. Further, while no property qualifications are laid down for membership of the House of Representatives, in order to be a Senator a person must own substantial real property in the Province which he represents.⁴

(C) *U.S.A.*—Art. I, Sec. 2 (2) of the Constitution says—

"No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

The qualifications for being a Senator are laid down in Art. I, s. 3 (3) thus—

"No Person shall be a Senator who shall not have attained to the Age of thirty Years and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

(D) *Eire*.—Art. 16 of the Constitution of Eire, 1937, provides—

"1. (1) Every citizen without distinction of sex who has reached the age of 21 years, and who is not placed under disability or incapacity by this constitution or by law, shall be eligible for membership of Dail Eireann.

(2) Every citizen without distinction of sex who has reached the age of 21 years, who is not disqualified by law and complies with the provisions of the law relating to the election of members of Dail Eireann, shall have the right to vote at an election for members of Dail Eireann.

(3) No law shall be enacted placing any citizen under disability or incapacity for membership of Dail Eireann on the ground of sex or disqualifying any citizen from voting at an election for members of Dail Eireann on that ground.

(4) No voter may exercise more than one vote at an election for Dail Eireann and the voting shall be by secret ballot."

(E) *Japan*.—Art. 44 of the Japanese Constitution, 1946 says—

"The qualification of members of both Houses and their electors shall be fixed by law."

(F) *Ceylon*.—Sec. 12 of the Ceylon (Constitution) Order in Council, 1946, says—

"Subject to the provisions of this Constitution, a person who is qualified to be an elector shall be qualified to be elected or appointed to either Chamber."

INDIA

Cl. (a) : 'A citizen of India.'

The regard for women in India is illustrated by the fact that the people have fulfilled the intentions of the framers of the Constitution by returning not less than 24 women members to the House of the People, out of an elected membership of less than 500 members (in 1957), while the British electorate returned 17 out of 625 members in the House of Commons, in the 1951 election.

In order to preserve the integrity of India and to ensure the allegiance of the candidates to India, the taking of the oath under the Third Schedule has been added as a necessary qualification, by the Constitution (Sixteenth Amendment) Act, 1963.

In the result, a person must take the oath before standing for election or nomination and, again, before taking his seat, as required by Art. 99, if chosen as a member.

Cl. (b) : Age qualification.

By raising the age-limit for membership of Parliament over that required for being a voter (21 years, under Art. 326, *post*), our Constitution departs from the general rule that a person qualified to be a voter is also qualified to stand as a candidate for election.

CLAUSE (c).

OTHER CONSTITUTIONS

U.S.A.—Though the Constitution [Art. I, Sec. 2 (2)] lays down the qualifications for membership of Congress and there is no provision for requiring additional

(4) Dawson, Government of Canada, 1949, pp. 333, 387.

(4a) In 1964, the corresponding figure was 31 out of a total Membership of 510.

qualifications by legislation, it has been conceded in practice that each House has the power, by resolution, to refuse admission to undesirable persons, even though they may possess the constitutional qualifications—e.g., on the ground of insanity, leprosy, criminality.⁵

INDIA

Cl. (c) : Additional qualifications by legislation.

The general rule is that a person who is qualified to be an elector is qualified to be a candidate for election to Parliament [Cf. Sec. 12 of the Ceylon (Constitution) Order in Council, 1946; Sec. 34 (i) of the Australian Constitution Act]. But the present Clause of *our* Constitution engrafts an innovation, by empowering Parliament to lay down additional qualifications for being a member of either House of Parliament.⁶ The object behind this innovation was to secure for Parliament men of a better calibre than an ordinary voter.⁷ But no additional qualifications to achieve that end have as yet been imposed by legislation.

So far, the following additional qualifications have been prescribed by ss. 3-4 of the Representation of the People Act, 1951:

"3. Qualifications for membership of the Council of States.—A person shall not be qualified to be chosen as a representative of any State (other than the State of Jammu and Kashmir) or Union Territory in the Council of States unless he is an elector for a Parliamentary constituency in that State or territory.

4. Qualifications for membership of the House of the People.—A person shall not be qualified to be chosen to fill a seat in the House of the People, other than a seat allotted to the State of Jammu and Kashmir, to the Andaman and Nicobar Islands to the Laccadive, Minicoy and Amindivi Islands, to Dadra and Nagar Haveli or to the Part B Tribal areas, unless—

(a) in the case of a seat reserved for the Scheduled Castes in any State, he is a member of any of the Scheduled Castes, whether of that State or of any other State, and is an elector for any Parliamentary constituency;

(b) in the case of a seat reserved for the Scheduled Tribes in any State (other than those in the autonomous districts of Assam), he is a member of any of the Scheduled Tribes, whether of that State or of any other State (excluding the tribal areas of Assam), and is an elector for any Parliamentary constituency;

(c) in the case of a seat reserved for the Scheduled Tribes in the autonomous districts of Assam, he is a member of any of those Scheduled Tribes and is an elector for the Parliamentary constituency in which such seat is reserved or for any other Parliamentary constituency comprising any such autonomous district; and

(d) in the case of any other seat, he is an elector for any Parliamentary constituency."

Disqualifications for membership.

Together with the qualifications laid down by the present Article, we should read the 'disqualifications' specified by Art. 102. Even though a person is qualified according to the present Article, he would not be entitled to be chosen as or to continue to be, a member, if he incurs any of the disqualifications specified in Art. 102 (1), *post*.

Qualifications for membership summarised.

The result of the foregoing constitutional and statutory provisions is that in order to be a member of Parliament, a person—

(i) must be a citizen of India [Art. 84 (a)];

(ii) must not be less than 30 years of age in the case of the Council of States and not less than 25 years in the case of the House of the People [Art. 84 (b)];

(iii) in the case of a seat in the Council of States, from a State other than the State of Jammu & Kashmir, or from a Union Territory,—must be an elector for a Parliamentary constituency in that State or Territory [s. 3, R.P.A., 1951];

(5) Beard, *American Government and Politics*, 1939, pp. 79, 83.

(6) *Vide* Constituent Assembly Debates, Vol. VIII, p. 94.

(7) Dr. Ambedkar, C.A.D., Vol. VIII, p. 89.

(iv) in the case of seat in the House of the People from a State other than the State of Jammu & Kashmir, or from the island Union Territories or from the Union Territory of Dadra and Nagar Haveli or from the Part B Tribal area,—must be an elector for any Parliamentary constituency [s. 4 (d), R.P.A., 1951];

(v) in the case of a seat in the House of the People reserved for the Scheduled Tribes in the autonomous districts of Assam,—must be an elector for the Parliamentary constituency in which such seat is reserved or for any other Parliamentary constituency comprising any such autonomous district [s. 4 (c), R.P.A., 1951];

(vi) in the case of a seat in the House of the People reserved for the Scheduled Castes or Tribes [Art. 334],—must also be a member of such Scheduled Castes or Tribes as are specified under Art. 341 or 342 [s. 4 (a) (b), R.P.A., 1951];

(vii) must not have been declared by a competent Court to be of unsound mind [Art. 102 (1) (b)];

(viii) must not be an undischarged insolvent [Art. 102 (1) (c)];

(ix) must not have voluntarily acquired the citizenship of a foreign state, or is under any acknowledgment of allegiance or adherence to a foreign State [Art. 102 (1) (d)];

(x) must not hold any office of profit under the Government of India or of a State, other than an office exempted by a law of Parliament, in this behalf [Art. 102 (1) (a)];

(xi) must not have been convicted or held by the Election Tribunal to have been guilty of any offence or corrupt practice, specified in ss. 139-40 of the Representation of the People Act, 1951, unless the period of disqualification prescribed in those sections has elapsed of the Election Commission has removed the disqualification [s. 7 (a), R.P.A., 1951];

(xii) must not have been convicted by any Court in India of an offence and sentenced to imprisonment for not less than 2 years,—unless a period of 5 years or such less period as the Election Commission shall allow, has elapsed since his release;

(xiii) must not have failed to lodge an account of his election expenses as required by the Representation of the People Act, 1951, unless 3 years have elapsed from the date when the account was due to be lodged, or the Election Commission has removed the disqualification [s. 7 (c), R.P.A., 1951];

(xiv) must not be a party to a subsisting contract with the appropriate Government, for the supply of goods to, or the execution of any work by, that Government [s. 7 (d), R.P.A., 1951];

(xv) must not be the director, managing agent, manager or secretary of any company or corporation, in which the Government has a share of not less than 25% [s. 7 (e), R.P.A., 1951];

(xvi) must not have been dismissed from Government service for corruption or disloyalty to the State, unless 5 years have elapsed from the date of such dismissal [s. 7 (f), R.P.A., 1951].

MEMBERS OF PARLIAMENT

Qualifications for becoming a member.—See Art. 84, above.

Disqualifications for membership.—See above, and under Art. 102, *post*.

Election or nomination.—The mode of election has been described under Arts. 80-81, *ante*. It has been seen that some of the members in either House of our Parliament are chosen by nomination.

Summoning and seating.—Whether elected or nominated, a Member is invited to attend Parliament only by a summons issued by the Secretary of the House to which he belongs.* A list of Members is prepared by the Secretary of

(8) R. 3 of the Rules of the Council;
r. 3 of the Rules of the House.

each House with reference to the official report of elections received by him under s. 67 of the Representation of the People Act (XLII of 1591) or the Gazette notification of nominations, as the case may be, and the summons is issued with reference to that list.

On receiving the summons, the Member appears at the House, takes the oath, and signs the Roll of Members in the presence of the Secretary, after which he is introduced to the Chair. He then takes his seat in the House. The form of oath is given in the Third Schedule *post*. The taking of the oath is *obligatory* before taking seats (Art. 99, *post*) and the penalty for sitting or voting in the House before taking the oath is prescribed by Art. 104, *post*. The taking of the oath of all Members who have not already taken it, therefore, takes place in either House at the beginning of each day's sitting before any other business is taken up according to the 'List of Business'.

Salaries and allowances of Members.—See under Art. 106, *post*.

Attendance of Members.—See under Art. 101 (4), *post*.

Prohibition of simultaneous membership of more than one House.—See under Art. 101, *post*.

Vacation of seats.—See under Art. 101, *post*.

Prohibition against holding an 'office of profit'.—See under Art. 102, *post*.

Immunities and Privileges.—See under Art. 105, *post*.

Legislative independence of Members.

Just as judicial independence is essential for the proper administration of justice, so the legislative independence of members of the Legislature is necessary for the successful working of representative democracy of the English type. A member of the Legislature, according to this system, is a 'representative' of the nation and not a 'delegate' of his constituency. As *Blackstone* observed—

"Every member, though chosen by one particular district, when elected and returned, serves for the whole realm."

This means that though a member is returned by the vote of the electors of a particular area or territorial constituency, or any other section of the people, while in Parliament, he is not supposed to vote on every question according to the mandates of that locality or sect,⁹ but must exercise his vote in favour of the proposal which is most conducive to the welfare of the nation as a whole. Even though trade unions may raise funds for the payment of members of Parliament under the provisions of the Trade Disputes and Trade Unions Act, 1927, any contract that a member who is so paid must on all occasions vote in accordance with instructions of the Trade Union or of any outside body or group is against public policy and is accordingly void.⁹ Such a contract is also inconsistent with the dignity of the House.¹⁰

In *Osborne's case* Lord Shaw observed—

"A member of Parliament is not to be the paid mandatory of any man or organisation of men nor is he entitled to bind himself to subordinate his opinions on public questions to others, for wages or at the peril of pecuniary loss; and any contract of this character would not be recognised by a court of law either for its enforcement or in respect of its breach".

The famous words of *Burke*¹¹ are worthy of being remembered by any legislator in a representative assembly:

"Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain as an agent, and advocate against other agents and advocates; but Parliament is a deliberative assembly of the nation, with one interest, that of the whole, where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole".

(9) *Osborne v. Amalgamated Society*,
(1910) A.C. 87.

(10) (1946-47) H.C. 118, p. xii.

(11) Address to the Electors of Bristol.
1774.

The principle is so important that it was specifically enacted in the Weimar Constitution of Germany (Art. 21)—

"The delegates are representatives of the whole People. They are subject only to their own consciences and are not bound by any instructions".

The same provision has been reiterated in Art. 38 (1) of the West German Constitution of 1958.

Even though the representatives are elected in territorial constituencies, the theory of Parliamentary democracy is that each member is "the deputy of the entire nation". The development of the party system has, however, altered the picture appreciably and the relationship between a member and his party has assumed more importance than the relation between the member and his constituency. The discipline and organisation of a party both within and outside Parliament, is vitally undermining the theoretical independence of a representative and when the party issues a mandate, though a member is not legally bound, he is obliged to obey it, unless he is bold enough to face the consequences of expulsion from the party. Thus, in *England*, the 'decline of the private member' has attracted the attention of all constitutional writers and *Keith*¹² illustrates the position by saying—

"The passage of time has seen vital changes in this attitude, and has completely altered the position of the Commons, changing incidentally the attraction once possessed by mere membership, so that an ex-Cabinet minister may well prefer to be an active member of, for example, the London Country Council, than a private member of Parliament".

The result has been—

"Programmes therefore are inseparably bound up with personalities, and members of Parliament find themselves returned as followers, not only of a party, but also of the party leader. . . . In these circumstances it would be idle to expect that the members of the Commons should feel free to make or break ministries, or even to deal, with independent judgment, with the policies submitted by ministers".¹³

Though the control within the Opposition parties in Parliament is naturally weaker, for various reasons they, too, cannot allow their respective members to act according to their independent views if they are to maintain the very existence of the parties,—apart from the need for cohesion for the purpose of offering an effective opposition to the government in power.

Of course, there is logic behind this situation, viz., that modern representative democracy, owing to the very force of circumstances, has come to be a government by party. It is the parties which formulate alternative policies and the nation has to choose between these alternatives in toto. In the ultimate analysis, the member also tends to become more proximately a representative of the party¹⁴ than of the unwieldy body of electors who, broadly speaking, wind up their joint business after the choice between the party programmes is over. The theory of representative democracy, however, is that the policy shall be shaped by the wisdom and experience contributed by members drawn from different sections and strata of the society. If, therefore, this democracy is to be saved from being reduced to a dictatorship of the party machine which, in fact, means dictatorship of the few who lead it, is for the party organisation itself to use its whip as sparingly as possible¹⁴ and only on questions with regard to which it had held out a promise to the electors or upon which the fate of the Government would be decided; and for the party leaders to be more tolerant towards the views of the minor partners in the party association and to keep their minds open to different shades of opinion within the same group.

Much will also depend upon the improvement in the level of political education and information of an average representative so that he can make himself indispensable in the very formulation of the party programmes which would then become a joint-stock business in the real sense.

(12) Keith, *British Cabinet System*, 1952, pp. 174, 178-9.

(13) *Ibid.*, pp. 188-9.

(14) Questions on which members are allowed to vote according to their individual convictions without any party directive are called 'open questions'.

INDEX TO COMMENTS

ARTICLE 84.

Clauses (a)-(b).

Other Constitutions :

(A) England, 506 ; (B) Canada, 506 ; (C) U.S.A., 507 ; (D) Eire, 507 ; (E) Japan, 507 ; (F) Ceylon, 507.

India :

Clause (a).

Citizen of India, 507.

Clause (b).

Age qualification, 507.

Clause (c).

Other Constitutions : U.S.A., 507.

India : Additional qualifications by legislation, 508 ; disqualifications for membership, 508 ; qualifications for membership summarised, 508.

Members of Parliament: Qualifications for becoming a Member, 509 ; disqualifications for membership, 509 ; election or nominations, 509 ; summoning and seating, 509 ; salaries and allowances of Members, 510 ; attendance of Members, 510 ; prohibition of simultaneous membership of more than one House, 510 ; vacation of seats, 510 ; prohibition against holding an office of profit, 510 ; immunities and privileges, 510 ; legislative independence, 510.

Before 18-6-51

85. (1) The Houses of Parliament shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of clause (1), the President may from time to time—

(a) summon the Houses or either House to meet at such time and place as he thinks fit ;

(b) prorogue the Houses ;

(c) dissolve the House of the People.

After 18-6-51

¹⁵**85.** (1) *The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for their first sitting in the next session.*

(2) The President may from time to time—

(a) prorogue the Houses or either House ;

(b) dissolve the House of the People.

Amendment.—The original Article 85 was amended by the Constitution (First) Amendment Act, 1951. The changes are indicated by the words in italics.

Effects of Amendment.—From cl. (1), the words 'twice at least in every year' have been deleted. Under the old clause, there was no compliance with the Constitution if Parliament had been in continuous sitting for more than six months. The clause has been amended to meet such an absurdity.

The words 'President shall', on the other hand, make it mandatory on the President to summon Parliament within six months from the sitting of one session ; if he fails to summon, there will be a breach of the Constitution.

(15) Substituted by the Constitution (First Amendment) Act, 1951.

(16) Superseding Art. I, s. 4 (2).

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *U.S.A.*—The 20th Amendment to the Constitution¹⁶ provides—

"The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day".

No law has yet been passed, modifying the above provision.

Apart from the above regular sessions to begin on the appointed days, the President has been given the power to summon extraordinary or special sessions. Art. II, s. 3 provides that the President—

"may, on extraordinary occasions, convene both Houses or either of them".

This power of summoning extraordinary sessions has, however, not been much in use.¹⁷

(B) *England*.—A statute of 1630 in the reign of Edward III enacted that "a Parliament shall be holding every year once, and more if needed be." This statute was not however followed in practice and the Triennial Act of 1641 enacted that "the sitting and holding of Parliament shall not be intermitted or discontinued above three years or most". The Bill of Rights, 1688 declared that Parliament ought to be held 'frequently'. The annual meeting of Parliament, however, has been secured not by the provision of any statute, but by the fact that the Army Act, Finance Act and many other important Acts are annual, and unless these are re-enacted within a year, the government of the country would come to a deadlock. In practice, Parliament has a continuous session for the whole year, intervened by holidays for Christmas, Easter and the like. It sits for about 200 days in the year.

The Crown's prerogative to call Parliament at any time has thus come to be regulated by convention.

The Crown may, at any time, issue a Proclamation summoning Parliament to meet at the expiration of 20 days from the date of the Proclamation. It is also established that, constitutionally, Parliament can be assembled only by a summons from the Crown, except in the case of demise of the Crown, by virtue of the provisions of the Succession of the Crown Act, 1707 and the Meeting of Parliament Act, 1797.¹⁸⁻²⁵

(C) *Australia*.—Sec. 6 of the Australian Constitution Act provides—

"There shall be a session of the Parliament once at least in every year so that 12 months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session".

(D) *Canada and South Africa*.—Sec. 20 of the British North America Act is the same as Sec. 6 of the Australian Constitution, quoted above.

(E) *Eire*.—Art. 15 (7) of the Constitution of 1937 says—

"The Oireachtas shall hold at least one session every year".

(F) *Fifth French Republic*.—Art. 28 of the Constitution of 1958 provides—

"Parliament shall convene by right in two ordinary sessions a year. The first session shall begin on the first Tuesday of October and shall end on the third Friday of December. The second session shall open on the last Tuesday of April; it may not last longer than three months".

Art. 29 says—

"Parliament shall convene an extraordinary session at the request of the Premier or of the majority of the members comprising the National Assembly, to consider a specific agenda. When an extraordinary session is held at the request of the members of the National Assembly, the closure decree (i.e. prorogation) shall take effect as soon as the Parliament has exhausted the agenda for which it was called, and at the latest twelve days from the date of its meeting.

(17) Luce, *Legislative Assemblies*, pp. 137-8.

(18-25) May, 16th Ed., pp. 32-34.

Only the Premier may ask for a new session before the end of the month following the closure decree".

The new Constitution thus retains the distinction between ordinary and extraordinary sessions but reduces the maximum duration of an ordinary session from 7 to 5 months in the year.

A special session may be convened at the request of the Prime Minister or of a majority of the members of the National Assembly. A special session cannot last for more than 12 days (except under Art. 51) and can be convened only to consider a specific agenda.

(G) *West Germany*.—Art. 39 (2)—(3) of the West German Constitution of 1949 provide as follows:

"(2) The *Bundestag* shall meet not later than 30 days after the election; nevertheless, not before the end of the electoral period of the previous *Bundestag*.

(3) The *Bundestag* shall determine the closure and resumption of its sessions. The President of the *Bundestag* may convene it at an earlier date. He shall be obliged to do so if one-third of the members or the Federal President or the Federal Chancellor so determine".

Similar provision is made regarding the *Bundesrat* under Art. 52.—

"(52) The President (of the *Bundesrat*) shall convene it if the representatives of at least two *Leander* or the Federal Government so determine".

It is evident that it is not open to the German President to postpone the sessions of either House of Parliament though he may request for an earlier session.

(H) *Japan*.—Arts. 52-3 of the Japanese Constitution of 1946 provide—

"Art. 52. An ordinary session of the Diet shall be convoked once per year.

Art. 53. The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation".

Art. 54 next provides for special sessions following a dissolution:

"When the House of Representatives is dissolved, there must be a general election of members of the House of Representatives within forty (40) days from the date of dissolution, and the Diet must be convoked within thirty (30) days from the date of the election.

When the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors in emergency session.

Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten (10) days after the opening of the next session of the Diet".

(I) *Ceylon*.—Sec. 15 (2) of the Ceylon (Constitution) Order in Council, 1946, says—

"Parliament shall be summoned to meet once at least in every year".

(J) *Government of India Act, 1935*.—Sec. 19 (1) of the Act of 1935 was similar, to Art. 85 (1) of our Constitution save that it required a minimum of one session during the year while the Constitution requires two sessions. In practice, however, the Central Legislature had two sessions under the Act 1935,—the Budget Session, held in February, and the legislative session usually held in autumn.

INDIA

Cl. (1) : Summoning of the Houses.

Though the marginal note to the article refers to 'sessions of Parliament, prorogation and dissolution', the article refers to the summoning, and prorogation of the Houses¹⁻⁷ of Parliament and the dissolution of the 'House of the People'. This implies that Parliament, as referred to in Art. 79, will be regarded as a

(1-7) Contrast section 15 (1) of the Ceylon Constitution Order, 1946, and Jennings, *Constitution of Ceylon*, pp. 44, 142. The language of our Constitution is more exact, since even

the 'Senate of Ceylon' is a permanent Upper Chamber, not subject to dissolution, as our Council of States is.

permanent institution, though there may be changes in the *Houses*. The Parliament of India will never be dissolved, though one of its Houses may be. This is a departure from the English precedent, for in *England*, it is 'Parliament' that is dissolved even though the House of Lords is a hereditary body. So when Parliament is dissolved, there is no House of Lords, until the next Parliament is summoned.⁸

That the Council of States can effectively function while the House of the People remains dissolved will appear from the provisions of the 1st Proviso to cl. (3) and the 2nd Proviso to cl. (4) of Art. 356, *post*.

Whether the power is subject to judicial interference.

The Constitution vests the power of summoning the House of Parliament in the President, and, subject to the six-month-limit, the President has got absolute discretion to fix the time for summoning the Legislature, and within the period of six months, the Judiciary cannot, obviously, enjoin that a proper occasion has arisen for summoning Parliament.⁹

Cl. (1) of Art. 85, however, lays down that six months shall not intervene between its last sitting and the date appointed for the next sitting. Supposing, however, the President does not summon Parliament for more than six months, can the Judiciary, in such a case, compel the President to exercise his power? *Mandamus* will not lie against the President to compel him to exercise his constitutional power [see under Art. 361, *post*], and the only remedy lies in impeachment, for violation of the Constitution. It is also clear from the present Article that under *our* Constitution, Parliament has no authority to assemble by its own right (as under the French Constitution, p. 513, *ante*). It can assemble to perform its function under the Constitution only when summoned by the President. Hence, even for impeachment the Houses cannot assemble unless the Courts do intervene on the ground that the breach of a mandatory provision of the Constitution is outside the immunity conferred by Art. 361 (1).

Presidential Order for summoning, prorogation and dissolution.

In practice, Orders of the President regarding summoning, prorogation and dissolution of the Lok Sabha are obtained by the Lok Sabha Secretariat, upon suggestion received from the Cabinet (through the Minister of Parliamentary Affairs) and agreed to by the Speaker.

The Presidential Order takes the following form:—

(a) Summoning

"In exercise of the powers conferred upon me by clause (1) of Article 85 of the Constitution, I hereby summon the Lok Sabha to meet at New Delhi on . . . the . . . 19....., at 11 A.M.

President.

The . . . , 19"

(b) Prorogation

"In exercise of the powers conferred upon me by sub-clause (a) of clause (2) of Article 85 of the Constitution, I hereby prorogue the Lok Sabha.

President.

The . . . , 19"

(c) Dissolution

"In exercise of the powers conferred upon me by sub-clause (b) of Cl. (2) of Art. 85 of the Constitution, I hereby dissolve the Lok Sabha.

President.

The . . . , 19"

Summons to members.

While the summoning of the Houses is the function of the President, the issue of summons to the members individually is a duty of the Secretary

(8) Cf. Jennings, *Constitution of Ceylon*, p. 45.

(9) Cf. Cooley, *Constitutional Limitations*, I, p. 102.

of the two Houses. R. 3 of the Rules of the House of the People thus provides—

"The Secretary shall issue a summons to each member specifying the date and place for a session of the House:

Provided that when a session is called at short notice or emergency, summons may not be issued to each member separately but an announcement of the date and place of the session shall be published in the Gazette and made in the press, and members may be informed by telegram".

CLAUSE (2).

OTHER CONSTITUTIONS

(A) *U.S.A.*—The President has no power of summoning ordinary sessions of Congress, since the opening date for Congressional sessions is fixed by the Constitution itself [p. 507, *ante*],—subject to legislation. Ordinary sessions of the Legislature are thus independent of the will of the Executive. But the President is given the power—(a) to convene special sessions of Congress on 'extraordinary occasions';¹⁰ and (b) 'in case of disagreement between them (the two Houses) with respect to the time of adjournment, he may adjourn them to such time as he shall think proper' (Art. II, Sec. 3). The latter power, however, has never been used so far. The President has no power to prorogue the Congress. This is a business of the two Houses themselves [Article I, Sec. 5 (4)]. Nor does the American President possess any power to dissolve the House of Representatives. That House, in fact, cannot be dissolved at all *before* the constitutional term of 2 years [Art. I, Sec. 2 (1)].

(B) *England*.—It has already been explained (see p. 513, *ante*), that the powers of summoning, prorogation and dissolution are royal prerogatives, exercised on ministerial advice. Parliament can, accordingly, continue to sit only so long as the Executive so desires, subject, of course, to the obligation to re-summon it, which has already been mentioned.

(C) *Australia*.—Sec. 5 of the Commonwealth of Australia Constitution Act provides—

"The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives".

The power to dissolve the House of Representatives sooner than its normal term of three years is also referred to in s. 28.

S. 57 of the Constitution Act specifies a contingency under which the Senate also may be dissolved. This is known as the provision¹¹ for 'double dissolution' which is applicable in the case of a deadlock between the two Houses as regards the passing of a Bill [see s. 57 reproduced under Art. 108, *post*],—the Senate having twice rejected a Bill passed by the House of Representatives.

(D) *Canada*.—Sec. 38 of the British North America Act says—

"The Governor-General shall from time to time, in the Queen's name by instrument under the Great Seal of Canada, summon and call together the House of Commons".

The power to dissolve the House of Commons sooner than its normal term of five years is provided in s. 50.

(E) *Eire*.—Art. 13 (2) of the Constitution of 1937 says—

"(1) Dail Eireann shall be summoned and dissolved by the President on the advice of the Taoiseach. (2) The President may in his absolute discretion refuse to dissolve Dail Eireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dail Eireann. (3) The President may at any time, after consultation with the Council of State, convene a meeting of either or both of the House of the Oireachtas".

(10) See Beard, *American Government and Politics*, 1939, p. 90.

(11) The provision has been applied in 1914 and 1931 [Nicholas, *Australian Constitution*, 1952, pp. 79-80].

(F) *Fifth French Republic*.—In the Constitution of 1958, Art. 30 provides—
 “Apart from cases in which Parliament meets by right, extraordinary sessions shall be opened and closed by decree of the President of the Republic”.

The closure decree, in the case of an extraordinary session, must take place as soon as the agenda for the session is exhausted (see Art. 29 at p. 508, *ante*).

Art. 12 provides—

“The President of the Republic may, after consultation with the Premier and the Presidents of the Assemblies, declare the dissolution of the Assembly.

General elections shall take place not less than 20 days and not more than 40 days after the dissolution.

The National Assembly shall convene by right on the second Thursday following its election. If this meeting takes place between the periods provided for ordinary sessions, a session shall, by right, be opened for a fifteen-day period.

There may be no further dissolution within a year following these elections”.

A notable feature of the above provision for dissolution is that the President has to consult not only the Premier but also the Presidents of the two Houses of Parliament (even though the Senate itself is not affected by the dissolution).

There cannot be any dissolution of the Assembly when the President assumes to exercise emergency powers (Art. 16).

(G) *Japan*.—The Japanese Constitution (1946) has certain special provisions relating to the period which intervenes the dissolution of a House of Representatives and the election of another. Art. 54 provides—

“When the House of Representatives is dissolved, there must be a general election of members of the House of Representatives within forty days from the date of dissolution, and the Diet must be convoked within thirty days from the date of election.

When the House of Representatives is dissolved, the House of Councillors is called at the same time. However, the Cabinet may in times of national emergency convoke the House of Councillors in emergency session.

Measures taken at such session as mentioned in the Proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten days after the opening of the next session of the Diet”.

(H) *Ceylon*.—Sec. 15 (1) of the Ceylon Constitution Order in Council, 1946, says—

“The Governor-General may, from time to time, by Proclamation summon, prorogue or dissolve Parliament”

The terms adjourn, prorogue, etc., are defined in Sec. 3 (1) of the Order thus:

“‘Adjourn’ with its grammatical variations and cognate expressions means terminate a sitting of the Senate or the House of Representatives, as the case may be;

‘dissolve’ within its grammatical variations and cognate expressions means terminate the continuance of Parliament;

‘prorogue’ with its grammatical variations and cognate expressions means bring a session of Parliament to an end;

‘session’ means the meeting of Parliament commencing when Parliament first meets after being constituted under this Order, or after its prorogation or dissolution at any time, and terminating, when Parliament is prorogued or is dissolved without having been prorogued;

‘sitting’ means a period during which the Senate or the House of Representatives as the case may be, is sitting continuously without adjournment, and includes any period during which the Senate or the House of Representatives is in Committee.”

(I) *Government of India Act, 1935*—Sec. 19 of the Government of India Act was as follows—

“(1) The Chamber of the Federal Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this section, the Governor-General may in his discretion from time to time—

(a) summon the Chambers or either Chamber to meet at such time and place as he thinks fit; (b) prorogue the Chambers; (c) dissolve the Federal Assembly”

Under this Act, the act of summoning, etc., of the Legislature was to be performed by the Governor-General ‘in his discretion’, and not on ministerial advice.

INDIA

Cl. (2): President's power of prorogation and dissolution.

Like the British Crown, our President possesses the power to summon, prorogue or dissolve the lower House on the advice of the Prime Minister.¹² The power to *summon* Parliament at any time is, however, subject to the conditions imposed by Cl. (1).

Courts are bound to take judicial notice of the beginnings and ends of prorogations and sessions of Parliament.¹³

'Session', 'Recess', 'Sitting'.

As May observes—

"A session is the period of time between the meeting of a Parliament, whether after a prorogation or dissolution, and its prorogation The period between the prorogation of Parliament and its re-assembly in a new session is termed 'recess'.^{14, 15}

Within a session, there are a number of daily sittings.¹⁵ The Speaker¹⁶ or the Chairman¹⁷ directs, having regard to the state of business, on which days the the House or the Council shall sit. What constitutes a 'sitting' of the House or the Council is also laid down in the Rules. Thus, r. 11 of the House¹⁸ says—

"A sitting of the House is duly constituted when it is presided over by the Speaker or any other member competent to preside over a sitting of the House under the Constitution or these rules."

Adjournment, Prorogation, dissolution.

Prorogation means the termination of a *session*; an adjournment is an interruption in the course of one and the same session.

(i) As stated already, within a session, there are a number of daily 'sittings'¹⁵ separated by *adjournments*, which postpone the further consideration of business for a specified time,—hours, days or weeks. A sitting takes place and is adjourned at such times as the Speaker of the House directs.

(ii) Prorogation terminates the session itself and, in *England* the effect of prorogation is at once to suspend all business of Parliament for that session, and all proceedings pending at that time, except impeachment, are quashed by prorogation. Every bill (excepting those which have been passed by both Houses and are awaiting the Royal Assent) must therefore be renewed in the next session after prorogation, as if the Bill had never been introduced before, and Committees have to be reconstituted. An adjournment has no such effect. When a House reassembles after an adjournment, it proceeds to transact the business previously appointed, from the stage where it was left before adjournment.

In *India*,¹⁹ however, the effect of prorogation is not so drastic. Pending notices of motions, resolutions, amendments etc., no doubt lapse on prorogation. But certain pending matters are *saved* by specific provisions of the Constitution or Rules of the House:

(a) Bills pending before either House [Art. 107 (3), *post*].

(b) Notices of intention to move for leave to *introduce Bills* [Rule 335 of the House of the People].

(12) As to how far the President shall be free to refuse the Prime Minister's advice as to 'dissolution', see p. 420, *ante*.

(13) *R. v. Wilde*, (1671) 1 Lev. 296; Craies, Statute Law, 52.

(14) May, Parliamentary Practice, 16th Ed., pp. 34, 378-9.

(15) Thus, the first meeting of the Council of States after its constitution was held on the 13th May, 1952. During the period from May, 1952 to December, 1956, the Council held 15 sessions covering a total period of 653 days during which it actually sat for 488 days.

To take the year 1955, in particular,—it had three sessions, with the number of sittings as follows—

(a) 21-2-55 to 7-5-55—58 days

(b) 25-7-55 to 1-10-55—54 "

(c) 21-11-55 to 23-12-55—25 "

Total—137 days in the year.

(16) R. 13 of the House.

(17) R. 12 of the Council.

(18) R. 10 of the Council.

(19) As to the effects of prorogation and dissolution under our Constitution, see under Art. 107, *post*.

(c) Motions, resolutions and amendments which have already been moved and are pending in the House [Rule 336, *ibid.*].

(d) Committees of the House and the business pending before them [Rule 284, *ibid.*].

Another distinction which exists between adjournment and prorogation under our Constitution is that the President has the power to make ordinances only when a House stands prorogued and not when it is adjourned [Art. 123].

It is to be noted that 'adjournment' is not included in Art. 85 (2). The reason is that even in *England*, where the Crown has the prerogative as regards summoning, prorogation and dissolution,—adjournment has come to be a matter solely in the power of each House of Parliament. So, while the Indian President shall have the power to summon, prorogue or dissolve,—the power to adjourn from day to day, would belong to the two Houses exclusively.²⁰

But under the Meeting of Parliament Acts, 1797 and 1870, the English Crown has the power to order resumption of Business when both Houses stand adjourned for more than 14 days. The President of India has no such power to interfere with the power of the Houses to adjourn or resume business after adjournment at or for any time within a session.²⁰

(iii) *Dissolution*, on the other hand, means the end of the life of the lower House itself, and calls for a fresh election. It may take place either by the expiry of the normal term of the House (e.g., 5 years in the case of our House of the People); or, by the exercise of the power of dissolution by the head of the Executive at any time earlier than the fixed term. Of course, the latter power belongs to the Executive only under the Cabinet form of Government. As already explained, it is a powerful weapon at the hands of the Prime Minister to bind down his recalcitrant supporters by the threat of the risk and expenses of a fresh election; and, at the same time, it places at the hand of the Cabinet the means of obtaining the verdict of the people themselves when they consider that the adverse vote of the House does not reflect the views of the people.

While in *England*, all business pending in Parliament is wiped out by dissolution, in *India*, Bills which originated in the Council of States and are pending in that House at the time of dissolution, without having been passed by the House of the People, do not lapse.

Form of Order of Prorogation and Dissolution.—See p. 515, *ante*.

Effects of Prorogation and Dissolution on pending business.—See under Art. 107 (3), *post*.

How the President is to exercise his power of dissolution. See pp. 426, *ante*.

INDEX TO COMMENTS

ARTICLE 85.

Amendment, 512; effects of amendment, 512.

Clause (1).

Other Constitutions:

(A) U.S.A., 513; (B) England 513; (C) Australia, 513; (D) Canada and South Africa, 513; (E) Eire, 513; (F) Fifth French Republic, 513; (G) West Germany, 514; (H) Japan, 514; (I) Ceylon, 514; (J) Government of India Act, 1935, 514.

India:

Summoning of the Houses, 514; Whether the power is subject to judicial interference, 515; Presidential Order for summoning, prorogation and dissolution, 515; Summons to Members, 515.

Clause (2).

Other Constitutions:

(A) U.S.A., 516; (B) England, 516; (C) Australia, 516; (D) Canada, 516; (E) Eire, 516; (F) Fifth French Republic, 517; (G) Japan, 517; (H) Ceylon, 517; (I) Government of India Act, 1935, 517.

(20) Under r. 15 of the Rules of Procedure in the House of the People, the power of adjournment (from time to time or *sine die*) and the power to call a sitting after the

House has been adjourned, belongs to the Speaker. The same result follows from rr. 12-13 of the Rules of the Council.

India :

President's power of prorogation and dissolution, 518; Session, recess, sitting, 518; Adjournment, prorogation and dissolution, 518; Form of order or prorogation and dissolution, 519; Effects of prorogation and dissolution of pending business, 519; How the President is to exercise his power of dissolution, 519.

86. (1) The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.

Right of President to address and send messages to Houses.

(2) The President may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England*.—No doubt, the Crown has the legal right to attend Parliament at any time and to require the attendance of members of Parliament for hearing him. But with the growth of constitutional government, the Crown has ceased to visit Parliament or to address it except on ceremonial occasions.²¹ It is interesting to note that Charles II visited the House of Lords to rebuke them, in 1671. But the Crown has ceased to visit Parliament for participating in its deliberations or to give them any directions, since the time of Queen Anne.

(B) *U.S.A.*—Some Presidents have used the constitutional right to give information to the Congress [Art. II, sec. 3], to address the Houses orally,—though usually the practice is to send written messages.²²

(C) *Government of India Act, 1935*.—Sec. 20 of the Act provided—

"(1) The Governor-General may in his discretion address either Chamber of the Federal Legislature or both Chambers assembled together, and for that purpose require the attendance of members."

INDIA

Cl. (1) : President's right of address.

While Art. 87 (1) makes it obligatory upon the President to make the 'opening address' to Parliament, the present clause *enables* him to address Parliament (either House or both Houses together) at any time and for any purpose, *e.g.*, at the time of prorogation.²³ So far the President has not visited Parliament except for delivering the 'opening address'.

Time limit for discussion.

The Rules of both the Houses provide for a discussion subject to a time-limit:

"The Speaker may allot time for the discussion of the matters referred to in the President's Address under Art. 86 (1) of the Constitution."²⁴

(21) For example, for delivering the 'Speech from the Throne' (see under Art. 87, *below*), for opening or proroguing the session (Chalmers and Hood Phillips, p. 52). Even this function is sometimes performed by the Lord Chancellor as his deputy.

(22) Beard, *American Government and Politics*, 1939, p. 166.

(23) See rr. 22, 24 of the Rules of the House of the People and r. 22 of the Rules of the Council.

(24) R. 22 of the Rules of the House of the People; R. 20 of the Rules of the Council.

CLAUSE (2).

OTHER CONSTITUTIONS

(A) *U.S.A.*—The *American President* possesses the power to inform, and send messages to, the Congress, though he has no right to attend or to address them. Art. II, section 3 says—

"He (the President) shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and excellent"

This provision may seem to be rather anomalous, since the American President is no part of the Legislature, and cannot have any legislative functions, owing to the rigid application of the doctrine of Separation of Powers. But the very operation of that Theory necessitates such a provision for communication between the Executive and the Legislature. By the nature of things, the Executive must have more extensive sources of information in regard to domestic and foreign affairs than the Legislature can be expected to possess. Since the American Executive is not represented in the Legislature through responsible Ministers, there is no possibility for Congress to have the benefit of the experience and information of the Executive on matters of national importance. Through the messages, Congress may also have the wishes of the leader of the nation, though they are *not bound* to act upon such messages. The messages, in short, are an instrument of co-ordination between the Executive and the Legislature, which would have been entirely lacking, without them, in the American Constitution. They are used not only for the purpose of announcing policies, but also for suggesting legislation. They have great public importance and are widely read and discussed.²²

(B) *England*.—On this point, we have a divergence between law and practice, in the English Constitution. In law and theory, there is nothing to bar the Crown to send any messages to Parliament, when he possesses the legal right to personally attend and address them. But since the time of George III, this power also has come to be in disuse except for purely formal purposes. Thus, on purely formal occasions, such as a request for supply or an intimation of permission to deal with a matter of prerogative or royal property, the Crown communicates by message; otherwise the indulgence of the House concerned is necessary and any statement must be one of fact,—not to influence the House's judgment. Even an allusion to the King's personal wishes in debate is forbidden.²⁵ The Crown has no longer any constitutional right either to influence the deliberations of Parliament or to interfere with them. Sometimes a royal message is sent through a Minister to announce a sudden emergency, necessitating the calling out of the army reserves.¹

(C) *Fifth French Republic*.—Art. 18 of the Constitution of 1958 improves upon the foregoing provision by providing for messages to the upper Chamber as well. It says—

"The President of the Republic shall communicate with the two Chambers of Parliament by means of messages, which he shall cause to be read, and which shall not be the occasion for any debate.

Between sessions, the Parliament shall be specially convened for this purpose."

(D) *Eire*.—Art. 13 (7) of the Constitution of Eire says—

"(1) The President may, after consultation with the Council of State communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance. (2) The President may, after consultation with the Council of State address a message to the nation at any time on any such matter. (3) Every such message or address must, however, have received the approval of the Government."

(E) *Government of India Act, 1935*.—Sec. 20 (2) of the Act provided—

"(2) The Governor-General may in his discretion send messages to either Chamber of the Federal Legislature, whether with respect to a Bill then pending in the Legislature or otherwise,

(25) Keith, *Constitutional Law*, p. 53.

(1) Chalmers and Hood Philipps, *Constitutional Law*, p. 115.

and a Chamber to whom any message is so sent shall with all convenient dispatch consider any matter which they are required by the message to take into consideration."

INDIA

Cl. (2) : President's right to send messages to Parliament.

Though *our* Constitution has adopted the Parliamentary system of government to the exclusion of the Presidential system of the *American* type, and though royal messages, except on formal matters, have practically become obsolete in *England*, *our* Constitution, nevertheless, gives the President the right to address and to send messages to Parliament, at any time.

It is to be noted that no provision corresponding to that in Art. 13 (7) of the Constitution of *Eire* has been engrafted in *our* Constitution, to require that the President's address or message must have the approval of the Cabinet. Nevertheless, it may be expected that unless the President ventures to interfere with the constitutional responsibility of the Council of Ministers to Parliament, he would not give any address or message except on ministerial advice.

The power given by the present clause is very wide; it provides that the message may relate to a pending Bill or to any other matter.

Procedure in Parliament on receipt of the message.

R. 23 of the Rules of the House of the People² provides—

"Where a message from the President for the House under Art. 86 (2) of the Constitution is received by the Speaker, he shall read the message to the House and give necessary directions in regard to the procedure that shall be followed for the consideration of matters referred to in the message. In giving these directions, the Speaker shall be empowered to suspend or vary the rules to such extent as may be necessary."

Communications between President and Parliament.

Rr. 246-7 of the Rules of Procedure and Conduct of Business in the House of the People³ may be noticed in this connection:

"246. Communications from the President to the House shall be made to the Speaker by written message signed by the President or, if the President is absent from the place of meeting his message shall be conveyed to the Speaker through a Minister.

247. Communications from the House to the President shall be made—(1) by formal address, after motion made and carried on the House, and (2) through the Speaker."

Analogous Provisions.—In case of a deadlock between the two Houses, the President may notify his intention to summon a joint sitting, by a message [Art. 108 (1)]. Instead of assenting to a Bill, the President may return a Bill to the Houses with a message requesting its reconsideration [Art. 111, Proviso].

INDEX TO COMMENTS

ARTICLE 86.

Clause (1).

Other Constitutions :

(A) England. 520 ; (B) U.S.A., 520 ; (C) Government of India Act, 1935, 520.

India :

President's right of address, 520 ; Time limit for discussion, 520.

Clause (2).

Other Constitutions :

(A) U.S.A., 521 ; (B) England, 521 ; (C) Fifth French Republic, 521 ; (D) *Eire*, 521 ;

(E) Government of India Act, 1935, 521.

India :

President's right to send messages to Parliament, 522 ; Procedure in Parliament on receipt of message, 522 ; Communications between President and Parliament, 522 ; Analogous Provisions, 522.

(2) R. 21 of the Rules of the Council is similar.

(3) Rr. 185-6 of the Council are similar.

Before 18-6-51

87. (1) At the commencement of every session the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address and for the precedence of such discussion over other business of the House.

Amendment.—This Article has been amended by the **Constitution (First Amendment) Act, 1951**. In Cl. (1), the words in italics have been substituted for the words 'every session'. In Cl. (2), the words "and for the precedence of such discussion over other business of the House", at the end of clause, have been omitted.

Effects of Amendment.—The above amendment would make a departure from the English practice. In *England*, the King's speech is delivered or read at the beginning of *each session*. But as a result of this amendment it will be *obligatory* for our President to address the House only (a) at the commencement of the first session after a new Parliament is elected; and (b) at the commencement of the first session of each year.

The procedure is now left entirely to the Rules of the House (see pp. 525-6, *post*).

OTHER CONSTITUTIONS

(A) *England*.—Not only is Parliament summoned by the Crown,—neither House can proceed with any business until the Crown has declared to the House the causes of summons.⁶ He does this by a speech at the commencement of *each session*, which he delivers either in person or by commission. In the absence of the Sovereign, the Speech is read by the Lord Chancellor. The Speech from the Throne is now used for political purposes, by the Cabinet, to announce ministerial policies, both external as well as internal, including the legislative programme, and the speech is usually written by the Prime Minister.

"The speech deals in outline with the general political outlook, the legislative measures to be introduced during the session, and in a portion addressed to the Commons alone, calls attention to the requirements of the Crown for supplies to carry on the government of the country."

After the King's speech is delivered or read, an address is presented by the House in the form of a resolution thanking the Crown for his most gracious speech. Thereafter *amendments* are moved to the address by way of additions thereto. Amendments to the Speech are also used for political purposes. Usually it is the members of the Opposition who move these amendments, but even members of the majority party who are disgruntled may sometimes move such

After 18-6-51

87. (1) At the commencement of *the first session after each general election to the House of the People and at the commencement of the first session of each year* the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address⁵ * * * *.

(4) Substituted for the words 'every session' by the Constitution (First Amendment) Act, 1951.

(5) The words "and for the precedence of such discussion over other business of

the House" were omitted by the Constitution (First Amendment) Act, 1951, s. 7.

(6) May, 16th Ed., p. 290.

(7) Keith, Constitutional Law, p. 50; May, 15th Ed., p. 275; Campion, p. 107.

amendments so as to raise a debate on matters of general policy or administration which are of general interest and importance, and the debate on them sometimes extends over several days.⁸ The occasion is very rarely used to bring about a fall of the Government.⁸

(B) *Canada*.—The speech from the Throne, prepared by the Prime Minister,⁹ is read by the Governor-General.

(C) *U.S.A.*—There is no specific provision enjoining or empowering the President to address Congress at the opening session. But there is nothing to bar the President's sending or reading a message at the opening session, declaring policies. Advantage has been taken by the President of the general provision in Art. II, s. 3, to send a 'State of the Union' message at the beginning of each regular session.¹⁰

(D) *Government of India Act, 1935*.—It has already been noticed (p. 520, ante) that under As. 20 (1) of the Act of 1935, the Governor-General had the right to address the Federal Legislature or either Chamber thereof *at any time* and to require the attendance of the members for this purpose. There was no specific provision for such address being delivered at the commencement of each session or at the commencement of the first session after a general election.

INDIA

Cl. (1) : The Opening Address.

The power conferred upon the President by the present Article corresponds to the 'Speech from the Throne' in *England*. Though there was no precedent for any such speech under the Government of India Act, 1935, the opening address delivered by our first President shows that this power of the President will be utilised by the ministry. The President's speech will be the first authoritative pronouncement of the policy of the Government both domestic and foreign, after each general election and also at the commencement of the first session of each year, which is usually the Budget session. Under the Rules of the House of the People (r. 20), the Prime Minister or some other Minister on behalf of the Government has a right of reply during the discussion on the Opening Address.

'*Causes of summons*.'—This means that the head of the Executive will draw the attention of the House to important public events which require their attention.

'*At the commencement of the first session*.'—The House cannot be said to be duly constituted until the members take their seat by taking oath (Art. 99) and the Speaker is elected (Art. 93). The House is then ready to hear the 'opening address' and to proceed with the initial business of the session. No public business can be taken up by the House until the session is 'opened' by the President and the causes of its summons are declared. This English convention¹¹ has been adopted in India.¹² It means that on the 'opening day', no business is transacted before the President's address, other than the taking of oath by the members and the election of the Speaker.¹³

Can the President delegate his function?

Since in *England* (p. 523, ante) it is not obligatory for the Sovereign to read the Opening Speech in person, a question has been raised in India as to whether

(8) Lowell, Government of England, Vol. I, pp. 307, 330.

(9) Dawson, Government of Canada, 1949, p. 248.

(10) Pritchett, American Constitution, 1959, p. 305. Schwarty, Commentary of the Constitution of the U.S., 1963, Vol. II, p. 27.

(11) May, Parliamentary Practice, 14th Ed., p. 273.

(12) *Saradhakar v. Orissa Legislative Assembly*, A. 1952 Orissa 234.

(13) H. P. Deb, 1957, Vol. I, 25.

the President or a Governor can authorise another person to read his Opening speech. The answer should be in the negative.

Even though the Opening speech may embody the policy of the Government, the functions conferred by Art. 87 (1) or 176 (1) of our Constitution appear to vest the functions in the President or the Governor (as the case may be), *personally*.^{13a} Art. 87 (1) is mandatory as contrasted with Art. 86 (1) which is enabling. Any other interpretation would render Art. 65 (2) or Art. 160 redundant. The Opening speech must, therefore, be delivered by the President personally. If he is temporarily indisposed, the date for the opening of the session should be fixed according to his convenience. If the illness is prolonged, the difficulty may be overcome only by allowing Art. 65 (2) to operate, in which case the Vice-President will discharge all the functions of the President during the period of illness, including the function in question.

Of course, in the States, there is no provision corresponding to Art. 65 (2); but there is Art. 160 to provide that it is for the President to provide 'for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter'. It follows, therefore, that if the Governor is unable to attend the State Legislature owing to absence, illness or otherwise, a proper order is to be issued by the President. But it is not possible for the Governor himself to delegate his function under Art. 175 or the like.

CLAUSE (2).

Rules of Procedure.

Rules 16-21 of the Rules of Procedure and Conduct of Business in the House of the People¹⁴ provide—

"16. The Speaker, in consultation with the Leader of the House, shall allot time for the discussion of the matters referred to in the President's Address under Art. 87 (1) of the Constitution.

17. On such day or days or part of any day, Parliament shall be at liberty to discuss the matters referred to in such Address on a motion of thanks moved by a member, which shall be seconded by another member.

18. Amendments may be moved to such motion of thanks in such form as may be considered appropriate by the Speaker.

19. (1) Notwithstanding that a day has been allotted for discussion on the President's Address—

(a) A motion or motions for leave to introduce a Bill or Bills may be made and a Bill or Bills may be introduced on such day, and

(b) Other business of a formal character may be transacted on such day before the House commences or continues the discussion on the Address.

(2) The discussion on the Address may be postponed in favour of a Government Bill or other Government business on a motion being made that the discussion on the Address be adjourned to a subsequent day to be appointed by the Speaker. The Speaker shall forthwith put the question, no amendment or debate being allowed.

(3) The discussion on the Address shall be interrupted in the course of a sitting by an adjournment motion under rule 61.

20. The Prime Minister or any other Minister, whether he has previously taken part in the discussion or not, shall on behalf of the Government have a general right of explaining the position of the Government at the end of the discussion and the Speaker may enquire how much time will be required for the speech so that he may fix the hour by which the discussion shall conclude.

21. The Speaker may, if he thinks fit, prescribe a time limit for speeches after taking the sense of the House."

Form of motion of thanks and amendments.

The motion of thanks to the President's address is usually made in the following terms:

(13a) This view of the Author, expressed at p. 520 of Vol. II of the previous Edition, now finds support from *Jayantilal v. Rana*, A. 1964 S.C. 648 (656).

(14) Rr. 14-17 of the Rules of the Council are exactly similar.

"That an Address be presented to the President in the following terms—

That the members of the Sabha assembled in this Session are deeply grateful to the President for the Address which he has been pleased to deliver to both the Houses assembled together on"

The amendment motions are in the following form:

"That at the end of the Motion the following be added—
'but regret—

(i) that the Government has failed to take effective steps to rehabilitate the refugees....."

'Discussion of the matters referred to in such address'.—A literal interpretation of these words would lead to the view that matters omitted from the President's Address cannot be the subject of discussion under Art. 87 (2) of our Constitution.¹⁵ The practice in *England* is otherwise:

"Formerly the Address (of thanks) was framed to follow the King's Speech paragraph by paragraph, but it is now moved in the form of a short expression of thanks.

The debate, which follows, normally falls into two parts: (1) a general debate upon the policy of the Government as outlined in the Speech, and (2) debate on the amendments moved for the most part by the Opposition, advocating alternative policies, usually expressed in the form of regret for the omission from the Speech of the policies advocated."^{16,17}

May also observes—

"..... the causes of summons, as declared from the throne, do not bind Parliament to consider them alone"¹⁸

This is also the practice in *Canada*, where the debate on the Address in reply to the Speech from the Throne sometimes takes place for a month and private members are allowed much freedom to express their views,¹⁹—"to talk about anything under the sun and yet be in order".

In *India*, the number of days allotted for the debate on the Address in Reply being much shorter (usually 3 days), some restriction in the scope of the discussion becomes inevitable, and the view that the matters raised in the discussion should be relevant to the matters 'referred to in the Address' is the only practicable solution²⁰ to find out time for discussion of all the amendments, since they are numerous and the House cannot come to an agreement to pursue only some of the selected amendments or subjects.^{21,22}

Amendments inconsistent with the provisions of the Constitution have been held to be out of order.²³

Since the 'Opening Speech' is a declaration of policy, an amendment to the Address is treated as a vote of no-confidence against the Government.²⁴

Control over the House which is addressed by the President.

The President addresses both Houses assembled together but the rules as to the conduct of the meeting are not provided by the Constitution. Cl. (2) of Art. 87 says that each House shall make rules as to the allotment of time for discussion of the matters referred to in such address which takes place in each House after the President's address.

But there is no provision relating to the procedure at the meeting of the Houses assembled, together to hear the President's address. It is not a 'joint sitting' of the Houses in the proper sense, because the session commences only after the President has delivered his address.

(15) This view has been taken in our Council of States.

(16) Campion, Introduction to the Procedure in the House of Commons, 1950, p. 108.

(17) The debate on the King's Speech usually continues for 5 or 6 days.

(18) May, 15th Ed., p. 31.

(19) Cf. Dawson, Government of Canada, 1949, pp. 416-7, 436. [In 1942, not less than 142 members spoke on the Address in the Canadian House (*ibid*)].

(20) Cf. (1952) H. P. Deb., Vol. I, 88-9.

(21) C. S. Deb., 19-5-52, Vol. I, Cols 92-5; H. P. Deb., 13-2-53.

(22) In England, the Speaker secures such an agreement by consultation with the different parties [cf. Dawson, Government of Canada, 1949, p. 445].

(23) (1954) H. P. Deb., Vol. I, 261-2.

(24) Cf. Jennings, Cabinet Government, 1959, p. 496.

It seems that provision for maintenance of order at such a meeting can be framed only by agreement between the different parties. The President is entitled to prevent breaches of order in the assembly addressed by him, by his own body-guards.

But, in the absence of specific provision in the Constitution, it is hardly possible for the President himself to make Rules for regulating the conduct of the members at such sitting. Nor is it possible for the Speaker to enforce the ordinary rules as the Presiding Officer because at the meeting addressed by the President under Art. 87 (1) no one presides and Art. 118 (4) or the Rules made thereunder do not extend to such meeting if it is not a 'joint sitting' of the two Houses. Taking advantage of this want of provision there have been in some State Legislatures walk-out demonstrations attended with the shouting of slogans etc. at the time of the Governor's Opening address and Speakers of such Legislatures have felt themselves helpless in the matter. No such incident has so far happened in Parliament. Pending the insertion of proper constitutional provisions, however, it may be said that any such situation may be avoided if members of all parties remember that the President or the Governor is a head of the State and any disparaging remark about the Opening Address read by him²⁵ or any other violent conduct¹ is a disgrace to the Nation. Opportunity for giving vent to the members' reactions to the contents of the Address is available in the debate which follows on a subsequent day (*cf.* r. 17 of the Rules of the House).

INDEX TO COMMENTS

ARTICLE 87.

Amendment, 523 ; Effects of Amendment, 523.

Other Constitutions :

(A) England. 523 ; (B) Canada, 524 ; (C) U.S.A., 524 ; (D) Government of India Act, 1935, 524.

India :

Cl. (1): The Opening Address, 524 ; 'Causes of summons', 524 ; 'At the commencement of the first session', 524.

Can the President delegate his function? 524.

Cl. (2): Rules of Procedure, 525 ; Form of motion of thanks and amendments, 525 'Discussion of the matters referred to in such address', 526 ; Control of the House which is addressed by the President, 526.

88. Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, any joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.

Right of Ministers and Attorney-General as respects Houses.

OTHER CONSTITUTIONS

(A) *England*.—A minister has the right to address the Chamber of which he is a member ; and though he may visit the other Chamber when matters relating to his own Department are under discussion, he has *no right to speak* in that House. Again, a minister who is not for the time being a member of Parliament has no right to speak in either House.²

(B) *Eire*.—Art. 28 (8) of the Constitution of 1937 provides—

"Every members of the Government shall have the right to be heard in each House of the Oireachtas."

This is a departure from the English precedent and enables a Minister to address a Chamber of which he is not a member.

(25) (1957) H. P. Deb., Vol. I, 584.

(1) H. P. Deb., 22-2-54.

(2) Lowell, Government of England, Vol. I, p. 61.

(C) *South Africa*.—Sec. 52 of the South African Constitution Act provides—

"A member of either House of Parliament shall be incapable of being chosen or of sitting as a member of the other House: Provided that every Minister of State who is a member of either House of Parliament shall have the right to sit and speak in the Senate and the House of Assembly, but shall vote only in the House of which he is a member."

By giving the right of speech in either House to a non-Member Minister, the South African Constitution Act differs from the English precedent.

(D) *Fifth French Republic*.—Art. 31 of the Constitution of 1958 says—

"The Minister shall have access to the two Chambers and to their Committees. They must be heard when they require it."

So, a minister who is a member of one Chamber may also speak in the other Chamber and even a minister who is not a member of the Legislature at all may speak in either Chamber.

(E) *Japan*.—The Japanese Constitution not only confers a right but also imposes a duty upon the ministers, in this respect.

Art. 63 says—

"The Prime Minister and other Ministers of State may, at any time, appear in either House for the purpose of speaking on bills, regardless of whether they are members of the House or not. They must appear when their presence is required in order to give answers or explanations."

(F) *Government of India Act, 1935*.—S. 21 of the Act was as follows—

"Every minister, and the Advocate-General shall have the right to speak in, and otherwise to take part in the proceedings of, the Dominion Legislature or any Committee thereof of which he may be named a member, but shall not by virtue of this section be entitled to vote."

INDIA

Art. 88: Right of Ministers and Attorney-General to speak in either House or Committee thereof.

Every House of Parliament being an autonomous body, would not allow any person who is not a member of that House, either to participate in its proceedings or to vote [cf. Art. 100 (1); 104]. The present article engrafts an *exception* to that general rule. It enables every Minister (*i.e.*, any member of the Council of Ministers, whatever be his rank) as well as the Attorney-General³ to *speak* in either House of Parliament or any of its Committees, or at a joint sitting of both Houses, though they might not be members of that particular House or of any House at all. But such person would have a right to *vote* only if he is a member of that House of Parliament in which the voting takes place.

Art. 75 (5) provides that a person who is not a member of either House of Parliament, may remain a Minister for a period of six months. Again, the Attorney-General would be a nominated person [Art. 76 (1)] and would not be a member of Parliament. It would be a disadvantage for the Legislature if such a Minister or the Attorney-General is debarred from placing his information or point of view before either House when some matter under his charge is being discussed in the House. Further, since a Bill requires passage by both Chambers, it would be difficult for the Government to pilot a Bill, if the Minister-in-charge is not allowed to speak in the lower House simply because he is a member of the Upper House, and conversely. It is to meet these difficulties, that the present article has been adopted. But the right to vote is confined to members of the House concerned [Art. 100 (1), *post*]. This provision seems to be an improvement upon the English precedent (see *above*) and follows the French and the Irish precedents.

(3) In practice, the Attorney-General attends only when his presence is arranged for by the Government or desired by the Speaker, *e.g.*, to give his opinion on the constitution-

ality of a Bill [H. P. Deb., 9-5-53, C. 6304] or to give a legal interpretation [L. S. Deb., 28-2-56, C. 1048].

The right of a Minister to speak in either House, no doubt, gives either House the opportunity of hearing the Minister who is responsible for any act in question before the House; but it also causes some strain upon the senior Ministers. Though the strain is sought to be avoided by arranging the business of the two Houses by a process of co-ordination and appointing Ministers of State and Deputy Ministers, it is not seldom that a House causes embarrassment to a particular Minister-in-charge by insisting upon him to have his say on the matter.

INDEX TO COMMENTS

ARTICLE 88.

Other Constitutions :

(A) England, 527 ; (B) Eire, 527 ; (C) South Africa, 528 ; (D) Fifth French Republic, 528 ; (E) Japan, 528 ; (F) Government of India Act, 1935, 528.

India :

Right of Ministers and Attorney-General to speak in either House or Committee thereof, 528.

Officers of Parliament

The Chairman and Deputy Chairman of the Council of States.

89. (1) The Vice-President of India shall be *ex-officio* Chairman of the Council of States.

(2) The Council of States shall, as soon as may be, choose a member of the Council to be Deputy Chairman thereof and, so often as the office of Deputy Chairman becomes vacant, the Council shall choose another member to be Deputy Chairman thereof.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) U.S.A.—Art. I, s. 3 (4) of the Constitution says—

"The Vice-President of the United States shall be the President of the Senate but shall have no vote, unless they be equally divided."

(B) *Argentina*.—On the model of the American Constitution, the Constitution of the Argentine Republic (1949) provides that the Vice-President of the Republic "shall be the President of the Senate, but he shall have no vote unless there be a tie."

(C) *England*.—The Lord Chancellor is the *ex-officio* Speaker or presiding officer of the House of Lords. Being a member of the Cabinet, he is naturally a party man and holds a political appointment which ensures so long as the Government of which he is a member remains in power. Though he is usually raised to the peerage before appointment, a commoner may also be appointed Lord Chancellor. If he is a peer, the Lord Chancellor may take part in the debate and vote like other peers; but he cannot do this if he is not a peer.

(D) *Canada*.—S. 34 of the Br. North America Act, 1867 says—

"The Governor-General may, from time to time, by instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead."

Strikingly, the Speaker of the Canadian Senate is not an elected person but a nominee of the Executive and holds office during the pleasure of the Governor-General, i.e., of the Prime Minister.

(E) *Fifth French Republic*.—Art. 32 of the Constitution of 1958 says—

"The President of the Senate shall be elected after each partial re-election of the Senate" (i.e., every third year).

(F) *West Germany*.—Art. 52 (1) of the West German Constitution of 1949 provides—

"The *Bundesrat* elects its President for one year."

(G) *Japan*.—Each House of the Diet "selects its own president and other officials" (Art. 58).

INDIA

Cl. (1): Chairman of the Council of States.

This Clause follows Art. I, sec. 3 (4) of the Constitution of the United States of America, and provides that the Council of States shall have an *ex-officio* Chairman [while the Speaker of the House of the People shall be an elected member of that House],—viz., the Vice-President of India.

It may be recalled [Art. 66 (2), p. 394, *ante*] that though the Vice-President is elected by both Houses of Parliament, he is expressly prohibited to be or to remain a member of either House of Parliament. The Chairman of the Council of States cannot, therefore, be a member of the Council so long as he remains the Chairman.

Functions of the Chairman.

These are similar to those of the Speaker in the House of the People. Under *our* Constitution, there is no distinction between the two Houses in this respect, as exists in *England*. The Speaker has, of course, certain additional powers, owing to the difference in the powers of the two Houses, e.g., the power of certifying a Bill to be a money Bill [Art. 110 (3)-(4)].

CLAUSE (2).

OTHER CONSTITUTIONS

(A) *U.S.A.*—Art I, s. 3 (6) of the Constitution says—

"The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of the President of the United States."

The President *pro tempore* acts as the presiding officer of the Senate when the President (i.e., the Vice-President of the *U.S.A.*) is absent from the House. Like the Speaker of the House of Representatives, the President *pro tempore* is a ranking member of the dominant party.

(B) *England*.—The Crown appoints several Peers to act as Deputy Speakers of the House of Lords in the absence of the Lord Chancellor. As amongst themselves, they get the chance to act as the Deputy Speaker in the order of their precedence in the Royal Commission which appoints them.

INDIA

Cl. (2): Deputy Chairman.

Unlike the Chairman, the Deputy Chairman is an elected member of the Council. His function is to act as Chairman when the Chairman is acting as the President or is otherwise absent from any sitting of the Council [Art. 91].

The mode of election of the Deputy Chairman is laid down in r. 7 of the Rules of Procedure of the Council, as follows:

"(1) The election of a Deputy Chairman shall be held on such date as the Chairman may fix and the Secretary shall send to every member notice of this date.

(2) At any time before noon on the day preceding the date so fixed, any member give notice in writing addressed to the Secretary of a motion that another member be chosen as the Deputy Chairman of the Council, and the notice shall be seconded by a third member and shall be accompanied by a statement by the member whose name is proposed in the notice that he is willing to serve as Deputy Chairman if elected:

Provided that a member shall not . . . propose or second more than one motion.

(3) A member in whose name a motion stands in the list of business may, when called, move the motion or withdraw the motion, in which case he shall confine himself to a mere statement to that effect.

(4) The motions which have been moved and duly seconded shall be put one by one in the order in which they have been moved and decided if necessary by division. If any motion is carried, the person presiding shall, without putting later motions, declare that the member proposed in the motion which has been carried, has been chosen as the Deputy Chairman of the Council."

INDEX TO COMMENTS

ARTICLE 89.

Clause (1).

Other Constitutions :

(A) U.S.A., 529 ; (B) Argentina, 529 ; (C) England, 529 ; (D) Canada, 529 ; (E) Fifth French Republic, 529 ; (F) West Germany, 530 ; (G) Japan, 530.

India :

Chairman of the Council of States, 530 ; Functions of the Chairman, 530.

Clause (2).

Other Constitutions :

(A) U.S.A., 530 ; (B) England, 530.

India :

Deputy Chairman, 530.

Vacation and resignation of, and removal from, the office of Deputy Chairman.

90. A member holding office as Deputy Chairman of the Council of States—

(a) shall vacate his office if he ceases to be a member of the Council ;

(b) may at any time, by writing under his hand addressed to the Chairman, resign his office ; and

(c) may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council :

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

Cl. (c) : Resolution for removal of Deputy Chairman.

The procedure for removal of the Deputy Chairman is a resolution passed in the Council of States. The only two conditions for the passing of such resolution are—

(a) It cannot be moved unless at least 14 days' notice has been given of the intention to move the resolution.

(b) It must be passed by the vote of the majority of the membership of the Council for the time being (*i.e.*, a vote of the majority of those present and voting is not sufficient for this purpose).

While the House of the People has made specific rules (rr. 200-203) to regulate the procedure relating to such resolution, the Council of States has made no such Rules. Hence, no leave of the Council is required to move such resolution while

the leave of the House, indicated by not less than 50 members of the House supporting it, is required by r. 201 (3) of the House of the People, to move such resolution.

Since the provision in Art. 94 (c) relating to the removal of the Speaker and Deputy Speaker is identical with Art. 90 (c), it is seriously debatable whether r. 201 (3), imposing an *additional* requirement for the resolution, is *ultra vires*, however desirable it may be, having regard to the seriousness of a resolution for removal. The rule-making power of the House under Art. 118 (1) is "subject to the provisions of this Constitution". When the Constitution itself provides that the Speaker and the Deputy Speaker can be removed by a resolution which complies with two specified conditions, the House can hardly impose another fetter upon the constitutional provision for removal of the presiding officer of the House itself. The rule in question does not simply lay down the procedure for the passing of the resolution, it imposes a condition in excess of the condition, non-compliance with which leads to a failure of the resolution which is authorised by the Constitution.

Analogous Provision.—For comments on this Article, see under Art. 94, *post*.

91. (1) While the office of Chairman is vacant, or during any period when the Vice-President is acting as, or discharging the functions of, President, the duties of the office shall be performed by the Deputy Chairman, or, if the office of Deputy Chairman is also vacant, by such member of the Council of States as the President may appoint for the purpose.

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act, as, Chairman.

(2) During the absence of the Chairman from any sitting of the Council of States the Deputy Chairman, or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

CLAUSE (1).

Functions of the Deputy Chairman.

The two clauses of this Article provide for two different contingencies.

Cl. (1) provides for the situation which arises when (a) the Chairman in his capacity as Vice-President has to act as the President of India (Art. 65) or (b) when there is a vacancy in the office of the Chairman by reason of the death, resignation or removal (see Art. 67, p. 396, *ante*).⁴

Cl. (2), on the other hand, provides for the contingency which arises owing to the absence of the Chairman from any particular sitting or sittings of the Councils.

(a) In any of the cases arising under cl. (1), the Deputy Chairman shall perform the "duties of the office of the Chairman", which would comprise all the functions of the Chairman, as pointed out at p. 530, *ante*, that is, not only the function of presiding over the sittings of the Council but also the administrative functions connected with that office.

(b) In the case of absence of the Chairman from any sitting of the Council, however, the Deputy Chairman does not acquire all the functions and powers of

(4) It is to be noted that mere expiration of the term of the Vice-President does not cause a vacancy in the office of the Chairman, for Art. 67 (c) provides that on the

expiry of his term, a Vice-President continues to hold that office until his successor is elected and 'enters upon office' (see p. 396, *ante*).

the Chairman but only gets the function of presiding over the House so far as that sitting is concerned. Of course, when he so presides he shall be competent to exercise all the powers of the Chairman as a presiding officer,⁵ including the powers of control over members, strangers etc., as are mentioned to be the powers of the Chairman in the Rules of Procedure of the Council, and there is no appeal from his decisions to the Chairman. But he cannot exercise powers relating to any matter which do not relate to the proceedings of the House on that day.

Neither the Constitution nor the Rules, however, provide any solution for the situation which arises when the Chairman, while in office, remains away from the country or is otherwise physically incapable of exercising the administrative and ancillary functions which belong to the Chairman according to the Rules, at a time when the Council is not in session. Of course, things which may wait may be kept pending until the Chairman returns to duty, but there may be functions which have to be discharged forthwith, e.g., the function of disallowing or admitting Questions⁵ which has to be discharged before the Questions are actually printed and circulated amongst members and then put down for answer in the House. The constitutional position as it stands is that in such cases, the powers still remain in the Chairman and cannot be assumed by the Deputy Chairman. The question is whether there is anything which prevents the Chairman from having it done by any other person, i.e., the Deputy Chairman or the Secretary, subject to subsequent ratification by the Chairman and on his own responsibility. From the very fact that the Constitution does not provide for such a contingency, it would appear that this is not prohibited, provided the Chairman assumes responsibility for the acts of the delegate.

'Performing the duties of the office of Chairman'.—It is to be noted that when the Deputy Chairman or other member has to perform the duties of the Chairman under cl. (1) of Art. 91, he does not 'hold the office' of Chairman. It is only the Vice-President of India who 'holds the office' of Chairman, according to Art. 64.

Again, when the Deputy Chairman performs the functions of the Chairman under the present clause, there is no vacancy in the office of the Deputy Chairman, for the circumstances in which vacancy may be caused in that office are enumerated in Art. 90.

CLAUSE (2).

OTHER CONSTITUTIONS

England.—If the Lord Chancellor as well as all the Deputy Speakers are absent from the House at any sitting, the House elects a temporary Speaker from amongst themselves to preside during such absence.⁶

INDIA

Cl. (2) : Panel of Vice-Chairmen.

Under this clause, the Council has made r. 8 of its Rules of Procedure which provides—

"At the commencement of the Council or from time to time as the case may be the Chairman shall *nominate* from amongst the members of the Council a panel of not more than four Vice-Chairmen, any one of whom may preside over the Council in the absence of the Chairman and the Deputy Chairman when so requested by the Chairman or in his absence, by the Deputy Chairman."

It has already been pointed out (*above*), that when a member of a panel of Vice-Chairmen 'acts as' Chairman at any sitting of the Council under the present

(5) Cf. r. 9 of the Rules of the Council.

(6) H.L. S.O. no. V.

clause, he can exercise all the powers which belong to the Chairman, as presiding officer, so far as that particular sitting is concerned. He does not, however, 'hold the office' of the Chairman. It is to be noted that under r. 8 of the Rules of the Council, quoted above, the Chairman is competent to reconstitute the panel 'from time to time'. Hence, if a member of the panel, while acting as the presiding officer over a particular sitting misbehaves himself, the Chairman may be requested to exercise his power to reconstitute the panel so as to exclude that member from the panel.

92. (1) At any sitting of the Council of States, while any resolution for the removal of the Vice-President from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 91 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman, or, as the case may be, the Deputy Chairman, is absent.

The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Council of States while any resolution for the removal of the Vice-President from his office is under consideration in the Council, but, notwithstanding anything in Article 100, shall not be entitled to vote at all on such resolution or on any other matter during such proceedings.

Art. 92: Chairmanship when resolution for removal under consideration.

It would be anomalous if the Vice-President were to preside over the Council of States when a resolution for his own removal [Art. 67, Prov. (b)] is being considered by the Council. At such a sitting, the Vice-President shall have a right to be present, to speak in or otherwise take part in the proceedings, but he shall neither act as Chairman nor have a vote. At such a sitting, the Deputy Chairman shall preside over the Council, as if the Chairman was absent. Similar is the provision as regards a sitting for consideration of removal of the Deputy Chairman.

Analogous Provision.—See Art. 96, relating to the Speaker and Deputy Speaker of the House of the People. See also Arts. 181, 185, *post*.

93. The House of the People shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to be Speaker or Deputy Speaker, as the case may be.

The Speaker and Deputy Speaker of the House of the People.

OTHER CONSTITUTIONS

(A) *England.*—The Speaker of the House of Commons, is elected from amongst its members at the commencement⁷ of each Parliament and his office lasts for

(7) May, 15th Ed., pp. 268-271.

(7a) When a Speaker seeks re-election, he is usually not opposed in his constituency.

But there have been exceptions in 1935 and 1945 (see Campion, 1950 p. 77).

the life of that Parliament, unless, of course, it is terminated prematurely by death, resignation or removal.

In practice, however, once elected, a Speaker is usually re-elected by each successive Parliament irrespective of its party composition;⁸ so that the election of a new Speaker takes place only if a Speaker dies or fails to be returned in a new Parliament. Since 1895, the election of Speaker has been by unanimous vote, except in 1951 when the election of Mr. Morrison was contested.⁹

His functions are—

1. He is the mouthpiece through whom the Commons communicate with the Sovereign and he represents the House on all occasions in relation to outside authorities. The substantial part of his duties now is to preside over the proceedings of the House, to preserve order within the House and to rule upon 'points of order'. He issues warrants of commitment and enforces obedience to the order of the House.

2. He has, under the Parliament Act, 1911, the power of certifying whether a particular bill is a Money bill or not, and his decision is final on that point.

3. As the presiding officer of the House and the guardian of its privileges, the Speaker has the following powers, *inter alia*, which may be said to be autocratic: (i) He decides whether a motion to closure debate, may be put or whether it is an infringement of the rights of the Opposition. (ii) He can refuse to entertain a dilatory motion if he considers it to be an abuse of the rules of the House. (iii) He can stop irrelevance or repetition in speech. (iv) He can name a member for suspension for disregard of his authority. (v) He can exclude strangers from the Houses.¹⁰ (vi) All speeches in the House are addressed to "Mr. Speaker", and it is the Speaker who determines who is to speak when one member has finished [see also p. 538, *post*]. (vii) He puts 'questions' to the House and announces the decision of the House on each question.

4. The Speaker maintains order in the House in the following ways—(i) By calling members to order; (ii) By ordering them to withdraw for the sitting; (iii) By 'naming' them to the House, *i.e.*, for considering whether a named member should be suspended; (iv) In case of grave disorder, the Speaker can adjourn the House without question put, or suspend the sitting for any time he thinks fit.

Reflections upon the character or action of the Speaker constitutes contempt and his conduct cannot be criticised except on a substantive motion expressing want of confidence in him.¹¹

The position of the Speaker of the House of Commons is one of strict impartiality or neutrality. He resigns from his party¹² and discards his party colours as soon as he takes the Chair. He is the spokesman and representative of the dignity of the House and the guardian of its privileges. As the presiding officer, he must act with the impartiality of an umpire or judge, free from any personal or party bias. It is this impartiality which upholds the finality of his decisions. From the Speaker's rulings on points of order there is no appeal and any expression of disagreement with it by a member would constitute contempt of the Chair. Even the House cannot directly override a Speaker's decision, though the House may at any time change its own rules by a majority vote.¹³ Sometimes the Speaker himself refers a question to the judgment of the House; but if he makes a decision on his own responsibility, its authority cannot be questioned.

"If a member raises a point of order the Speaker gives his decision; he may permit questions to elucidate it and suggestions which may enable the member to keep within the rules but he allows no discussion."¹⁴

(8) Jennings, *Parliament*, 1948, pp. 56-57.

(9) *The British Parliament* (R.F.P. 3405), p. 11.

(10) See, further under Art. 105 (3), *post*.

(11) May, 16th Ed., pp. 249, 400. An action of the Speaker may, however, be dis-

cussed by the House, on a substantive motion, brought at a different time (May, 16th Ed., p. 249).

(12) Jennings, *Parliament*, 1948, p. 61.

(13) Jennings, *Parliament*, 1948, p. 61.

The Speaker's decisions are printed in the Official Report and the Journals of the House, have the force of precedents and are followed by each successive Speaker until the Rules or Standing Orders are themselves changed. The Speaker's rulings thus constitute the 'practice' of the House, while the Standing Orders govern the 'procedure'.¹³

The neutrality of the Speaker's position is maintained by the operation of several factors—(i) Owing to the practice of being re-elected so long as he desires, once elected, the Speaker has not got to seek favours of the Government or the party in power. (ii) He has an official residence, and a liberal salary, charged on the Consolidated Fund (so that his emoluments are not dependent on the vote of the House). He also gets a pension and a peerage when he retires. (iii) He does not speak in any debate,¹⁴ nor vote except in case of a tie (of this see further, under Art. 100 (1), *post*). (iv) He resigns from his party after election.

The Speaker is the 'first commoner' of England, and takes precedence of all commoners.

As to the administrative duties of the Speaker, see under Art. 98, *post*.

In the House of Commons, there are two officers besides the Speaker, who are similarly elected by the House, *viz.*, the Chairman of Ways and Means and the Deputy Chairman. The Chairman of Ways and Means presides over Committees of the whole House, and acts as the Deputy Speaker of the House during the absence of the Speaker from any sitting of the House, or at his request.¹⁵ The Deputy Chairman performs these functions in the absence of the Chairman of Ways and Means.

(B) *U.S.A.*—The Constitution simply says that "the House of Representatives shall choose its Speaker" [Art. I, sec. 2 (5)], so that the position and functions of the Speaker are regulated largely by practice. Differing from the English practice, the Speaker of the House of Representatives is a *party man*, chosen by a caucus of the majority party. In fact, he is the most powerful member of his party in the House. He has the power to recognize or refuse to recognize those who desire to speak on a measure, but in all this, he is influenced by his party bias.¹⁶ He also differs from his English counterpart in having a right to speak or vote in any debate, like any other member of the House.

(C) *Canada*.—Though Canada closely follows the British practice in most matters relating to the Parliamentary system, she departs in the important matter of election of the Speaker. The Canadian Speaker is usually elected from the Government party for each Parliament. The English practice of re-election is not strictly adhered to.¹⁷

(D) *Australia*.—S. 35 of the Australian Constitution Act, 1900 provides—

"The House of Representatives shall, before proceedings to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker."

(E) *Fifth French Republic*.—Art. 32 says—

"The President of the National Assembly shall be elected for the duration of the Legislative."

(F) *Japan*.—Art. 58 of the Japanese Constitution, 1946, says—

"Each House shall select its president and other officials."

(G) *Ceylon*.—See Sec. 17 of the Ceylon (Constitution) Order in Council, 1946.

(H) *Government of India Act, 1935*.—Sec. 22 (5) of that Act contained similar provision.

(14) Lowell, Government of England, Vol. I, p. 262; May, 16th Ed., p. 249.

(15) Campion, Introduction to Parliament, 1950, pp. 77-9.

(16) Ogg & Ray, Introduction to American

Government, 1951, pp. 282-5; Pritchett, American, Constitution, 1959, p. 186.

(17) Dawson, Government of Canada, 1949, p. 407.

INDIA

Election of Speaker and Deputy Speaker.

See rules 7-8 of the Rules of Procedure and Conduct of Business in the House of the People.

Briefly speaking, the election of the Speaker takes place, as soon as may be, after a general election, on such date as may be fixed by the President.¹⁸ At this meeting of the House of the People, some member of the House, nominated by the President, presides [Art. 95 (1), *post*]. Any member may, after giving the requisite notice, seconded by another member, move that a third member be elected Speaker.¹⁸ No debate as to the qualities of the persons whose names are proposed is allowed, and the motion is put to vote, only after a brief statement of the mover.¹⁸ When there are several motions, they are put to vote in the order they have been moved, and as soon as any motion is carried, the person presiding shall, without putting the later motions, declare that the member proposed in the motion which has been carried, has been elected as the Speaker of the House.¹⁸ No consent of the head of the State is necessary for completing the election of the Speaker. As soon as the Speaker is declared elected by a majority of the votes at the meeting of the House, he is conducted to the Chair by the Leader of the House and the leader of the largest Opposition group in the House.¹⁹

The election of the Deputy Speaker differs from the foregoing procedure in the following respects: Since it takes place after the House has elected its Speaker, the election of Deputy Speaker takes place on such date as may be fixed by the Speaker²⁰ and the meeting is presided over by the Speaker.

'Two Members'.—These words make it clear that the same person cannot be elected to be both Speaker and Deputy Speaker. It follows, therefore, that a Deputy Speaker cannot be elected as Speaker unless he resigns his office of Deputy Speaker before such election.

'Another member'.—It is not clear whether the word 'another' has been used in this Article and in cl. (2) of Art. 89, *ante*, inadvertently for the article 'a' which occurs in s. 35 of the Australian Constitution Act (see p. 536, *ante*). The word 'another' however, occurred in s. 22 (1) of the Government of India Act, 1935. Literally, the use of the word 'another' suggests that the person to be elected must be other than the person who has vacated the office. It is, however, doubtful whether this was intended, for one of the results of such a view would be that a person who has resigned the office of Speaker or Deputy Speaker for any reason would not be entitled to seek re-election in the vacancy caused by his resignation, even though the reason which led him to resign may have ceased to exist in the meantime. But if that was not intended, these Articles require to be amended in order to remove any controversy.

Functions of the Chairman of the Council of States and of the Speaker of the House of the People.

The following is a summary of the more important functions and powers of the Chairman or the Speaker, under the Rules of Procedure of the Council of States and of the House of the People:

(i) He determines the days and hours of sitting and conclusion of sitting of the Council or the House, or its adjournment *sine die*.²¹

(ii) He allots, in consultation with the Leader of the House, time for discussion of matters referred to in Art. 87 (1), and prescribes the form in which amendments may be moved to the motion of thanks to the Address. He may also prescribe a time-limit for speeches on the Address under Arts. 86-87 (1).²²

(18) R. 7, Rules of the House.

(19) H. P. Deb., (1957) Vol. I, 27.

(20) R. 7, Rules of the House.

(21) Rr. 10-13 of the Rules of the Council ;
rr. 11-15 of the Rules of the House.

(22) Rr. 14-20 of the Rules of the Council ;
rr. 16-23 of the Rules of the House.

(iii) He determines order of business in the House, in consultation with the Leader of the House.²³

(iv) He decides the admissibility of questions, and has the power of disallowing questions which are calculated to obstruct procedure in Parliament.^{23a} Similarly, he decides whether a matter is of sufficient public importance to be put down for a 'half-an-hour discussion'.²⁴

(v) His consent is necessary to make a motion for adjournment to discuss a matter of 'urgent public importance', and he prescribes the time-limit for speeches on such motion.²⁵

(vi) No motion to introduce a Bill is necessary, if he directs publication in the Gazette.¹

(vii) He appoints Chairmen of Select Committees from amongst members of the respective Committees.²

(viii) He also nominates the members of some Standing Committees such as the Business Advisory Committee; Committee on Private Members' Bills and Resolutions; Committee on Petitions; Committee of Privileges; Committee on Subordinate Legislation; Committee on Government Assurances; Committee on Absence of Members; Rules Committee.³

(ix) His consent is necessary for moving a motion for adjournment of debate on a Bill,⁴ and he may postpone the consideration of a clause in a Bill.⁵

(x) He decides the admissibility of a 'resolution';⁶ a motion;⁷ a notice to discuss a matter of urgent public importance, for short duration.⁸

(xi) He has the power to select amendments to be proposed in respect of any motion and to put them in such order as he may think fit.⁹

(xii) When a Bill is passed by the House (or the Council, as the case may be), it requires to be authenticated by him, before being presented to the President.¹⁰

(xiii) He may prescribe a time-limit for speeches on the Budget and take all steps necessary for timely completion of all financial business.¹¹

(xiv) Communications between the President and the House (or the Council, as the case may be), and *vice versa* shall take place through him.¹²

(xv) He decides a member's right to speak and order of speeches and speeches shall be addressed to him, and questions to other members must be asked through him.¹³

(xvi) Whenever he rises, others must take seat and must not leave while he addresses the House.¹⁴

(xvii) He decides all points of order and his decision is final.¹⁵

(xviii) He preserves order in the House and has all powers necessary for that purpose.¹⁶

(xix) He puts questions to vote and announces results and his announcement is final.¹⁷

(23) R. 23 of the Rules of the Council; rr. 25-26 of the Rules of the House.

(23a) R. 49 of the Rules of the Council; r. 43 of the Rules of the House.

(24) R. 60A (3) of the Rules of the Council; r. 55 (3) of the Rules of the House.

(25) Rr. 177, 179 of the Rules of the Council; rr. 56, 63 of the Rules of the House.

(1) R. 61 of the Rules of the Council; r. 64 of the Rules of the House.

(2) R. 73 of the Rules of the Council; r. 258 of the Rules of the House.

(3) Rr. 32, 40, 181, 249, 265; 278; 287; 302 of the Rules of the House; rr. 30, *et seq* of the Rules of the Council.

(4) R. 117 of the Rules of the Council; r. 109 of the Rules of the House.

(5) R. 105 of the Rules of the Council; r. 89 of the Rules of the House.

(6) R. 158 of the Rules of the Council; r. 174 of the Rules of the House.

(7) R. 170 of the Rules of the House; r. 187 of the Rules of the Council.

(8) R. 177 of the Rules of the House.

(9) Rr. 346-7 of the Rules of the House.

(10) R. 128 of the Rules of the House; r. 135 of the Rules of the Council.

(11) R. 182 (3) of the Rules of the Council; r. 218 of the Rules of the House.

(12) Rr. 221-222 of the Rules of the Council; rr. 246-7 of the Rules of the House.

(13) Rr. 235, 237 of the Rules of the Council; rr. 330, 338 of the Rules of the House.

(14) R. 243 of the Rules of the Council; r. 341 of the Rules of the House.

(15) R. 258 of the Rules of the Council; r. 376 (3) of the Rules of the House.

(16) R. 259 of the Rules of the Council; r. 378 (3) of the Rules of the House.

(17) R. 367B (3) of the Rules of the House; r. 253 (3) of the Rules of the Council.

(xx) He may direct any member guilty of disorderly conduct to withdraw, and name a member for suspension who disregards the authority of the chair and persists in obstructing business of the House.¹⁸

(xxi) He may adjourn or suspend business in case of grave disorder.¹⁹

(xxii) He may regulate admission of strangers and ask them to withdraw at any time.²⁰

(xxiii) If he is of opinion that a word or words has or have been used in debate which is or are defamatory or indecent, or unparliamentary or undignified, he may, in his discretion, order that such word or words be expunged from the proceedings of the House.²¹

(xxiv) His consent is necessary for raising a question of privilege and he may, *suo motu* refer any question of privilege to the Committee of Privileges for examination, investigation or report.²²

(xxv) He communicates to the House intimation as to arrest of any member received from a Magistrate.²³

(xxvi) His permission is necessary to make an arrest or to serve any legal process within the precincts of the House.²⁴

(xxvii) His consent is necessary for moving a motion for suspension of the Rules relating to a particular motion before the House.²⁵

(xxviii) The detailed working of the Rules and the regulation of all matters not specified in the Rules of the House is left to him.¹

Some special powers of the Speaker.

Besides the above powers which are common to both the Speaker of the House of the People and the Chairman of the Council of States, there are certain special powers which belong to the Speaker alone, by reason of the constitutional powers and status of the House of the People. Thus,—

(i) The Speaker has the exclusive power of certifying a Bill to be a Money Bill [see under Art. 110 (4), *post*].²

(ii) The Speaker presides over a joint sitting of the two Houses [Art. 118 (4), *post*] and determines the adjournment of the sitting.³

(iii) His permission is necessary to call the attention of a Minister to a matter of urgent importance.⁴

(iv) He determines whether a motion of no-confidence in the Council of Minister is in order.⁵

(v) His consent is necessary if a Minister who has resigned wants to make a personal statement in explanation of his resignation.⁶

(vi) The Speaker may himself, or on a point being raised or on a request made by a member, address the House at any time on a matter under consideration in the House with a view to aiding members in their deliberations, and such expression of views shall not be taken to be in the nature of a decision.⁷

Constitutionality of Bills.

Though it is the duty of the Speaker to point out formal defects in a Bill, it is not for him to decide whether a Bill is beyond the legislative competence of

(18) Rr. 255-6 of the Rules of the Council ; rr. 386-7 of the Rules of the House.

(19) R. 257 of the Rules of the Council ; r. 388 of the Rules of the House.

(20) Rr. 264-5 of the Rules of the Council ; rr. 399-400 of the Rules of the House.

(21) R. 261 of the Rules of the Council ; r. 393 of the Rules of the House.

(22) Rr. 187, 190 of the Rules of the Council ; rr. 244, 259 of the Rules of the House.

(23) Rr. 231 of the Rules of the House.

(24) Rr. 232-3 of the Rules of the House.

(25) R. 388 of the Rules of the House ; r. 267 of the Rules of the Council.

(1) R. 266 of the Rules of the Council ; r. 389 of the Rules of the House.

(2) R. 96 (2), Proviso, of the Rules of the House.

(3) R. 4 of the Houses of Parliament (Joint Sittings and Communications) Rules.

(4) R. 197 of the Rules of the House.

(5) R. 198 (2) of the Rules of the House.

(6) 372 of the Rules of the House.

(7) R. 360 of the Rules of the House.

Parliament or is otherwise unconstitutional.^{7a} It is ultimately for the Courts to decide whether an enactment was within the competence of the Legislature in question. Of course, if any question as to the unconstitutionality of a Bill is raised in Parliament, it is for the House concerned to take into consideration the objection raised, in accepting or rejecting the Bill.^{7b}

Conduct of members while the Chair rises.

It would be impossible for the Presiding Officer to perform his function of maintaining order in the House unless the members maintain order and remain silent while he rises to speak. The Rules of *our* Parliament^{7c} expressly lay this down:

"(1) Whenever the Chairman/Speaker rises he shall be heard in silence and any member who is then speaking or offering to speak shall *immediately* sit down."

(2) No member shall leave his seat while the Chairman/Speaker is addressing the Council/House."

Decision of the Chair not to be questioned except on a substantive motion.

The decision of the Chair on any question cannot be challenged or criticised by any member, in any manner except by moving a substantive motion.⁹ As an instance of a substantive motion to criticise the decision of the Chair may be cited the following motion which was moved by the Opposition in the House of Commons¹⁰ in 1951:¹¹

"That this House views with concern the decision of the . . . so to exercise his powers of selection as to exclude Amendments to cl. 1 of the Finance Bill, which would have permitted the House to debate and pronounce upon specific burdens upon individuals and industries."

It has, however, been held by the Speaker of the House of Commons that after the Speaker's Ruling on a point of order is given, a member may submit that the Speaker was *mistaken* or had misunderstood the proposition, without entering upon a discussion of the very matter which has been ruled out by the Speaker.¹²

In *India*, the conduct of the Speaker can be discussed by bringing a formal resolution for his removal, under Art. 94 (c), *post*. The Rules of the House do not, however, exclude a substantive motion to criticise the Speaker's ruling, brought at a subsequent point of time, in the form it takes place in the House of Commons, just stated.

How the dignity and independence of the Speaker is secured.

In *England*, the independence of the Speaker is ensured by a number of conventions and rules of procedure. Most of these have been adopted in India either in the Constitution itself or in the Rules of Procedure of the House of the People. Thus,

(a) As in *England*, the salary and allowances of the Speaker are charged on the Consolidated Fund [Art. 112 (3) (b)].

(b) His conduct cannot be criticised except on a substantive motion criticising or censuring his conduct,¹³ or upon a resolution for removal [Art. 94 (c)].

Reflections upon his impartiality, except on such substantive motion, is regarded as a breach of privilege of the House.¹⁴

(7a) L. S. Deb. (II), 15-4-55, cc. 5321-24.

(7b) H. P. Deb. (II), 25-11-52, c. 1148; L.

S. Deb. (II), 1-11-56, cc. 5292-94.

(7c) R. 243 of the Rules of the Council; r. 361 of the Rules of the House.

(8) Cf. (1950) 476 Parl. Deb., c. 2014.

(9) May, 16th Ed., p. 249.

(10) 488 H.C. Deb., c. 2521; 489 H.C. Deb., c. 243.

(11) A later instance is the motion brought by Mr. Wedgood Benn (L) against

the Speaker Mr. Morrison, in July 1957, to criticise the latter's ruling that Government's military action in Oman did not constitute a definite matter of public importance for immediate debate.

(12) (1950) 476 Parl. Deb. (Com.), 2294-5.

(13) (1935) L.A. Deb., Vol. I, 625-6; Morrison, Government & Parliament, 1954, p. 204.

(14) (1937-38) C.J. 213.

(c) He does not cast vote except in case of a tie [Art. 100 (1)].

(a) He can be removed only by a resolution of a special majority of the House itself [Art. 94 (c)].

Impartiality of the Speaker.

Impartiality has been regarded as an indispensable condition of the office of the Speaker¹⁵ because the Speaker is to be the guardian of the powers and privileges of the House as a whole¹⁶⁻¹⁷ and not of the political party who might have nominated him for the office. It is not possible for him to maintain order in the House unless he receives the confidence of the minority parties and groups that their rights will be duly safeguarded by him. Parliament cannot discharge its duties as a deliberative assembly unless opportunities for a full debate are allowed to all sections of the House without inclination in favour of any particular party.

It is because of these reasons that the *English* Speaker, as soon as he is elected, "rigorously cuts off his party affiliations. He decides his honourable intention of being the impartial servant of the House as a whole and that in particular he will do his best to safeguard the rights of the minorities."¹⁸ As Speaker Clifton Brown declared—"I am not the Government's man, nor the Opposition's man, and I am the House of Commons' man".¹⁹

Though the *English* model differs from that of the American Speaker who is openly a party man (p. 536, *ante*), it is the English model which should be followed in India simply because we have adopted the British Parliamentary system also in *toto*. In fact, even prior to the Constitution, Speakers in the Indian Legislative Assembly had declared that they had no party affiliations; would not act according to the mandate of any party in or outside the House;²⁰ and that they were the custodians of the rights of every party and every section in the House.²¹

But our first Speaker, Mavalankar,²² struck a different note that, owing to the peculiar circumstances in India, he could not afford to sever his membership of the Congress party though, of course, he would not take part in active politics and would try to be impartial in the House notwithstanding such membership. His successor, Sri Ayyangar, followed the same course and both offered themselves for re-election in 1952 and 1957, respectively. This was thus an open departure from the English practice.²³

It should be pointed out that in order to make our Speaker impartial in the strict sense of being free from any party affiliation it is necessary to build up conventions similar to those which have made an *English* Speaker indifferent to party support from the moment of his election, e.g.,

(a) that the election of the Speaker should be unanimous;

(b) that a Speaker who seeks re-election as a member of Parliament should be returned unopposed from his constituency;²⁴⁻²⁵

(c) that when returned to the House, he should be re-elected to be Speaker unanimously, unless, of course, he does not offer himself for the office.²⁶

The need for this latter conventions will be evident from the observation of Speaker Sri Mavalankar, explaining why he had sought re-election (1952) as a

(15) May, *Parliamentary Practice*, 16th Ed., p. 249; (1955-6) 546 Parl. Deb., c. 2.

(16) In *England*, it is customary for the Speaker to claim from the Sovereign the privileges of the House of Commons [May, *ibid.*, pp. 45, 247].

(17) (1946) L.A. Deb., Vol. I, 163, 165.

(18) Morrison, *Government & Parliament*, 1954, pp. 203-204; (1945-6) 413 Parl. Deb., c. 10.

(19) (1945-6) 413 Parl. Deb., c. 8.

(20) (1930) L.A. Deb., Vol. I, 131; (1925) L.A. Deb., Vol. IV, 37.

(21) (1946) L.A. Deb., Vol. I, 163.

(22) (1952) H.P. Deb., Vol. I, 43-44. But the third Speaker, Sardar Hukam Singh, has disaffiliated himself from his party—the Congress Party.

(23) In *England*, there have been contests in 1935 and 1945 and 1950, but these are regarded as unwholesome exceptions; Jennings, *Parliament*, pp. 57-58; (1945) 413 Parl. Deb., c. 5.

(24) The re-election of the sitting Speaker Sri Ayyangar at the election of 1962 was also uncontested.

(25) (1927) L.A. Deb., Vol. I, 11.

Congress candidate instead of as an independent candidate as Speaker Patel had done in 1927:

"We have yet to evolve . . . healthy conventions about Speakership, the principle of which is that, once a Speaker he is not opposed by any party in the matter of his election, whether in the Constituency or in the House, so long as he wishes to continue as a Speaker. To expect the Speaker to be out of politics altogether *without the corresponding convention* is perhaps entertaining contradictory expectations".¹

In fine, the impartiality of a Speaker cannot be maintained unless the Opposition also appreciates the importance of the office and has confidence in the impartiality of his orders as if they were judicial pronouncements. In the words of Morrison,

" . . . it is only by respecting the authority of the Chair that their proceedings (*i.e.* of the House) can be kept dignified and orderly".²

Frequent protests or resentment against the Speaker's rulings are helpful to none. This is why though the conduct of the Speaker in the House of Commons is open to criticism only upon a substantive motion, and though notices of such motion have been given from time to time, except once, in 1925, no such motion has ever been *moved* and even on that solitary occasion, the motion was heavily defeated by the House. Even though a resolution under Art. 94 (c) is prescribed by our Constitution as the mode for removal of the Speaker, a substantive motion for censuring or criticising the conduct or decision of the Speaker does not appear to be excluded by the Rules. Such motions should not be light-heartedly brought for a conscientious Speaker is sure to resign if such motion is carried.

Analogous Provision.—Cf. Art. 178, relating to the Legislative Assembly of a State.

INDEX TO COMMENTS

ARTICLE 93.

Other Constitutions :

(A) England, 534 ; (B) U.S.A., 536 ; (C) Canada, 536 ; (D) Australia, 536 ; (E) Fifth French Republic, 536 ; (F) Japan, 536 ; (G) Ceylon, 536 ; (H) Government of India Act, 1935, 536.

India :

Election of Speaker and Deputy Speaker, 537 ; 'Two members', 537 ; 'Another member', 537. Functions of the Chairman of the Council of States and of the Speaker of the House of the People, 537 ; Some special powers of the Speaker, 539 ; Constitutionality of Bills, 539 ; Conduct of members while the Chair rises, 540 ; Decision of the Chair not to be questioned except on substantive motion, 540.

How the dignity and independence of the Speaker is secured, 540 ; Impartiality of the Speaker, 541.

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker.

94. A member holding office as Speaker or Deputy Speaker of the House of the People—

(a) shall vacate his office if he ceases to be a member of the House of the People ;

(b) may at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office ; and

(c) may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House :

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution :

(1) (1952) H.P. Deb., Vol. I, 43-4.

(2) (1945-6) 413 Parl. Deb., c. 11.

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution.

OTHER CONSTITUTIONS

(A) *England*.—The vacancy in the office of the Speaker may be caused by (a) death; (b) resignation; (c) protracted illness; or (d) acceptance of office.³

Under the House of Commons (Speaker) Act, 1832 and the House of Commons Officers Act, 1846, no vacancy in the office is caused by dissolution of Parliament; the then Speaker continues until the election of a Speaker by the new Parliament.⁴

(B) *Government of India Act, 1935*.—See Sec. 22 (2) and (5) of that Act.

INDIA

Scope of Art. 94.

This Article exhaustively lays down the circumstances in which a member holding office as Speaker or Deputy Speaker may vacate his office. The office is vacated only if the conditions laid down in this Article are duly complied with. When a vacancy arises a fresh election must take place in conformity with Art. 93.

'A member holding office as Speaker or Deputy Speaker'.—These words make it clear that the present clause applies only to a member who has been elected as Speaker or Deputy Speaker under Art. 93 and does not apply to members who may be acting as Speaker or Deputy Speaker under either cl. (1) or cl. (2) of Art. 95.

Cl. (a).—See Arts. 101-2, *post*, as to the circumstances when a member vacates his seat in the House. A member who is holding office as Speaker or Deputy Speaker will vacate his office as soon as any of these contingencies arises.

Cl. (b).—It is to be noted that there is no question of acceptance of the resignation by any authority, under the present clause. The resignation is complete as soon as the writing is 'addressed' to the Deputy Speaker or Speaker, as the case may be.

A nice question, however, arises as to how a Speaker is to resign his office if the Deputy Speaker's office has *already* become vacant by reason of any of the circumstances enumerated in cls. (a)-(c) and there has not yet been a fresh election to that office. As the office of the Deputy Speaker is 'vacant', it follows that there is no Deputy Speaker for the time being, and, therefore, no resignation can be addressed by the Speaker to the 'Deputy Speaker' under the present clause until a new Deputy Speaker is elected under Art. 93. The Speaker cannot, in such circumstances, tender his resignation to the House itself, because, as has been stated at the outset (Vol. I, p. 31), the conditions of vacation of the office having been codified in the present Article of the Constitution, the application of any general principles outside the present Article is excluded by the Constitution itself. The net result is that in the given circumstances, the Speaker cannot resign his office until fresh election to the office of the Deputy Speaker has taken place.

A similar situation would arise where the Deputy Speaker seeks to resign while the office of the Speaker has fallen vacant.

There is thus an obvious lacuna in the present clause and in the corresponding cl. (b) of Art. 90 (p. 531, *ante*), unless this fetter upon the right to resign was deliberate. In practice, the difficulty has been got over by holding that the letter of resignation may be addressed to the Speaker or the Deputy Speaker (and sent to the Secretariat of the House) even though the office of the Speaker or the Deputy Speaker may, for the time being, lie vacant.⁵ The practice, however, is

(3) May 16th Ed., p. 286.

(4) *Ibid.*, p. 251.

(5) LSS NOT, No. 496-T/56, d. 7-3-56:

Gaz. of India (I-1), 7-3-56 [resignation of Deputy Speaker, Shri Ananthasayanam Ayyangar].

no answer to the proposition that the resignation cannot be addressed to the 'Speaker' when the House has no Speaker, owing to a vacancy. It is to meet such a contingency that Proviso 2 to Art. 94 has been engrafted but that Proviso does not cover all cases of vacancy.

Cl. (c).—This clause corresponds to cl. (c) of Art. 90, *ante*, except that the 2nd Proviso to the present Article is new.

Procedure for removal of the Speaker or Deputy Speaker.

Rules 200-3 of the House of the People lay down the following procedure for a resolution to remove the Speaker or Deputy Speaker under Art. 94 (c):

(i) A member who wishes to move such a resolution must give notice in writing to the Secretary for leave to move the resolution.

(ii) On receipt of such notice, the Speaker shall fix a day for consideration of the motion not earlier than 14 days from the date of the receipt of the notice of the resolution.

(iii) On the day so appointed the motion shall be moved by the member in whose name it stands when called upon to do so, but no speech shall be permitted at this stage. The person who is to preside at this sitting is laid down by Art. 96 (1).

(iv) The person presiding shall then place the motion before the House and shall request those members who are in favour of leave being granted to rise in their places:

(a) If less than 50 members rise, the Presiding Officer shall inform the member that he has not the leave of the House.*

(b) If not less than 50 members rise in favour of leave being granted, the Presiding Officer shall say that leave has been granted and that the resolution will be taken up on such day, not being more than 10 days' from the date on which leave is asked for, as he may appoint.

(v) On the day so appointed, the resolution shall be taken up for discussion after the question hour and before any other business for the day is entered upon. There is provision for a time limit for speeches. Thereafter the resolution will be put to vote.

It has further been ruled by the Chair* that the resolution will be out of order if it does not contain specific charges which could be met.

The conduct of the Speaker can be discussed only by a resolution under the present clause or by a substantive motion of censure. It cannot be done by a cut motion or a motion for adjournment* or by any reflection on his speech.¹⁰

Though the Speaker does not, as in *England*, take part in the deliberations and proceedings of the House, Art. 96 (2) gives him a right to speak in, and to take part in the proceedings of the House and to vote like an ordinary member while a resolution for his removal is under consideration.

Proviso 2.

As a result of this Proviso, though both the Speaker and the Deputy Speaker cease to be members of the House, on dissolution, only the Deputy Speaker vacates his office, while the Speaker continues to hold his office until the date of first meeting of the House as reconstituted by election after the dissolution.¹¹

(6) A resolution brought in 1954 for the removal of Speaker Sri Mavlankar was lost on this ground [(1954) H.P. Deb., Vol. IX, 3297-3301].

(7) In Art. 94 (c) of the Constitution the provision for 14 days' notice of the motion exists but it is not suggested that the voting on the resolution shall take place at any later date after the leave is granted by

the House. The rule thus engrafts an additional time-lag for taking a vote on the resolution, which is not provided for by the Constitution itself.

(8) (1954) H.P. Deb., Vol. IX, 3297-3301.

(9) L.A. Deb., (1935) Vol. I, 625-6.

(10) H.C. Manual, p. 108.

(11) Vide LSS Not. No. 496-T/57; Gaz. of India,—1-6-57.

Analogous Provisions.—Excepting the second Proviso, this Article is identical with Art. 90, above. Note that under either Article, a majority of all the then members of the House (as distinguished from the ordinary majority of members voting) will be required for removal.

The provisions of Art. 179, relating to the Speaker or Deputy Speaker of a State Legislative Assembly are similar to those of the present Article.

INDEX TO COMMENTS

ARTICLE 94.

Other Constitutions :

(A) England, 543 ; (B) Government of India Act, 1935, 543.

India :

Scope of Artt. 94, 543 ; 'A member holding office as Speaker or Deputy Speaker', 543.

Cl. (a), 543 ;

Cl. (b), 543 ;

Cl. (c), 544 ; Procedure for removal of Speaker or Deputy Speaker, 544.

Proviso 2, 540.

Analogous Provisions, 545.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker.

95. (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as Speaker.

OTHER CONSTITUTIONS

Government of India Act, 1935.—S. 22 (3) of that Act was substantially the same as the present Article—

"While the office of President is vacant, the duties of the office shall be performed by the Deputy President, or, if the office of Deputy President is also vacant, by such member of the Council as the Governor-General may in his discretion appoint for the purpose, and during any absence of the President from any sitting of the Council the Deputy President or if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as President."

INDIA

Cls. (1) and (2).—The difference between the scope of cls. (1) and (2) should be carefully noted. Each clause, again, has two parts: (a) the Deputy Speaker performing the duties of or acting as the Speaker ; and (b) some other member performing the functions of or acting as the Speaker.

The difference between 'performing the duties of' and 'acting as' Speaker is that when a person acts as the Speaker at a particular sitting or sittings under cl. (2), he exercises all the functions and powers of a Speaker so far as the procedure and conduct of business within the House in respect of such sitting or sittings is concerned.¹² But when a person performs the *duties of the office* of the Speaker under Cl. (1), he exercises not only the powers of control over the proceedings of the House but also the administrative and ancillary functions of the Speaker as the head of the Secretariat.

(12) R. 10 of the Rules of the House of the People ; r. 9 of the Rules of the Council.

On the other hand, it is also to be noted that in neither of the cases under cl. (1) or (2) does the person 'hold the office' of the Speaker within the meaning of Art. 94. Only a person who is elected as Speaker under Art. 93 'holds the office' of Speaker within the meaning of Art. 94. It follows, therefore, that when the Deputy Speaker 'performs the duties of' Speaker under Art. 95 (1), there is no vacancy in the office of Deputy Speaker. The only circumstances under which a vacancy takes place in the office of Deputy Speaker are enumerated in Art. 94.

Deputy Speaker's functions.

The Deputy Speaker functions as an ordinary member and has no functions to discharge by virtue of his office unless any of the following contingencies happens:¹³

(a) Office of the Speaker falling vacant in any of the ways specified in Art. 94.—In such a case, the Deputy Speaker *performs the duties* of the office of the Speaker¹⁴ [Art. 95 (1)].

(b) Absence of the Speaker from any sitting of the House.—In this case, he *acts as* the Speaker so far as that sitting is concerned [Art. 95 (2)]. This applies also to temporary absence of the Speaker from parts of a sitting.

(c) While any resolution for the removal of the Speaker [Art. 94 (c)] is under consideration by the House,—the Deputy Speaker shall preside [Art. 96 (1)].

When the Deputy Speaker or any other member of the House presides over the House under the provisions of Art. 95, the Deputy Speaker or such other member so presiding, shall have all the powers of the Speaker (see pp. 537-9, *ante*) when presiding over the House.¹⁵ It follows, therefore, that there cannot be anything like an appeal to the Speaker from a decision of the Deputy Speaker while he was in the Chair.¹⁵

There is, however, a difference between cls. (1) and (2). When the Deputy Speaker or other member merely *acts as* Speaker under cl. (2), he can only exercise those powers which the Speaker possesses *as presiding officer* of the House, but cannot exercise any power specifically vested in the Speaker by the Constitution, e.g., that of certifying a Bill as Money Bill [Art. 110 (4)]. But such power can be exercised when the Speaker's office is vacant and the Deputy Speaker or other member is performing his duties under cl. (1).

Provision for temporary vacancy in the offices of and temporary absence of Speaker and Deputy Speaker : Panel of Chairmen.

While cl. (1) provides for the occasion when the offices of both the Speaker and Deputy Speaker are *vacant* and new incumbents have not yet been elected according to Art. 93, cl. (2) provides for the occasion when both the Speaker and Deputy Speaker are *absent* from the House.

Under cl. (1), it is the President who will appoint another member of Parliament to act as Speaker until a new Speaker or Deputy Speaker is elected under Art. 93.

Under cl. (2), it is the Rules of Procedure of the House which are to provide for the contingency. R. 9 of the Rules of Procedure in the House of the People provides—

"(1) At the commencement of the House or from time to time as the case may be, the Speaker shall nominate from amongst the members of the House a panel of not more than six Chairmen any one of whom may preside over the House in the absence of the Speaker and Deputy Speaker, when so requested by the Speaker, or in his absence, by the Deputy Speaker.

(13) The provisions of Arts. 91-2 of the Constitution relating to the Deputy Chairman are similar, except that the Deputy Chairman has to function as the Chairman also when the Chairman acts as or discharges the functions of President of India.

(14) Thus, on the death of the Speaker

Shri Mavlankar, the Deputy Speaker Shri Ananthasayanam Ayyangar performed the duties of the Speaker till 7-3-56 when he resigned his office of Deputy Speaker, for standing for election as Speaker [LSS Not. No. 496-T/56, dated 7-3-56].

(15) Parl. Deb., 20-2-51, Pt. II, col. 3196.

(2) A Chairman nominated under sub-rule (1) shall hold office until a new panel of Chairmen is nominated."

A question arose in the U. P. Vidhan Sabha¹⁶ as to whether cl. (2) of Art. 180, which corresponds to cl. (2) of the present Article, may apply when the office of the Deputy Speaker is *vacant*; in other words, whether a member of the Panel of Chairmen can preside over the House when the Speaker is absent from a sitting and the office of the Deputy Speaker has not yet been filled up.

It is submitted that the answer should be in the *negative*, because—

(a) According to the rules of statutory interpretation, since two different words, 'vacant' and 'absent', occur in two clauses of the same Article (95 or 180), they cannot be interpreted to refer to the same situation.

(b) The word 'absent' implies that there is a holder of the office, who is not physically present in a sitting. When there is no Deputy Speaker at all, how can it be said that the Deputy Speaker is 'absent'?

(c) That the word 'absent' is used in a sense other than absence owing to vacancy will be apparent if we refer to other articles, such as Art. 65.

The above interpretation does not lead to the result that there shall be no sitting of the House in such a contingency, until a Deputy Speaker is duly elected, but that the Speaker himself shall have to preside at any sitting that may take place during the intervening period, or to adjourn the House when he is unable to remain present. This may be inconvenient to the Speaker but the only remedy for this is to elect a Deputy Speaker immediately after the election of the Speaker is held or immediately after the vacancy in the office of the Deputy Speaker takes place.

It was, in fact, ruled in the Legislative Assembly¹⁷ that the word 'absence' means physical absence from the House. Hence, if the Deputy Speaker is present in the House, he cannot, for the purpose of recording his vote, put a member of the Panel in the Chair. It is only when he is going to be absent from the House that he can request a member of the Panel to take the Chair.

96. (1) At any sitting of the House of the People, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 95 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker, or, as the case may be, the Deputy Speaker, is absent.

The Speaker or Deputy Speaker not to preside while a resolution for his removal from office is under consideration.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the House of the People while any resolution for his removal from office is under consideration in the House and shall, notwithstanding anything in article 100, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

Analogous Provision.—Cl. (1) of Art. 96 is similar to Cl. (1) of Art. 92, but Cl. (2) differs. While the Chairman of the Council of States shall have no vote when a resolution for his removal is being considered by the Council,—the Speaker shall have a right to vote in the first instance upon such resolution, but not in case of equality of votes. Cf. also Art. 181, relating to the Legislative Assembly of a State.

(16) Hindusthan Standard, Delhi, 5-5-57, p. 1.

(17) (1938) L.A. Deb., Vol. V. 1583-6.

97. There shall be paid to the Chairman and the Deputy Chairman of the Council of States, and to the Speaker and the Deputy Speaker of the House of the People, such salaries and allowances as may be respectively fixed by Parliament by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

Salaries and allowances of the Chairman and Deputy Chairman and the Speaker and Deputy Speaker.

OTHER CONSTITUTIONS

(A) *England*.—The Speaker of the House of Commons gets a salary of £5,000/- plus an allowance of £750/-¹⁸ *per annum*, charged on the Consolidated Fund, plus free residence. On retirement, he gets a yearly pension of £4,000 and is usually offered a peerage.

(B) *U.S.A.*—The Speaker of the House of Representatives and the President of the Senate each draws 15,000 dollars *per annum*, regulated by congressional legislation.

INDIA

Salaries and Allowances of Officers of Parliament.

The salaries and allowances of the Officers of Parliament mentioned in Art. 97 have been fixed by the Salaries and Allowances of Officers of Parliament Act (XX of 1953), with effect from 1-5-53. Part C of the Second Schedule of the Constitution, therefore, *no longer governs the matter*. In addition to a furnished residence and other facilities, the salaries payable under this Act are—

Speaker and Chairman.—Rs. 2,250 *per mensem* plus a sumptuary allowance of Rs. 500 *per mensem*.

Deputy Speaker and Deputy Chairman—Rs. 2,000 *per mensem*.

Under Art. 112 (3) (b), all these salaries and allowances are charged on the Consolidated Fund of India [see *post*].

They cannot, of course, draw the salary or allowances of a Member of Parliament in addition to those prescribed by the above Act.

Secretariat of Parliament.

98. (1) Each House of Parliament shall have a separate secretarial staff:

Provided that nothing in this clause shall be construed as preventing the creation of posts common to both Houses of Parliament.

(2) Parliament may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of either House of Parliament.

(3) Until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People or the Council of States, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

(18) Since 1957 [572 H.C. Deb. 1316-22].

OTHER CONSTITUTIONS

England.—I. In the House of Lords, the head of the permanent staff of the House is the 'Clerk of the Parliaments' who is appointed by the Crown for life and can be removed only by the Crown upon an address of the House of Lords (Clerk of Parliaments Act, 1824). The other officers of the staff are appointed by the Clerk of the Parliaments who has power to remove them at pleasure (*ibid*).

II. In the House of Commons, the head of the staff is the 'Clerk of the House of Commons' who is appointed for life by the Crown. The subordinate staff are divided into several categories. Officers of the 'Department of the Clerk of the House' are nominated by the Clerk but they have to qualify themselves by competing at the examination for administrative posts in the Civil Service.¹⁹ They are, however, all servants of the House and not of the Executive as other civil servants are.²⁰

INDIA

Functions of the Secretary.

The office of the Secretary of either House of our Parliament corresponds to the office of the Clerk of the House of Commons.

(A) *England.*—The Clerk of the House of Commons holds an important and highly paid office. He is appointed by the Crown and is usually an expert having special knowledge in the history and procedure of the House. His principal function is to advise the Speaker, Ministers and other members of the House on matters of procedure. He is the head of the staff of the House and is responsible for drafting the proceedings of the House as entered in the Journals.

His other duties are to sign the Addresses, votes of thanks, Orders of the House, to endorse Bills sent or returned to the other House and to read whatever is required to be read in the House.²¹

Though the Speaker is ultimately responsible for the supervision of the administrative work of the House, the Speaker performs this function through the Clerk of the House, without seeking to interfere with the control of the Clerk over the staff under his charge. In practice, it is the Clerk who takes all steps necessary with respect to the staff of the House and informs the Speaker who, as a rule, agrees.

(B) *India.*—The functions of the Secretary of either of the two Houses of our Parliament are, generally, similar, except on points which are shown as such in the list below. The more important functions are—

(i) The first business of the Secretary is to issue a summons to each member specifying the date and place for a session of the Council²² (or the House).

(ii) The Secretary has to keep a Roll of Members of the Council (or the House, as the case may be), which must be signed by every member, in the presence of the Secretary, before taking his seat.²³

(iii) The Secretary has to send to every member the date fixed by the Chairman for election of the Deputy Chairman.²⁴ He also receives from members notices of motions proposing names of other members for the office of Deputy Chairman.²⁴ (In the House of the People, the Secretary performs similar functions in connection with the election of Speaker,²⁵ Deputy Speaker¹).

(iv) The Secretary has to prepare a list of business for each day of the session and a copy thereof has to be made available for the use of every member.²

(19) May, 16th Ed., p. 257.

(20) Gordon, *Our Parliament*, 1952, p. 79.

(21) Campion, *Introduction to Procedure in the House of Commons*, 1950, p. 79; May, 15th Ed., p. 241.

(22) R. 3 of the Rules of the Council; R. 3 of the Rules of the House.

(23) R. 6 of the Rules of the Council; R. 6 of the Rules of the House.

(24) R. 7 of the Rules of the Council.

(25) R. 7 of the Rules of the House.

(1) R. 8 of the Rules of the House.

(2) R. 29 of the Rules of the Council; R. 31 of the Rules of the House.

(v) The Secretary has to receive notice of Questions³; motions⁴; resolutions⁵; questions of privilege⁶; motion for leave to introduce a Bill⁷; amendments.⁸

(vi) He counts the votes from the Division Lists when there is a division on any debate.⁹

(vii) It is the duty of the Secretary to circulate to each member a copy of every notice or other paper which is required by the Rules of the Council or the House to be made available for the use of members.¹⁰

(viii) It is the duty of the Secretary to prepare and publish a report of the proceedings of the Council at each stage;¹¹ every report of a Select Committee.¹²

(ix) The Secretary shall have custody of all papers of the House or its Committees and shall not permit any such paper to be taken away from the Parliament House without the permission of the Speaker.¹³

(x) The Secretary shall report to the House any petition to the House which is received by him.¹⁴

(xi) When the Speaker (or the Chairman) is absent from New Delhi, the Secretary may, in case of urgency, authenticate a Bill on behalf of the Speaker¹⁵ (or Chairman,¹⁶ as the case may be).

(xii) When a Bill is passed by the House of the People and transmitted to the Council it shall be certified by the Secretary of the House at the top of the Bill that it has been passed by the House to which he belongs.¹⁷ In the Council, this is done by a message signed by the Secretary.¹⁸

(xiii) In general, it is the duty of the Secretary to advise the Speaker or Chairman in the matter of exercise of all the powers and functions that belong to the Speaker or Chairman.

Cl. (1) : '*Separate secretarial staff*'.—The word 'separate' indicates that the staff of each House shall be independent of control from the other House. Of course, the Proviso says that posts common to both Houses may be created. This would, however, be possible only by agreement between the two Houses and only if a satisfactory arrangement between the two Houses as to the control over such officers by each House as regards matters concerning itself could be devised.

The function of a Proviso is to except a case which would otherwise fall within the general language of the main provision to which it is engrafted (see Vol. I, p. 38). The Proviso, therefore, indicates that the main part of cl. (1) intends that the staff of each House shall be normally separate from that of the other and shall work without any interference from the staff of the other House. It would also follow from cl. (3) that the control over the staff of the Council of States shall be a concern of the Chairman as the control of the staff of the House of the People shall be a concern of the Speaker.

Cl. (2) : '*Conditions of service of the Secretarial staff*'.—It is to be carefully noted that while provision is made in Art. 309 as to the regulation of the conditions of service of persons 'serving the Union', special provision is made in the present Article as to the same subject relating to persons serving in the Secretariat of each House of Parliament. According to the canons of construction (Vol. I, pp. 31-2), this means that the general provisions contained in Part XIV of the Constitution relating to servants of the Union are not to apply to servants of either

(3) R. 40 of the Rules of the Council;
R. 53, Rules of the House.

(4) R. 168 of the Rules of the Council;
R. 204 of the Rules of the House.

(5) R. 154 of the Rules of the Council;
R. 189 of the Rules of the House.

(6) R. 188 of the Rules of the Council;
R. 53, Rules of the House.

(7) R. 62 of the Rules of the Council;
R. 84 of the Rules of the House.

(8) R. 95 of the Rules of the Council;
R. 117 of the Rules of the House.

(9) R. 254 (2) of the Rules of the Council;
r. 367 (4) (b) of the Rules of the House.

(10) R. 224 of the Rules of the Council;
R. 334 of the Rules of the House.

(11) R. 260 of the Rules of the Council;
R. 379 of the Rules of the House.

(12) R. 92 of the Rules of the Council;
R. 114 of the Rules of the House.

(13) R. 383 of the Rules of the House.
(14) R. 167 of the Rules of the House.

(15) Proviso to r. 128 (1), Rules of the House.

(16) Proviso to r. 135 of the Rules of the Council.

(17) R. 96 (2) of the Rules of the House.
(18) R. 97 of the Rules of the Council.

House of Parliament except in so far as an application of these provisions is authorised by the law or the rules referred to in cls. (2)-(3) of Art. 98.

This is indeed essential for the independence of Parliament from the Executive and it has already been pointed out (p. 549, *ante*) that even in England, the staff of the House of Commons are servants of the House and are not subject to the control of the Executive like other civil servants, even though they may have to qualify themselves at the tests prescribed for the civil service. The same situation is envisaged by the present Article of *our* Constitution, *viz.*, that the servants of the Parliament Secretariats shall form a class apart from the civil servants of the Union and would be under a separate system of control and regulations. The Secretariat of Parliament shall thus be independent of the Executive Government.¹⁹

Cl. (3) : Rules relating to the secretarial staff.—The power to make rules relating to the recruitment etc. of the servants of the Secretariat of either House is given by cl. (2) to Parliament. Until Parliament undertakes such legislation (no such law has yet been passed), this function will be exercised by the President in consultation with the Speaker or Chairman in relation to the staff of the two Houses, respectively. In exercise of this power, the President has made—

(1) The Lok Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1955.

(2) The Rajya Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1957.

The concluding words of the clause suggest that Parliament may, instead of legislating comprehensively, deal with certain matters, leaving the rest to be regulated by rules made under cl. (3). In such a case, the Rules shall have effect 'subject to the provisions of the law' made by Parliament.

INDEX TO COMMENTS

ARTICLE 98.

Other Constitutions : England, 549.

India :

Functions of Secretary: (A) England, 549 ; (B) India, 549.

Cl. (1): 'Separate Secretarial staff', 550.

Cl. (2): 'Conditions of service of the Secretarial staff', 550. *

Cl. (3): Rules relating to the Secretarial staff, 551.

99. Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Oath or affirmation by members.

OTHER CONSTITUTIONS

England.—A member of Parliament is, before taking his seat for the first time, required to take oath or make affirmation, by the Parliamentary Oaths Act, 1861 (s. 3).

INDIA

Art. 99 : 'Before taking his seat'.

Taking of oath is thus the first act of a member after his election or nomination, to either House of Parliament.

(19) Cf. Constituent Assembly Deb., Vol. IX (30-7-49), pp. 2-3.

After the election of a new Parliament, while in England, the oath is taken by the members after the Speaker is elected and before the Speaker, in India, the members take their oath before the election of the Speaker and before a person appointed by the President. Members who are subsequently elected to fill vacancies, take their oath before the Speaker, under r. 5 of the Rules of the House of the People which says—

"A member who has not already made or subscribed an oath or affirmation, in pursuance of Art. 99 of the Constitution, can do so at the commencement of a sitting of the House on any day after giving previous notice in writing to the Secretary."

Penalty for not taking oath —See Art. 104, *post*.

Form of oath or affirmation. —See Form III, Sch. III, *post*.

Analogous Provision.—See Art. 188 for corresponding provision for the State Legislature.

100 (1) Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker.

Voting in Houses, power of Houses to act notwithstanding vacancies and quorum.

The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) Either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament, shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat voted or otherwise took part in the proceedings.

(3) Until Parliament by law otherwise provides, the quorum to constitute a meeting of either House of Parliament shall be one-tenth of the total number of members of the House.

(4) If at any time during a meeting of a House there is no quorum, it shall be the duty of the Chairman or Speaker, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England.*—All questions in the House of Commons are decided by a majority of votes of the members present and voting. The Speaker puts the questions to vote and declares the result which is then recorded in the Journal of the House. Usually, he ascertains the result by the voices. But if the Speaker's statement is challenged, he directs the lobby to be cleared, and again puts the question; if his statement is again challenged, he directs the locking of the doors and directs the members to the 'ayes' and 'noes' lobbies. But before doing that, he may ask the persons challenging his decision to rise and then give his final decision instead of directing a counting in the division lobbies.²⁰ Voting in the lobbies is technically called a 'division'.

(20) S.O. No. 34; Morrison, Parliament, 1934, pp. 53-4; May, 15th Ed., p. 410.

Prior to 1906, refusal to vote might lead to suspension. But now, a member of Parliament is under no obligation to vote on any particular question.

(a) It has been already stated (p. 536, *ante*), that owing to the impartial position of the Speaker, he never votes on any question except in the case of a 'tie' or equality of votes. Again, even when he thus votes in case of a tie, he bases his vote, "not upon his personal opinion of the merits of the measure, but upon the probable intention of the House as shown by its previous action, or upon some constitutional principle,"²¹ for which he may take information from the Clerk of the House. For instance, the Speaker would, by tradition, vote in such a way as to secure further discussion on the subject²² but there have been instances where the Speaker's casting vote has concluded the matter before the House.²³ In practice, he also gives reasons as to why he is giving his casting vote for or against the measure, though he is not bound to assign reasons.

(b) The position of the Chairman of the House of Lords,—the Lord Chancellor, differs from that of the Speaker of the House of Commons.

The Lord Chancellor performs, in the House of Lords, the functions assigned in the House of Commons to the Speaker, but has not the same powers for maintaining order and controlling the course of debates.

"He does not even decide which peer shall speak but if more than one rise at once, and refuse to give way, the question who shall have the floor is decided by House itself. Order in debate, also, is enforced not by him but by the Lords themselves In short, his functions are limited to formal proceedings, and even in these he can be overruled by the House." (*Lowell*).

The rules of the House of Lords are so liberal that any peer may initiate a debate on a matter of public importance almost at any time.

In addressing the House, the Lord Chancellor has precedence by courtesy, but though he has an ordinary vote of a peer, he has no casting vote like that of the Speaker. In practice he is always made a peer, but this is not a legal necessity. If a peer, he can of course, as such, take part in debate; but otherwise not.

(B) *Canada*.—Sec. 36 of the British North America Act says—

"Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative."

So, the Speaker of the Senate has an ordinary vote but no casting vote: in case of a tie, the motion will be lost.

Sec. 49, on the other hand, provides—

"Questions arising in the House of Commons shall be decided by a majority of voices other than that of the Speaker, and when the voices are equal, but not otherwise, the Speaker shall have a vote."

So, the Speaker of the House of Commons has a casting vote but no ordinary vote.

(C) *Australia*.—Secs. 23 and 40 of the Australian Constitution Act exactly correspond to Secs. 36 and 49 of the British North America Act, respectively.

(D) *Fifth French Republic*.—The usual procedure in either Chamber is that a simple majority of persons voting decides a question, but there are certain provisions in the Constitution requiring a special majority in some cases—

(a) A majority of the members of the Assembly is required for requisitioning an extraordinary session of Parliament (Art. 29).

(b) When there is a disagreement between the two Chambers over the passing of an 'organic law' the decision of the Assembly shall prevail, provided it is by

(21) *Lowell*, Government of England, Vol. I, p. 262; see also *Munro*, Governments of Europe, 1947, p. 197.

(22) *May*, 16th Ed., p. 435.

(23) The latest instance of the Speaker's exercise of the casting vote was on May 1,

1950, when the Speaker saved the Attlee Government from defeat by casting his vote against the motion to reduce the estimate of supplies for the Ministers of Transport, alleging discrimination against road transportation services which had not been nationalised. [*Statesman*, Calcutta, 3-5-50, p. 51].

an absolute majority of its members (Art. 46). If the organic law relates to the Senate, it must be passed in both Chambers, in a similar manner (Art. 46, para. 3).

(c) A motion of censure against the Government shall be carried only by the vote of a majority of the members of the Assembly (Art. 49, para. 2).

(E) *West Germany*.—Art. 42 (2) of the West German Constitution, 1949 provides—

“Decisions of the *Bundestag* require a majority of votes cast unless this basic law provides otherwise.”

(F) *Ceylon*.—Sec. 18 of the Ceylon (Constitution) Order in Council, 1946, is in the same language as Cl. (1) of Art. 100 of *our* Constitution. Under the Constitution of Ceylon, the only case in which a special majority [$\frac{2}{3}$ of the total number of members of the House of Representatives] is required, is amendment of the Constitution [Sec. 29 (4), Proviso].

(G) *Japan*.—Art. LVI of the Japanese Constitution says—

“All matters shall be decided, in each House, by a majority of those present except as elsewhere provided in the Constitution. In case of a tie, the presiding officer shall decide the issue.”

(H) *Government of India Act, 1935*.—Sec. 23 (1) of that Act was exactly similar to Art. 100 (1) of *our* Constitution.

INDIA

Cl. (1) : Decision by majority of votes.

This clause lays down that except in the cases otherwise provided by the Constitution, all questions at any sitting of either House or at any joint sitting, shall be determined by a majority of votes of the members *present* and *voting* on the question.

The constitutional provisions that require a special majority are: Arts. 61 (2) (b); 61 (4); 90 (c); 94 (c); 108 (4); 124 (4); 218; 249 (1); 368.

‘Other than the Speaker or person acting as Chairman or Speaker’.—These words lay down that not only the Speaker himself but the Deputy Speaker or any other member acting for the time being as Speaker under cl. (1) or (2) of Art. 95 shall lose his right to vote in the first instance. The same disability attaches to the Deputy Chairman or any other member presiding under Art. 91.

How a question is determined.

The procedure for determining the majority vote upon any question in either House is as follows. The determination by the Speaker or the Chairman, according to the following procedure, is final.

“(1) On the conclusion of a debate, the Speaker shall put the question and invite those who are in favour of the motion to say ‘Aye’ and those against the motion to say ‘No’.

(2) The Speaker shall then say: “I think the Ayes (or the Noes, as the case may be) have it”. If the opinion of the Speaker as to the decision of a question is not challenged, he shall say twice: “The Ayes (or the Noes, as the case may be) have it” and the question before the House shall be determined accordingly.

(3) If the opinion of the Speaker as to the decision of a question is challenged, he may, if he thinks fit, ask the members who are for ‘Aye’ and those for ‘No’ respectively to rise in their places and, on a count being taken, he may declare the determination of the House. In such a case, the names of the voters shall not be recorded.

(4) (a) If the opinion of the Speaker as to the decision of a question is challenged and he does not adopt the course provided for in sub-rule (3) above, he shall order a ‘Division’ to be held. (b) After the lapse of two minutes, he shall put the question a second time and declare whether in his opinion the ‘Ayes’ or the ‘Noes’ have it. (c) If the opinion so declared is again challenged, he shall direct the ‘Ayes’ to go into the right Lobby and the ‘Noes’ into the Left Lobby. In the ‘Ayes’ or ‘Noes’ Lobby as the case may be each member shall call out his Division number and the Division Clerk, while marking off his number on the Division List, shall simultaneously call out the name of the Member. (d) After voting in the Lobbies is completed, the Division Clerks shall hand over the Division Lists to the Secretary, who shall count the votes and present the totals of ‘Ayes’ and ‘Noes’ to the Speaker. (e) The result of a Division shall be announced by the Speaker and shall not be challenged. (f) A member who

is unable to go to the Division Lobby owing to sickness or infirmity may, with the permission of the Speaker, have his vote recorded either at his seat or in the Members' Lobby. (g) If a member finds that he has voted by mistake in the wrong Lobby, he may be allowed to correct his mistake provided he brings it to the notice of the Speaker before the result of the division is announced. (h) When the Division Clerks have brought the Division Lists to the Secretary's table, a member who has not up to that time recorded his vote but who then wishes to have his vote recorded may do so with the permission of the Speaker."²⁴

Thus, ordinarily, a question is decided by the Speaker's estimate of the majority of members voting being for or against the motion according to their voices. But when the Speaker's estimate is *challenged*, the decision takes place by a 'Division', which means the separation of the members into two lobbies for the purpose of actually counting the members voting for and against the question. The announcement by the Speaker of the result of a Division is *final*. Instead of ordering a Division, the Speaker has the discretion to count the votes by asking the members to rise in their places (see p. 554, *ante*).

Speaker's and Chairman's casting vote.

Our Constitution places the Presiding Officers of both Houses on the same footing, by denying the right to vote to both of them and enjoining both to exercise a casting vote in case of a tie [Cl. (1)]. The words 'shall exercise' make it *obligatory*²⁵ for the Presiding Officer to exercise his casting vote in case of a tie.

The exercise of the Speaker's casting vote in any division cannot be the subject of a discussion.¹

Restrictions upon the right to vote.

Generally speaking, a member, who is not disqualified from voting, is entitled to exercise his right of vote in any manner he likes. Thus—

A member who has signed the Report of the Select Committee on a Bill is not debarred from voting on the Bill in a way contrary to the report of the Select Committee.²

But in *England* there are certain general limitations upon the right of a member to vote on particular questions, and those limitations were applied in India, prior to the commencement of *our* Constitution.³ One of these is *pecuniary interest*.

If a member has a direct *pecuniary* interest in a question, as distinguished from the interest of the rest of the subjects in that question, he should not vote on that question, and the Chair may disallow the vote of a member having such interest, if objection is taken against his vote.⁴ The following points should be noted in this connection—

(i) An objection to the vote of a member on the ground of personal interest can only be taken by way of a *substantive motion* moved immediately after a division is completed, that the vote of the member in question be disallowed. The objection cannot be raised as a point of order.⁴

(ii) When an objection motion of the above nature is moved, the member whose vote is objected to, shall have a right to speak, but he should withdraw before the question founded on the objection motion is proposed.⁴

(iii) Though a person who has a direct pecuniary interest is not entitled to *vote*, he is not debarred from proposing a motion or amendment relating to the Bill.⁴

(24) Rr. 252-4 of the Council ; r. 367 of the Rules of the House.

(25) Cf. May, 16th Ed., p. 435. *

(1) (1936) L.A. Deb., Vol. III, 2408.

(2) L.A. Deb., 15-9-22, p. 615.

(3) Cf. L.A. Deb., 26-1-25, pp. 250-51.

(4) May, 16th Ed., pp. 439-443 ; r. 151 of the House of Commons Manual, 1951, p. 102 ; 431 Com. Hans. 5, S. 1614. A corresponding rule has been adopted in the Houses of the Canadian and Australian Parliaments by Standing Orders (e.g., S.O. 11 of the Canadian House of Commons).

So far as *our* House of the People is concerned, the English principles have been generally adopted by engrafting a provision in r. 371 of the House as follows:

"If the vote of a member in a division in the House is challenged on the ground of personal,⁵ pecuniary or direct interest in the matter to be decided, the Speaker may, if he considers necessary, call upon the member making the challenge to state precisely the grounds of his objection and the member whose vote has been challenged to state his case and shall decide whether the vote of the member should be disallowed or not and his decision shall be final.

Provided that the vote of a member or members is challenged immediately after the division is over and before the result is announced by the Speaker.

Explanation.—For purposes of this rule the interest of the member should be direct, personal⁶ or pecuniary and separately belonging to the person whose vote is questioned and not in common with the public in general or with any class or section thereof or on a matter of State policy."

There are no corresponding rules in the Council of States and it is debatable whether the Chair can under *our* Constitution claim a discretionary power to disallow a vote on such ground when the grounds of disqualification are specifically enumerated in Arts. 101-2, and cl. (1) of Art. 100 implies that any member who is not disqualified by any of the provisions of the Constitution and is present in the House has a right to vote. It is also to be noted that in England, there is a distinction between private and public bills and the disqualification is never applied to public bills⁶ and to matters of State policy.⁶ There is no distinction in India between private and public bills. So even from this point of view, the scope for application of the English principle becomes narrower in India.

Of course, it is a question of dignity for the member himself whether he should abstain from voting on a matter in which he has a personal and pecuniary interest; but disallowance of his vote by the Chair is a different thing.

Analogous Provision.—The provisions of Art. 189 (1), regarding the Houses of the State Legislature, are identical.

CLAUSE (2).

OTHER CONSTITUTIONS

(A) *Ceylon.*—Sec. 19 of the Ceylon (Constitution) Order in Council, 1946, is identical with Cl. (2) of Art. 100 of *our* Constitution.

(B) *Government of India Act, 1935.*—So was Sec. 23 (2) of the Act of 1935.

INDIA

Scope of Cl. (2) : Proceedings when not to be invalid.

The clause contemplates that there is a Legislature duly constituted and brought into existence, and it is subsequently discovered that some persons have sat or voted without making and subscribing an oath or affirmation. It does not cure the defect of an omission to make a notification under s. 74 of the Representation of the People Act, 1951.⁷ A summons for a session cannot cure such an initial defect which cuts at the root of the Legislature itself.⁷

CLAUSES (3-4).

OTHER CONSTITUTIONS

(A) *England.*—(1) 40 members, including the Speaker, (*i.e.*, about 7 per cent. of the membership) form the quorum in the House of Commons. If it is brought

(5) In the House of Commons, interest other than pecuniary does not affect a member's right to vote (May, 16th Ed., p. 443). The wording of the above rule of *our* House of the People appears to be defective unless a rule contrary to the English practice were intended to be laid down.

(6) Thus, a Minister is not disqualified from voting on a motion for reduction of minister's salary [(1946) 431 Com. Hans. 5, s. 1614].

(7) *Vinod v. State of Himachal Pradesh*, (1959) Supp. (1) S.C.R. 160: A. 1959 S.C. 223.

to the notice of the Speaker that 40 members are not present in the House, the Speaker orders for the withdrawal of strangers and allows 2 minutes' time for the members from other parts of the building to assemble. The members are then counted twice, and if the number present is still found to be less than 40 the House adjourns till the next sitting day.⁸ In practice, a member would not draw the attention of the Speaker to absence of quorum, except for purposes of obstruction;⁹ and the Speaker allows business to be done without a quorum unless some member asks for a count or unless there are less than 40 members voting at a division.⁹ There is no adjournment for want of quorum when the business before the House is a message from the Crown.

(II) In the House of Lords, on the other hand, only three members constitute a quorum for business other than legislation, while a quorum of 30 members is necessary for passing Bills.

(B) *U.S.A.*—Art. I, Sec. 5 (1) of the Constitution says—

"A majority of each House shall constitute a quorum to do business."

The Constitution leaves to each House to determine how the presence of a quorum shall be determined¹⁰ [Art. I, Sec. 5 (2)]. In practice it is determined from the journal kept by the Clerk of the House.

(C) *Australia*.—Sec. 39 of the Australian Constitution Act provides—

"Until the Parliament otherwise provides, the presence of at least one-third of the whole number of members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers."

Sec. 22 makes similar provision for quorum in the Senate.

(D) *Canada*.—Sec. 48 of the British North America Act provides—

"The presence of at least 20 members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers and for that purpose the Speaker shall be reckoned as a member."

Sec. 35 makes similar provision in the case of the Senate,—the quorum in that case being 15 Senators.

(E) *Ceylon*.—Sec. 20 of the Ceylon (Constitution) Order in Council, 1946, provides—

"If at any time during a meeting of either Chamber the attention of the person presiding is drawn to the fact that there are, in the case of a meeting of the Senate, fewer than six Senators present, or, in the case of a meeting of the House of Representatives, fewer than twenty members present, the person presiding shall, subject to any Standing Order of the Chamber, adjourn the sitting without question put."

(F) *Japan*.—Art. 56 of the Japanese Constitution says—

"Business cannot be transacted in either House unless at least one-third of the total membership is present."

(G) *Government of India Act, 1935*.—Sec. 23 (3) of the Act of 1935 was—

"If at any time during a meeting of a Chamber less than one-sixth of the total number of members of the Chamber are present, it shall be the duty of the President or Speaker or person acting as such either to adjourn the Chamber, or to suspend the meeting until at least one-sixth of the members are present."

INDIA

Cls. (3)-(4) : Absence of Quorum.

While under the Constitution of Ceylon (following *England*), the Speaker has no duty¹¹ of ascertaining whether there is absence of quorum at any time, and

(8) *Hood Phillips*, Constitutional Law, 1962, p. 203; May, Parliamentary Practice, 16th Ed., pp. 331-3.

(9) Cf. Jennings, Constitution of Ceylon, p. 172; Jennings, Parliament, 1948, p. 75.

(10) *U. S. v. Ballin*, (1892) 144 U.S. 1 (5).

(11) Cf. Jennings, Constitution of Ceylon, p. 171; Munro, Governments of Europe, 1947.

the House may continue sitting unless the Speaker's attention is drawn to that fact by some member,—it seems that under *our* Constitution, the Speaker shall have a duty¹² to ascertain that fact *suo motu*, if any doubt arises in his mind. But instead of adjourning, he shall have the power to suspend the business of the House for any length of time in order to allow members to assemble.¹³ If the Speaker finds that there is no quorum, he must adjourn the House.¹⁴

It is to be noted, however, that if any business is in fact transacted when there was no quorum, its validity would not be open to attack on that ground [Art. 122 (1), *post*].

The quorum in either House of *our* Parliament, is one-tenth of its membership, *i.e.*,—

For the House of the People: $\frac{510}{10} = 51$.

For the Council of States: $\frac{238}{10} = 24$.

The Speaker (or the Chairman) is counted for the purposes of quorum.

Quorum during 'lunch hour'.

In the House of Commons, S.O. No. 28 provides that no counting of the House for ascertaining the quorum shall take place between specified hours of a day when attendance is normally thin.¹⁵

Following this practice, it has been directed in *our* House of the People that no counting shall take place during lunch hour during midday sessions. In view of the words 'until Parliament by law otherwise provides' in cl. (3) and the words 'shall be the duty' in cl. (4) of the present Article, however, it is debatable whether the Speaker can, in the absence of a law contemplated by cl. (3), dispense with the quorum during any part of a sitting. Realising this constitutional position, the Speaker observed that the practice might be adopted as a 'convention'.¹⁶ A convention, however, cannot go against the express provisions of the Constitution.

Analogous Provision.—Cf. Art. 189 (3)-(4), relating to the State Legislature.

INDEX TO COMMENTS

ARTICLE 100

Clause (1).

Other Constitutions :

(A) England, 552 ; (B) Canada, 553 ; (C) Australia, 553 ; (D) Fifth French Republic, 553 ; (E) West Germany, 554 ; (F) Ceylon, 554 ; (G) Japan, 554 ; (H) Government of India, 1935, 554.

India :

Decision by majority of votes, 554 ; How a question is determined, 554 ; Speaker's and Chairman's casting vote, 555 ; Restrictions upon the right to vote, 555 ; Analogous Provision, 556.

Clause (2).

Other Constitutions :

(A) Ceylon, 556 ; (B) Government of India Act, 1935, 556.

India :

Scope of cl. (2) : Proceedings when not to be invalid, 556.

Clauses (3)-(4).

Other Constitutions :

(A) England, 556 ; (B) U.S.A., 557 ; (C) Australia, 557 ; (D) Canada, 557 ; (E) Ceylon, 557 ; (F) Japan, 557 ; (G) Government of India Act, 1935, 557.

India :

Absence of Quorum, 557 ; Quorum during 'lunch hour', 558 ; Analogous Provision, 558.

(12) Mark the words 'it shall be the duty' in cl. (4) of the present Article.

(13) (1956) H. P. Deb., Vol. III, 5563.

(14) Cf. (1953) H. P. Deb., Vol. II, 1770 ; (1955) H. P. Deb., Vol. VII, 14520.

(15) *Mav*, 16th Ed., p. 333.

(16) L. S. Deb., (II), 8-9-54, c. 1248.

Disqualifications of members

101. (1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

Vacation of seats.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State¹⁷, and if a person is chosen a member both of Parliament and of a House of the Legislature of¹⁸ a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of article 102, or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be, his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England*.—Double membership is avoided by the rule that none but a peer may sit in the House of Lords. On the other hand, a peer is disqualified to be elected to the House of Commons and if a sitting member of the House of Commons be made a peer, the House may declare his seat vacant.¹⁹

(B) *Australia*.—Sec. 43 of the Australian Constitution Act says—

"A member of either house of Parliament shall be incapable of being chosen or of sitting as a member of the other House."

(C) *Canada*.—The prohibition is one-sided. Sec. 39 of the British North America Act says—

"A senator shall not be capable of being elected or of sitting or voting as a member of the House of Commons."

(D) *Eire*.—Art. 15 (14) of the Constitution of Eire, 1937, provides—

"No person may be at the same time a member of both Houses of the Oireachtas, and, if any person who is already a member of either House becomes a member of the other House, he shall forthwith be deemed to have vacated his first seat."

(E) *Japan*.—Art. 48 of the Japanese Constitution says—

"No person shall be permitted to be a member of both Houses simultaneously."

(F) *French Republic*.—Art. 24 of the French Constitution of 1946 was similar to Art. 48 of the Japanese Constitution, quoted above. Under the 1958 Constitution, the matter may be regulated by law.

(17) The words "specified in Part A . . . First Schedule" have been omitted by the Constitution (Seventh Amendment) Act, 1956.

(18) The word 'such' was omitted by *ibid.*

(19) Keith, Constitutional Law, p. 61 n.; May, 16th Ed., p. 194.

(G) *Ceylon*.—Sec. 13 (1) of the Ceylon (Constitution) Order in Council, 1946, provides—

“A senator shall be disqualified for being elected or appointed or for sitting or voting as a member of the House of Representatives.”

Sec. 24 (1) (c) provides—

“The seat of a member of Parliament shall become vacant—if he is elected or appointed a member of the Senate.”

So, under the Constitution of Ceylon, a senator cannot be a member of the House of Representatives at all. On the other hand, a member of the House of Representatives can become a senator, but he would thereby vacate his seat in the House of Representatives, automatically.

(H) *Government of India Act, 1935*.—Cf. Sec. 25 (1) of that Act.

INDIA

Cl. (1) : Double Membership in Parliament.

It is left to Parliament to provide by law in which House a person shall vacate his seat in case he is chosen a member of both Houses of Parliament.

By ss. 68-69 of the Representation of the People Act, 1951, Parliament has provided as follows—

“68. **Vacation of seats when elected to both Houses of Parliament.**—(1) Any person who is chosen a member of both the House of the People and the Council of States and who has not taken his seat in either House may, by notice in writing signed by him and delivered to the Secretary to the Election Commission within ten days from the date, or the later of the dates, on which he is so chosen, intimate in which of the Houses he wishes to serve, and thereupon, his seat in the House in which he does not wish to serve shall become vacant.

(2) In default of such intimation within the aforesaid period, his seat in the Council of States shall, at the expiration of that period, become vacant.

(3) Any intimation given under sub-section (1) shall be final and irrevocable.

(4) For the purposes of this section and section 69, the date on which a person is chosen to be a member of either House of Parliament shall be, in case of an elected member, the date of his election and in the case of a nominated member, the date of first publication in the Gazette of India of his nomination.

69. **Vacation of seats by persons already members of one House on election to other House of Parliament.**—(1) If a person who is already a member of the House of the People and has taken his seat in such House is chosen a member of the Council of States, his seat in the House of the People shall, on the date on which he is so chosen, become vacant.

(2) If a person who is already a member of the Council of States and has taken his seat in such Council is chosen a member of the House of the People, his seat in the Council of States shall, on the date on which he is so chosen, become vacant.”

CLAUSE (2).

Simultaneous Membership of Parliament and State Legislature.

While Cl. (1) prohibits simultaneous membership of both Houses of Parliament, Cl. (2) prohibits simultaneous membership of a House of Parliament and of a State Legislature. While the question of vacation of one of the seats in the former case is left to be determined by law made by Parliament,—in the latter case it is to be determined by rules made by the President. The President has made the Prohibition of Simultaneous Membership Rules, 1950²⁰ as follows—

“1. These rules may be called the Prohibition of Simultaneous Membership Rules, 1950.

2. The period at the expiration of which the seat in Parliament of a person who is chosen a member both of Parliament and of a House of the Legislature of a State specified in the First Schedule to the Constitution of India (hereinafter referred to as “the Constitution”) shall become vacant, unless he has previously resigned his seat in the Legislature of such State, shall be fourteen days from the date of publication in the Gazette of India or in the Official Gazette of the State whichever is later, of the declaration that he has been so chosen

3. The period at the expiration of which the seat of a person who is chosen a member of the Legislature of two or more States specified in the First Schedule to the Constitution in the

(20) Not. No. F. 46/50-C, *Gazette of India*, 26-1-50, Extraordinary, p. 678.

Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States, shall be ten days from the later or, as the case may be, the latest of the dates of publication in the Official Gazettes of such States of the declarations that he has been so chosen."

Multiple elections to the same House.

Analogous to the situation dealt with in Cls. (1) and (2) of Art. 101, there is the situation arising when a person is elected to more than one seats in the same House of Parliament or of a State Legislature. For this provision has been made by Parliament legislating under its power over elections. S. 70 of the Representation of the People Act, 1951 provides—

"If a person is elected to more than one seat in either House of Parliament or in the House or either House of the Legislature of a State, then, unless within the prescribed time he resigns all but one of the seats by writing under his hand addressed to the Speaker or Chairman, as the case may be, or to such other authority or officer as may be prescribed, all the seats shall become vacant."

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England*.—By an ancient custom, a member of the House of Commons is not permitted to resign; but if a member insists on being relieved of his seat, he applies to the Chancellor of the Exchequer to be appointed steward of the Chiltern Hundreds, which is a sinecure 'office of profit' within the meaning of the Placemen Act of 1705. As soon as the appointment is made, the member loses his seat. He thereafter resigns the office of steward and thus keeps the office open for some other member who may desire to vacate his seat.

The above procedure has not been affected by the House of Commons Disqualification Act, 1957. Besides, s. 6 of that Act provides that if a person who is disqualified by that Act to be a member of the House of Commons is elected, his election shall be void, while if a sitting member incurs such a disqualification his seat shall become vacant.

(B) *U.S.A.*—A member of the House of Representatives may resign his seat by handing over to the Speaker his written resignation.

(C) *Ceylon*.—See Sec. 24 (1) of the Ceylon (Constitution) Order in Council, 1946.

(D) *Government of India Act, 1935*.—Sec. 25 (2) of the Act of 1935 was also similar.

INDIA

Cl. (3) : Vacation of seat by a member.

This clause provides the contingencies upon the happening of which and the time from which a member's seat shall be 'vacant'.

Sub-cl. (a) : Post-election disqualification.

The word 'becomes' refers to disqualifications incurred by a member *subsequent* to his election²¹ and not to disqualifications existing at the time of election.

The word 'thereupon', suggests that a member is deemed to have vacated his seat as soon as he incurs any of the disqualifications mentioned in Art. 102 (1). Of course, if any dispute arises, the only mode of settling the dispute is as laid down in Art. 103 (1), and until the President gives his decision under that Article, it cannot be said to have been determined that the member 'has become subject' to any of the disqualifications. The question naturally arises, from which

(21) *Election Commn. v. Venkata*, (1952-54) 2 C.C. 450 (453): (1953) S.C.R. 1144.

moment would the President's decision become operative. It seems to be clear that the President's decision would operate retrospectively, because the question for decision of the President under Art. 103 (1) is—whether a member 'has become' subject to the disqualification.

Once, therefore, the President gives his decision, the member shall be deemed to have vacated his seat from the moment when he had incurred the disqualification, e.g., by reason of insanity, insolvency. It is to be noted that such retrospective vacation of seat will not affect the proceedings of the House in which the disqualified member had taken part in the meantime, for, Art. 99 (2) says that 'any proceedings shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled . . . took part in the proceedings'.

The only other question is that of penalty under Art. 104. But Art. 104 makes *knowledge* of disqualification an essential condition for the liability to penalty under that Article and it is for the House to judge whether the member in question had 'knowledge' of the disqualification before the President gave his decision or at any other time when his disqualification came to be discovered.

Pre-election disqualification.

The words 'becomes subject'²¹ refers to a disqualification arising *after* a person has been elected as a member and that a pre-election disqualification is not included within the purview of the present clause. In other words, if a person, after having been elected, incurs any of the disqualifications mentioned in Art. 102 (1), his seat shall become forthwith vacant.

If, however, the person had incurred the disqualification *prior* to his election, and should not, therefore, have been declared elected, the present clause would not apply and the only means to unseat such a member would be an election petition [Art. 329 (b)]. But disqualification under Art. 102 or 191 was no ground for setting aside an election on an election petition under s. 100 of the Representation of the People Act (XLII of 1951) as it then stood. The Supreme Court advised that this lacuna should be removed by amending this Act.²¹

In pursuance of this advice, the Representation of the People Act, 1951 has been amended by Act 27 of 1956 to substitute s. 100 and sub-sec. (1) (a) of the section now provides that an Election Tribunal shall declare the election of the return candidate to be void if the Tribunal is of opinion

"that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act."

Sub-cl. (b) : Resignation.

The word 'thereupon' means that as soon as a member hands over his written resignation to the Chair, he ceases to be a member forthwith. It would seem that no proceedings for contempt can go on against him *as a member*, after the resignation.²²

No such problem arises in *England*, for a Member of the House of Commons cannot unilaterally resign his membership.

But since the House has the power to punish even strangers for contempt, it is arguable that once the House initiates proceedings in contempt against a member and is in seisin of the matter, the member cannot render the proceedings infructuous by tendering resignation.²² Of course, in such a case some of the penalties in contempt may no longer be enforceable, e.g., expulsion from the House.²³

(22) Parl. Deb., 24-9-51, Pt. II, col. 3250.

(23) In the *Mudgal* case, the Member tendered his resignation and withdrew from the House before the House could pass its resolution for expulsion of the Member for breach of privilege and the House eventually passed a Resolution which was, *prima facie*, ineffective:

"That this House . . . resolves that Shri Mudgal *deserved* expulsion from the House and further that the terms of the resignation letter he has given . . . constitute a contempt of this House which only aggravates the offence." [Parl. Deb., 24-9-51, Pt. II, col. 3250 *et seq.*].

Procedure relating to resignation.

The Constitution simply says that the resignation must take place by writing addressed to the Chair. Besides, the Rules of Parliament have laid down the following procedure relating to the matter:

"(1) A member who desires to resign his seat in Parliament shall intimate, in writing, under his hand addressed to the Speaker, his intention to resign his seat in Parliament in the following form and shall not give any reason for his resignation:—

"To

The Speaker of Parliament,
New Delhi.

Sir,

I hereby tender my resignation of my seat in Parliament with effect from^{24,25}.....

Date.....

Place.....

Yours faithfully,
Member of the House:

Provided that where any member gives any reason or introduces any extraneous matter the Speaker may, in his discretion, omit such words, phrases or matter and the same shall not be read out in the House.¹"

(2) As soon as may be, the Speaker shall, after he has received an intimation in writing from a member under his hand resigning his seat in the House, inform the House that such member has resigned his seat in the House. When the House is not in session, the Speaker shall inform the House immediately after it reassembles.

(3) As soon as may be, after the Speaker has received such intimation, the Secretary shall cause the information to be published in the Gazette and forward a copy of the notification to the Election Commission to take steps to fill the vacancy thus caused.¹¹

Jurisdiction of Courts in the matter of resignation.

The Travancore High Court² has held that resignation under the present clause must be a voluntary act of the Member and that, accordingly, a Civil Court has the jurisdiction to enquire whether a letter of resignation was a void document on the ground that it was forged or obtained by force or fraud, and to direct the Speaker to allow the Member to take his or her seat upon the declaration that he or she had not lost the seat by the alleged resignation.

It is submitted that the decision is not free from doubt, for, the Court would be *prima facie* barred by Art. 122 (2) to entertain the case since the resignation of a sitting Member may be said to be a part of the 'business' of the House and since the Constitution provides that the resignation is to be addressed to the Speaker, the Speaker is an officer empowered within the meaning of Art. 122 (2). Whether the Member is entitled to relief from the House itself is a different question but it is seriously debatable whether the Court has the jurisdiction to interfere in such circumstances.

CLAUSE (4).

OTHER CONSTITUTIONS

(A) *England*.—There is, at present, no legislative or other sanction for compelling the attendance of members³ and the only check is the watchfulness of the electorate.

(24-25) It is submitted that the words 'with effect from' might create difficulties which are not envisaged by the Constitution. As has been already stated, the constitutional provision in Art. 101 (3) (b) lays down that the resignation shall be effective immediately after the letter of resignation is delivered. The member cannot, therefore, have any option to fix any date previous or subsequent, from which his resignation shall have effect.

(1) R. 240 of the Rules of the House; R. 213 of the Rules of the Council (the form has not been prescribed by the Rules of the Council).

(2) *Thankamma v. Speaker*, A. 1952 T.C. 166.

(3) *Hollinshead v. Hazleton*, (1916) 1 A.C. 428 (437).

(B) *Australia*.—Rules of the Australian House of Representatives provide that members must attend the House unless leave of absence is given by the House on a motion stating the cause.⁴

(C) *Ceylon*.—Sec. 24 (1) (e) of the Ceylon (Constitution) Order in Council, 1946 says—

“The seat of a member of Parliament shall become vacant—if, without the leave of the House of Representatives first obtained, he absents himself from the sittings of the House during a continuous period of three months.”

(D) *Government of India Act, 1935*.—Cl. (4) of Art. 101 of *our* Constitution is taken *verbatim* from Sec. 25 (3) of the Government of India Act, 1935.

INDIA

Cl. (4) : Vacation by absence.

A member does not automatically vacate his seat in either House by absence for any length of time. But if he remains absent for a continuous period of 60 days (excluding periods of prorogation or adjournment over 4 days consecutively), the House *may* declare his seat vacant, by a resolution. It is not obligatory upon the House to pass such a resolution.

While the circumstances mentioned in cl. (3) of Art. 101 automatically cause a vacancy, the absence under Art. 101 (4) causes a vacancy only if the House considers it fit to unseat the member and declares the seat vacant.⁵⁻⁶

Procedure relating to permission to remain absent.

(A) When a member seeks permission of the Council of States to remain absent for a period of 60 days or more, the following procedure has to be followed⁷:

(1) Such member must make an application in writing to the Chairman, stating the period for which he seeks permission to be absent from the Council.

(2) After the receipt of such application,⁸ the Chairman shall, as soon as may be, read out the application to the Council and ask—

“Is it the pleasure of the Council that permission be granted to such and such a member for remaining absent for all meetings of the Council for such and such period?”

If no one dissents, the Chairman shall say—

‘Permission to remain absent is granted’.

But if any dissentient voice is heard, the Chairman shall take the sense of the Council and thereupon declare the determination of the Council.

(3) No discussion shall take place on any question before the Council under this rule.

(4) The Secretary shall communicate the decision of the Council to the member.

(B) In the House of the People, the procedure is slightly different inasmuch as that House has provided for a Committee on ‘Absence of Members from Sittings of the House’⁹ and it is obligatory to refer to this Committee all applications for leave of absence. The Report of the Committee is considered by the House and the decision of the House is communicated by the Secretary to the Member concerned.

(4) S. O. 34, Australian House of Representatives.

(5) *Ansumali v. State of W. B.*, A. 1952 Cal. 632 (637).

(6) Usually the House condones the absence. For an instance when a seat was

declared vacant, see (1956) H. P. Deb., Vol. X, 1922-36.

(7) R. 214 of the Rules of the Council.

(8) In the House of the People, the application is referred to a Committee [see below].

(9) Rr. 242, *et seq.* of the Rules of the House.

Functions of the Committee on Absence of Members.

The functions of this Committee¹⁰ of the House of the People are twofold—

(i) To consider all applications from members for leave of absence from the sittings of the House.

(ii) To examine every case where a member has been absent for a period of 60 days or more, without permission from the sittings of the House and to report whether the absence should be condoned or circumstances of the case justify that the House should declare the seat of the member vacant.

(iii) After the report of the Committee is presented to the House, a motion may be moved by any member (except where the Committee has recommended that the leave of absence be granted or the absence condoned) that the House agrees or disagrees or agrees with amendment with the recommendations contained in the report.

Procedure for declaring a seat vacant.

A specific motion is required for declaring a seat vacant when a member has remained absent for a period of 60 days or more without leave of the House. This motion is moved by the Leader of the House or such other member to whom he may delegate this function. If the motion be carried, the Secretary shall cause the information to be notified in the Gazette and also forward a copy of the notification to the Election Commission for taking steps to fill up the vacancy thus caused.¹¹

Register of attendance.

In order to ascertain whether a member has absented himself for the period referred to in the present clause, each House of Parliament has opened a Register which is signed by every member who attends a meeting of the House on any day during the session.

Absence from meetings of a Committee.

Art. 101 (4) deals with absence from meetings of the House itself. The consequences of absence from meetings of a Committee are not provided in the Constitution, but have been laid down in the Rules. Thus, r. 260 of the Rules of the House of the People¹² says—

"If a member is absent from two or more consecutive sittings of a Committee without the permission of the Chairman, a motion may be moved in the House for the discharge of such member from the Committee:

Provided that where the members of the Committee are nominated by the Speaker such member may be discharged by the Speaker."

INDEX TO COMMENTS

ARTICLE 101.

Clause (1).

Other Constitutions :

(A) England, 559 ; (B) Australia, 559 ; (C) Canada, 559 ; (D) Eire, 559 ; (E) Japan, 559 ; (F) French Republic, 559 ; (G) Ceylon, 560 ; (H) Government of India Act. 1935, 560.

India :

Double Membership in Parliament, 560.

Clause (2).

Simultaneous Membership of Parliament and State Legislature, 560 ; Multiple elections to the same House, 561.

Clause (3).

Other Constitutions :

(A) England, 561 ; (B) U.S.A., 561 ; (C) Ceylon, 561 ; (D) Government of India Act, 1935, 561.

(10) Rr. 325-8 of the Rules of the House.

(12-13) May, Parliamentary Practice, 16th Ed., pp. 190-2.

(11) R. 241 of the Rules of House ;
R. 215 of the Rules of the Council.

India :

Vacation of seat by a member, 561.

Sub-Cl. (a): Post-election disqualification, 561 ; Pre-election disqualification, 562.

Sub-Cl. (b): Registration, 562 ; Procedure for resignation, 563 ; Jurisdiction of Courts in the matter of resignation, 563.

Clause (4).

Other Constitutions :

(A) England, 563 ; (B) Australia, 564 ; (C) Ceylon, 564 ; (D) Government of India Act, 1935, 564.

India :

Vacation by absence, 564 ; Procedure relating to permission to remain absent, 564 ; Functions of the Committee on Absence of Members, 565 ; Procedure for declaring a seat vacant, 565 ; Register of attendance, 565 ; absence from meetings of a Committee, 565.

102. (1) A person shall be disqualified for
Disqualification for membership. being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder ;

(b) if he is of unsound mind and stands so declared by a competent Court ;

(c) if he is an undischarged insolvent ;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State ;

(e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England*.—The disqualifications for membership of the two Houses are different and are governed by separate statutes.

I. *House of Lords*.—At present the only persons disqualified are—aliens, infants, bankrupts, persons convicted of treason and felony and persons expelled from the House permanently by a sentence of the House of Lords, acting in its judicial capacity.¹³

The disqualification of women¹⁴ has been partially removed by the enactment of the Life Peerages Act, 1958, which empowers the Crown to confer life peerage on any person (including a woman) by virtue of which such person will rank as a born and also be entitled to sit and vote in the House of Lords.

II. *House of Commons*.—The disqualifications for membership of the House of Commons are laid down by common law as well as statutes. The principal categories of persons disqualified are¹⁵—(a) aliens ; (b) infants ; (c) lunatics and idiots ; (d) bankrupts ; (e) English and Scottish peers ; (f) persons convicted of treason and felony ; (g) persons disqualified for having been guilty of corrupt

(14) Viscount Rhondda's case, (1922) A.C. 339.

(15) May. Parliamentary Practice, 16th Ed., pp. 196-9 ; 1078-86.

practices at elections; (h) a returning officer at an election; (i) the holders of certain offices or places of profit.

The position relating to 'offices of profit' has been revolutionised by the enactment of the House of Commons Disqualification Act, 1957¹⁶ and deserves a special treatment. This statute replaces all previous statutes relating to this subject and forms an *exhaustive* code as to the offices or places of profit, the holders of which disqualify themselves for membership of Parliament, by enumerating them. It will no longer be necessary to apply precedents and common law principles to determine whether an office constitutes an 'office of profit'. The following persons are disqualified by the Act—

(i) A person who holds any of the *judicial* offices enumerated in Part I of the First Schedule to the Act;

(ii) Any person employed in the *civil service* of the Crown, whether in an 'established capacity' or not and whether for the whole or part of his time;

(iii) Any member of the regular armed forces of the Crown;

(iv) Any member of the public police forces;

(v) A member of the Legislature of any country or territory outside the Commonwealth;

(vi) A member of any of the Commissions or tribunals specified in Part II of the First Schedule;

(vii) Holders of the offices mentioned in Part III of the First Schedule;

(viii) The holders of political offices in excess of the number specified in s. 2 (1) of the Act. This means that Ministers as a class are not exempted from the disqualification. Not more than 27 of the Ministers named in Part I of the Second Schedule and not more than 70 of the Ministers specified in both Parts I and II of the Second Schedule shall be entitled to sit and vote in the House at any one time. The maximum number of Ministers who are not disqualified will be maintained by the order of their appointment as Ministers, so that any Minister who is appointed after the quota is filled up will be disqualified from sitting or voting unless the number of sitting members is reduced by death or resignation.

The lists in the First Schedule may be amended by a resolution of the House of Commons carried into effect by an Order in Council.

Two classes of persons who were disqualified under the existing law have been exempted by the Act of 1957; *viz.*, (a) Persons receiving any pension from the Crown; (b) Any person receiving any contract, agreement or commission for or on account of the public service as was disqualified under the House of Commons Disqualification (Declaration of Law) Act, 1931.

If the holder of a disqualifying office is elected, his election is void and he must vacate his seat but the House may order that any particular case of disqualification shall be disregarded.

(B) U.S.A.—Art. I, s. 6 (2) says—

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any Office under the United States, shall be a member of either House during his continuance in office."

(a) The first part of the clause disqualifies a member of Congress for appointment to a federal office which is created, or the emoluments of which are increased,¹⁷ during his term of membership.

(b) The second part disqualifies the holder of a federal office to become a member of Congress.

(16) (1957) Mod. Law Rev., pp. 269-70.

(17) Cf. *Ex parte Levitt*, (1937) 302 U.S. 633.

But a federal officer may be elected and may take his seat as member of Congress if he resigns his office before presenting his credentials to the House.¹⁸

(C) *Fifth French Republic*.—Art. 23 of the French Constitution of 1958 says—

“The functions of a member of the Government shall be incompatible with the exercise of any parliamentary mandate, with the holding of any office, at the national level in business, professional or labour organisations, and with any public employment or professional activity”.

One peculiar feature of this provision, as pointed out already [under Art. 75 (5), *ante*], is that it not only disqualifies or unseats a member of Parliament by reason of his having accepted an office of profit, business under the Government and the like, but also for being appointed a Minister.

(D) *Ceylon*.—*Vide* Sec. 13 of the Ceylon (Constitution) Order in Council, 1946.

(E) *Government of India Act, 1935*.—*Cf.* Sec. 26 of that Act.

INDIA

Disqualifications for membership.

While Art. 84 lays down the positive qualifications required for standing as a candidate for membership of either House of Parliament, the present Article lays down the negative qualifications. Any person who comes within any of the sub-clauses of the present article will not be fit to be a candidate for membership; further, if a sitting member of Parliament incurs any of the disqualifications mentioned in these sub-clauses, his seat will become automatically vacant [Art. 101 (3) (a)]. Additional grounds of disqualification may be imposed by law of Parliament, under sub-cl. (e).

This article lays down the same set of disqualifications for election as well as continuing as a member.¹⁹ In other words, it provides for both pre-existing and supervening disqualifications.²⁰

‘Chosen’.—This word makes it clear that disqualifications attach both to election as well as nomination.

Sub-Cl. (a) : ‘Office of profit’.—This expression occurs in the following Arts.—58 (2); 59 (2); 64; 66 (4); 102 (1) (a); 191 (1) (a).

The words ‘under any local or other authority’ which occur at the end of Arts. 58 (2) and 66 (4) are absent in Art. 102 (1) (a). In the result, though the holding of an office of profit under an authority subject to the control of the Government is a disqualification for the office of the President or the Vice-President, it is not a disqualification for membership of the Legislature.²⁰

Principle underlying the disqualification.

The principle underlying this disqualification is that there should be no conflict between the duties of a member of the Legislature as such and his private interests, and that the indebtedness of a member to Government is incompatible with his independence as a representative of the people. In 1941 and again, in 1955, the question was considered by a Select Committee of the House of Commons²¹ which explained that the main considerations underlying the principle of disqualifying holders of ‘offices of profit’, generally, for membership of Parliament were—

(i) incompatibility of certain non-ministerial offices with membership of the House of Commons (which must be taken to cover questions of a member's relations with, and duties to, his constituents);

(18) Corwin, *Constitution of the U.S.A.*, 1953, p. 101.

(19) *Election Commission v. Venkata*, (1952-53), 2 C.C. 450 (453).

(20) *Abdul Shakoor v. Election Tribunal*, A. 1958 S.C. 52 (55).

(21) (1955-56) H.C. 349.

(ii) the need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House; and

(iii) the essential condition of a certain number of ministers being members of the House for the purpose of ensuring control of the executive by Parliament.²²

As against these, there is a countervailing consideration, namely, that the qualification for membership of the House of Commons should be as wide a basis as possible.²¹

'Office'.

It is hardly necessary to point out that in order to be an 'office of profit' it must first be an 'office'²³ which means an 'employment' with "fees and emoluments thereunto belonging".²⁴ 'Office' means a position or place to which certain duties are attached, which, in the present context, means duties of a public character.²⁵ Hence, only holders of employments under the Government are disqualified by the present sub-clause.¹ Membership of the Legislature, thus, cannot be deemed to be an 'office' held under the Government.² Similarly, an ex-Ruler does not hold an office though the Privy Purse or political pension³ granted to him is 'profit'.⁴

Requisites for constituting an 'office of profit'.

1. Actual making of profit by the incumbent is not necessary to make an office an "office of profit"; it is enough if the holder of the office may *reasonably* be expected to make a profit out of it.⁵ But the disqualification does not relate to the holding of an office to which no salary is attached nor is there any other profit by way of "fee, allowance, reward, commodities, emoluments, perquisites or other *advantages* whatsoever". 'Profit' is used in a wide sense, and is not confined to emoluments in the nature of a salary.⁶ Thus, fees for attending the meetings of a Committee and travelling allowances and the like would also come within the scope of the doctrine, excepting out-of-pocket expenses and *reasonable* subsistence allowances, but not 'compensation for loss of remunerative time'.⁶

But fees for literary articles *supplied* for publication have been held not to be 'profit' in the present context.²²

2. 'Profit' means any pecuniary gain. The amount of such profit is immaterial for the present purpose; but fees to reimburse out-of-pocket expenses do not constitute profit for the present purpose.²⁷

Our Supreme Court has held²⁷ that the Chairman of a Development Committee who draws a fee of Rs. 6/- per sitting could not be said to 'hold an office of profit under the Government' within the meaning of s. 14 of the Mysore Town Municipalities Act, 1951. The following observations of the Court are to be noted—

"The plain meaning of the expression seems to be that an office must be held under Government to which any pay, salary, emoluments or allowance is attached. The word 'profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material; but *the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit* . . . The fee of Rs. 6/- which the non-official Chairman is entitled to draw for each sitting of the Committee he attends, is not meant to be a payment by way of remuneration or profit, but it is given to him as a consolidated fee for the out-of-pocket expenses which he has to incur for attending the meetings of the committee."

(22) Cf. May, 16th Ed., pp. 200-210.

(23) *Henry v. Galloway*, (1933) 148 L.T. 453

(455); *Reade v. Brearley*, (1933) 17 T.C. 687 (693).

(24) Blackstone, Commentaries, Vol. II. 36.

(25) *Ramappa v. Sangappa*, A. 1958 S.C. 937.

(1) See, however, the statutory disqualifications in India, imposed under sub-cl. (e), below.

(2) *Bholanath v. Krishna*, 6 E. L. R. 105.

(3) *Harish Chandra v. Man Singh*, 5 E.L.R. 129.

(4) *Daulat v. Maharaja*, 6 E.L.R. 87.

(5) *Delane v. Hillcoat*, (1829) 109 E.R. 115.

(6) Rep. of the Select Committee on Elections, (1956) H.C. 145-1.

The italicised words above are not supported by the *English* authorities, according to which any kind of 'compensatory allowance',⁷ whatever be its amount would constitute 'profit' in the present context. In *India*, apart from the above judicial view,⁸ compensatory allowance for membership of a public Committee has been excepted by statute, namely, the Prevention of Disqualification Act (10 of 1959) [see *below*].

On the other hand, if it is paid as a remuneration, it is a 'profit', no matter how it accrues. Thus, the office of an Oath Commissioner, who receives fees for his services, is an office of profit even though he receives no salary from the Government.^{8a}

3. It need not be a payment in money. Where lands are allotted to the officer by way of remuneration for services rendered or he is authorised to deduct his remuneration from the Government revenue collected by him, the office held by him is an 'office of profit'.^{8b}

4. The question is whether the 'office' is an office of profit and not whether the holder for the time being is making profit.^{8c} This is the principle according to which a member of the House of Commons who accepts the 'Stewardship of the Chiltern Hundreds' is considered to have accepted an 'office of profit' (even though he *does not, in fact*, receive any emoluments by virtue of his office), so as to disqualify him for membership and he has to vacate his seat.

Similarly, where an office is remunerated by a *share of profits*, it cannot be said that the person has ceased to hold an office of profit if in any particular year or years there has been no profit in the business to which the office is attached.^{8d}

5. The real question being whether remuneration of any kind is *attached* to the office, a voluntary renunciation of salary would not make the office other than one of profit. On the same principle,—

"If a person holds an office and the office is an office of profit, . . . no application of the income, which he may think proper to make as between himself and other persons, can for a moment affect his liability as being the holder of an office of profit."⁹

6. The payment, in order to constitute 'profit', must be made by reason of the person's holding the office.¹⁰

It follows from the above, that the disqualification cannot continue after a person has ceased to hold the office of profit in question.¹¹ On the same principle, when a person is not paid remuneration for any work, but is given some present or gift in recognition of his *past services*,¹² it cannot be said that he is still holding an office of profit.

'Office under the Government'.

Another essential condition for the application of the present sub-clause is that it must be an office held 'under the Government'. Broadly speaking, an office is held *under* an authority if the latter has the power to appoint and remove the holder of the office. It may be noted in this connection, that according to the Privy Council,¹³ Ministers of a Province under the Government of India Act, 1935 were 'officers subordinate to the Governor' because the power to appoint and remove them vested in the Governor.

(7) (1941-42) 376 H.C. Deb., c. 1408; May, 16th Ed., p. 215.

(8) *Ravanna v. Kaggeerappa*, A. 1954 S.C. 653 (657).

(8a) *Abdul Shakoor v. Rikhab Chand*, A. 1958 S.C. 52 (55).

(8b) *Ramappa v. Sangappa*, A. 1958 S.C. 937.

(8c) *Delane v. Hillcoat*, (1829) 109 E.R. 115.

(8d) *Henry v. Galloway*, (1933) 148 L.T. 453.

(9) *Reade v. Brearley*, (1933) 17 T.C. 687 (693).

(10) *Stedford v. Beloe*, (1930) 16 T.C. 505 (514); *Herbert v. McQuade*, (1902) 2 K.B. 631 (649).

(11) *Cf. Duncan's Executors v. Farmer*, (1909) 5 T.C. 417 (422).

(12) *Cowan v. Seymour*, (1919) 7 T.C. 372 (378); *Cooper v. Blackston*, (1906) 5 T.C. 347 (355).

(13) *Emp. v. Shibnath*, A. 1945 P.C. 157 (163).

It is, accordingly, the power of appointment and removal which determines whether any office is held under the 'Government of India' (or of a 'State', as the case may be). Employees of a statutory body corporate cannot be said to be holding their office under the Government where they are neither appointed nor are removable by the Government nor are they paid out of the revenues of the Government,¹⁴ even though the corporation itself may be under the control of Government.¹⁴

'Government' in this context includes all the three branches of Government,—legislative, executive and judicial, so that persons appointed to the Secretariat of the Legislature are also officers under the Government.¹⁵ But an elected member of the Legislative Council does not hold an office *under* the State Government, for his appointment or removal does not lie within the power of the State Government.¹⁶

What is important is that the person who is sought to be disqualified must have been appointed or be removable by the Government. In the absence of such power of the Government over the person in question, an office held under a statutory corporation is not an office of profit under the Government within the meaning of Art. 102 (1) (a), whatever may be the degree of control exercised by the Government over that corporation.¹⁴ (See *below*).

On the other hand, an Auditor to a statutory corporation (e.g., a 'Government owned company'), who is appointed and removed by the Government and is under the control of a Government official holds an office of profit under the Government even though he¹⁷ is paid out of the funds of the statutory corporation.

Where an *appointment* to an office is made by the Government and the person holds the office by reason of such appointment, it is immaterial for the present purpose that Government has no option but to appoint a particular person (e.g., the heir of a village patel,¹⁷ or of a Sarbarakar in Orissa).¹⁸ Similarly, where Government has the power to *dismiss* an officer it is immaterial for the present that such dismissal is not at the pleasure of the Government but has to be made under statutory grounds.¹⁷

For the same reason, where a person, in fact, holds an office by virtue of an appointment by the Government, any defect in the order of appointment is immaterial for the purpose of determining whether he is 'holding' an 'office of profit'.¹⁸

If the foregoing conditions are satisfied, it is not further required that the appointee must be a 'Government servant' in the strict sense of the term.

The source of payment for the office may also be taken into consideration, but it is 'not always a decisive factor'.^{14, 17} Thus, the following offices as regards which Government have no power of appointment and removal, have been held *not* to be offices of profit under the Government, even though the holders of the offices are directly or indirectly paid out of Government revenues:

(a) The Vice-Chancellor of a University.¹⁹

(b) The teacher of a Government-aided School.²⁰

Office under a statutory corporation.

(A) *England*.—In England, the test to determine whether an employee holds an 'office of profit' under the Crown is whether he may be said to be a servant of the Crown. Hence, in the case of employees of statutory corporations and other

(14) *Abdul Shakoor v. Rikhab Chand*, A. 1958 S.C. 52 (55).

(15) *Hoti Lal v. Raj Bahadur*, A. 1959 Raj. 227 (230).

(16) *Ramnarain v. Ramchandra*, (1957) 60 Bom. L.R. 770 (773).

(17) *Guru Gobinda v. Sankari Prasad*, A. 1964 S.C. 254 (258).

(18) *Raghunath v. Kishore*, A. 1958 Orissa 260 (264).

(17) *Ramappa v. Sangappa*, A. 1958 S.C. 937. [But such persons have since been excepted by s. 3(j) of the Parliament (Prevention of Disqualification) Act, 1959.]

(18) *Hoti Lal v. Raj Bahadur*, A. 1959 Raj. 227 (230).

(19) *Hansa Mehta v. Indubhai*, (1951-52) 1 E.L.R. 171.

(20) *Krishnappa v. Narayansingh*, 7 E.L.R. 294.

public bodies, the determining criterion is whether the corporation itself may be regarded as an agent or servant of the Crown.

(a) The statute which creates the corporation is, of course, the primary guide. Thus, if it states that the corporation (e.g., the Central Land Board) is to exercise its functions 'on behalf of the Minister', it is obviously an agent of the Government²¹ or a 'new Government Department'.²²

(b) If the statute does not give any such express answer, the fact that the corporation is made a distinct legal entity (e.g., the British Transport Commission),²¹ *prima facie* leads to the conclusion that it is not an agent or servant of the Crown.²¹ But this is not conclusive, and a statutory corporation may nevertheless be regarded as an agent or servant of the Crown—

(i) If it exercises functions of a governmental character, that is, functions which would, but for the corporation, have been performed by the Crown²³ (e.g., making treaties and implementing treaties and other international agreements). Hence, the Custodian of Enemy Property is a servant of the Crown.

(ii) If the corporation has no substantial discretion in the exercise of its powers but has to act under the directions of the Crown.²⁴ The power of appointment and removal by the Crown is one of the incidents to be taken into consideration in this context, but it is the degree of control exercised by the Crown which offers the primary test as to whether the corporation is a 'servant' or not.²⁵

(B) *India*.—As has been evident already, a simpler test have been applied by our Supreme Court, namely, that of appointment and removal of the employee in question by the Government. If the Government has this power, the office is an 'office of profit' within the meaning of this Article, even though the employee is paid out of the funds of the corporation.²⁵ On the other hand, if the Government does not possess this power, whatever control the Government may have over the employee in other matters, would not suffice for this purpose.¹

Statutory Exceptions in India.

I. Even though an office is an 'office of profit' according to the foregoing tests, the holder of such office will not be disqualified if Parliament so declares. Under this clause Parliament enacted the Parliament (Prevention of Disqualification) Acts, 1950, 1951 and 1953 (19 of 1950; 68 of 1951; 1 of 1954). All these Acts have now been replaced by the Parliament (Prevention of Disqualification) Act, 1959 (Act 10 of 1959).²

The following offices are declared by the Act of 1959 (s. 3) as not to disqualify their holders for membership of Parliament:

"(a) any office held by a Minister, Minister of State or Deputy Minister for the Union or for any State, whether *ex officio* or by name;

(b) the office of Chief Whip, Deputy Chief Whip or Whip in Parliament or of a Parliamentary Secretary;

(c) the office of a member of any force raised or maintained under the National Cadet Corps Act, 1948, the Territorial Army Act, 1948, or the Reserve and Auxiliary Air Forces Act, 1952;

(d) the office of a member of a Home Guard constituted under any law for the time being in force in any State;

(e) the office of sheriff in the city of Bombay, Calcutta or Madras;

(f) the office of chairman or member of the syndicate, senate, executive committee, council or court of a university or any other body connected with a university;

(g) the office of a member of any delegation or mission sent outside India by the Government for any special purpose;

(h) the office of chairman or member of a committee (whether consisting of one or more members), set up temporarily for the purpose of advising the Government or any other autho-

(21) *Tamlin v. Hannaford*, (1949) 2 All E.R. 295.

(22) *Fitzwilliams Wentworth Estate v. Minister of Town & Country Planning*, (1951) 1 K.B. 203 (211).

(23) *Bank Voor Handel v. Hungarian Administrator*, (1954) 1 All E.R. 969 (982).

(24) *Ibid.*, p. 989.

(25) *Guru Gobinda v. Sankari Prasad*, A. 1964 S.C. 254 (258).

(1) *Abdul Shakoor v. Rikhab Chand*, A. 1958 S.C. 52 (55).

(2) Vide Author's Acts, Rules & Orders under the Constitution. Book I, p. 170.

rity in respect of any matter of public importance or for the purpose of making an inquiry into, or collecting statistics in respect of, any such matter, if the holder of such office is not entitled to any remuneration other than compensatory allowance.

(i) the office of chairman, director or member of any statutory or non-statutory body other than any such body as is referred to in clause (h), if the holder of such office is not entitled to any remuneration other than compensatory allowance, but excluding (i) the office of chairman of any statutory or non-statutory body specified in Part I of the Schedule and (ii) the office of chairman or secretary of any statutory or non-statutory body specified in Part II of the Schedule;

(j) the office of village revenue officer, whether called a *lambardar*, *malguzar*, *patel*, *deshmukh* or by any other name, whose duty is to collect land revenue and who is remunerated by a share of, or commission on, the amount of land revenue collected by him but who does not discharge any police functions."

II. The Representation of the People (Miscellaneous) Provisions Act (88 of 1956) further declares that—

"the office of member of the Council of Advisers associated with the Chief Commissioner of Manipur or with the Chief Commissioner of Tripura shall not disqualify the holder thereof for being chosen as, or for being, a member of Parliament."

III. Specific provision is also made in particular enactments to the effect that an office created by such Acts shall not be deemed to be an 'office of profit' for the purpose of disqualification, e.g.—

- (i) Muslim Wakfs Act, 1954.
- (ii) Rubber (Production and Marketing) Amendment Act, 1954.
- (iii) Coffee Market Expansion (Amendment) Act, 1954.
- (iv) Tea (Second Amendment) Act, 1954.

Arts. 102(1) (a), 58(2) and 66(4).

The words 'under any local . . . said Governments' which occur at the end of Art. 58 (2) are absent in Art. 102 (1) (a). In the result, though the holding of an office of profit under an authority subject to the control of the government is a disqualification for the office of the President or the Vice-President, it is not a disqualification for membership of the Legislature.¹

Illustration.

The office of the Manager of a Dwarga Khwaja Sahib appointed by the Committee under the Darga Khwaja Sahib Act, 1950, which is a statutory corporation, is not an office of profit within the meaning of Art. 102 (1) (a).¹

Sub-Cl. (d) : Loss of citizenship.

It is to be noted that this Sub-Cl. is wider than the provision of Art. 9 [Vol. I, p. 107]. Not only acquisition of citizenship of a foreign State but even 'acknowledgment of allegiance or adherence to' a foreign State are disqualifications for membership of Parliament. It is the President who, under Art. 103 (1), will interpret the meaning of these expressions in disputed cases.

While sub-cl. (a) empowers Parliament to declare that certain offices, which are *prima facie* offices of profit, shall not disqualify its holder for membership of Parliament, cl. (e) empowers Parliament to provide grounds of disqualification other than the grounds specified in cls. (a) to (d) of cl. (1). Similar power relating to membership of the State Legislature also belongs to Parliament, under Art. 191 (1) (e), *post*. In exercise of these powers, Parliament has enacted ss. 7-8 of the Representation of the People Act (XLIII of 1951), which run as follows:

"7. *Disqualifications for membership of Parliament or of a State Legislature.*—A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State—

(a) if, whether before or after the commencement of the Constitution, he has been convicted, or has, in proceedings for questioning the validity or regularity of an election, been found to have been guilty, of any offence or corrupt practice which has been declared by section 139 or section 140 to be an offence or practice entailing disqualification for membership of Parliament and of the Legislature of every State, unless such period has elapsed

as has been provided in that behalf in the said section 139 or section 140, as the case may be or the Election Commission has removed the disqualification;

(b) if, whether before or after the commencement of the Constitution, he has been convicted by a court in India of any offence and sentenced to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release;

(c) if he has failed to lodge a return of election expenses within the time and in the manner required by or under this Act, unless three years have elapsed from the date by which the return ought to have been lodged or the Election Commission has removed the disqualification;

(d) if there subsists a contract entered into in the course of his trade or business by him with the appropriate Government for the supply of goods to, or for the execution of any works or the performance of any services undertaken by, that Government;

(e) if, he is a director or managing agent, manager or secretary of, or holds any office of profit under, any company or corporation (other than a co-operative society) in which the appropriate Government has not less than twenty per cent share;

(f) if, having held any office under the Government of India or the Government of any State or under the Crown in India or under the Government of an Indian State, he has whether before or after the commencement of the Constitution, been dismissed for corruption or disloyalty to the State, unless a period of five years has elapsed since his dismissal.

8. *Savings.*—(1) Notwithstanding anything in section 7—

(a) a disqualification under clause (a) or clause (b) of that section shall not, in the case of a person who becomes so disqualified by virtue of a conviction or a conviction and a sentence and is at the date of the disqualification a member of Parliament or of the Legislature of a State, take effect until three months have elapsed from the date of such disqualification, or if within these three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of;

(b) a disqualification under clause (c) of that section shall not take effect until the expiration of two months from the date on which the Election Commission has decided that the account of election expenses has not been lodged within the time and in the manner required by or under this Act;

(c) a person shall not be disqualified under clause (e) of that section by reason of his being a director unless the office of such director is declared by Parliament by law to so disqualify its holder;

(f) a disqualification under clause (e) of that section shall not, in the case of a director, take effect where the law making any such declaration as is referred to in clause (e) of this section in respect of the office of such director has come into force after the director has been chosen a member of Parliament or of the Legislature of a State, as the case may be, until the expiration of six months after the date on which such law comes into force or of such longer period as the Election Commission may in any particular case allow."

PARTICULAR GROUNDS OF DISQUALIFICATION.

Having considered the constitutional and statutory provisions relating to disqualifications for membership of Parliament, we may now deal with the question with reference to particular classes of office or employment. Since the provisions with respect to the State Legislatures is substantially the same (*vide* Art. 191, *post*), the position will be the same as stated hereunder as regards State Legislatures, except that a State Legislature has the corresponding power to declare an office not to be a disqualification for membership of that Legislature under Art. 191 (1) (a).

Contractors with Government.—Participation in a contract for or on account of the 'public service' is a ground for disqualification in *England*³ and *Ceylon*.⁴ Obviously, a person who supplies goods or services to Government is under the influence of Government.⁵

In *India*, this is a ground for disqualification under s. 7 (d) of the Representation of the People Act (XLIII of 1951), which has been noticed *above, ante*.

The contract must be a contract for the supply of goods to,⁶⁻⁷ or for the execution of any works or the performance of any services undertaken by, the 'appropriate Government' (*i.e.*, the Central Government in case of membership

(3) House of Commons (Disqualification) Act, 1782.

(4) Jennings, *Constitution of Ceylon*, pp. 163, 167.

(5) *Cf. Re Sir Stuart*, (1913) A.C. 514.

(6) *Cf. Samuel's Case*, (1913) A.C. 514.

(7) *E.g.*, for printing electoral rolls and supplying them to the Chief Commissioner

of Parliament, and the Government of the State in case of membership of the Legislature of that State).

These words make it clear that subscribers to Government loans or persons depositing money or securities with the Government would not come within this disqualification.

Office of profit under corporation in which Government has interest. The conditions for the publication of this disqualification are twofold—(i) the person must be a director, or managing agent or a manager or secretary of a 'corporation', and (ii) Government must have a share interest in the corporation not being less than 25% of its shares. It follows, therefore, that the mere fact that Government has some liability in respect of a statutory corporation would not disqualify an employee of such corporation, unless Government has a substantial share in the corporation.

A co-operative society is excepted from this rule.

Service under the Government of India or the Government of a State.—Cl. (1) (a) of Art. 102 disqualifies all persons who are in the employ of the Central or State Governments, so long as they remain in such service.

Dismissal from Government service in certain cases.—A Government servant is as a rule free from the disqualification after retirement. But cl. (f) of s. 7 of the Representation of the People Act, 1951 engrafts an exception. An ex-employee of any Government who has been *dismissed*, whether before or after the commencement of the Constitution, shall remain disqualified for a period of 5 years since his dismissal, provided he was dismissed either on the ground of (a) *corruption* or (b) *disloyalty* to the State.

As to whether he was dismissed on the ground of corruption or disloyalty, the certificate of the Election Commission is conclusive proof that the candidate is not disqualified on this ground.

Preventive detention is not a disqualification under this Article or under the Representation of the People Act, 1951.⁸

Removal of statutory disqualifications by Election Commission.

Under ss. 7, 140A and 144 of the Representation of the People Act, 1951, the Election Commission is empowered to remove the following disqualifications, out of those mentioned above—

- (i) Disqualification out of conviction for an 'election offence' or corrupt practices;
- (ii) Disqualification arising out of conviction for an offence resulting in imprisonment for not less than 2 years;
- (iii) Failure to lodge account of election expenses.

CLAUSE (2).

Office of Ministers.

Following the English precedent that a Minister is a servant of the Crown,⁹ it has been held in India that a Minister is an officer subordinate to the President or the Governor, as the case may be.¹⁰

This is the reason why Ministers have to be excluded from the category of 'holders of profit', by express provisions in Arts. 102 (2) and 191 (2).

It is to be noted that while the present clause saves the office of a 'Minister' generally, s. 3 (a) of the Parliament (Prevention of Disqualification) Act, 1959 seeks to save—

"any office held by a Minister . . . whether *ex officio* or by name".

(8) *Ansumali v. State of W. B.*, A. 1952 Cal. 632 (637).

(9) *Bank Voor Handel v. Administrator*, (1954) 1 All E.R. 969.

(10) *Emp. v. Sibnath*, A. 1945 P.C. 156.

INDEX TO COMMENTS

ARTICLE 102.

Clause (1).

Other Constitutions:

- (A) England, 566; (B) U.S.A., 567; (C) Fifth French Republic, 568; (D) Ceylon, 568; (E) Government of India Act, 1935, 568.

India

Disqualifications for membership, 568; 'Chosen', 568.

Sub-cl. (a): 'Office of profit', 568; Principle underlying the disqualification, 568; 'Office', 569; Requisites for constituting an 'office of profit', 569; 'Office under the Government', 570; Office under a statutory corporation, 571; Statutory exceptions in India, 572.

Sub-cl. (d): Loss of citizenship, 573; particular grounds of disqualification, 574; Removal of statutory disqualification by Election Commission, 575.

Clause (2).

Office of Ministers, 575.

103. (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

OTHER CONSTITUTIONS

(A) *England*.—Either House of Parliament has the right to provide for its due composition and to decide questions as to the legal qualifications of its members.¹¹

(a) If it is alleged that any candidate who has been elected is disqualified, his right to sit and vote in the House of Commons must be decided by the House itself.

As regards disqualifications arising under the House of Commons Disqualification Act, 1957, the House itself has been empowered to give relief in proper cases where disqualification is alleged in the House. Apart from this, the Act gives a right to *any* person to seek a declaration by an application to the Crown that a Member of the House is disqualified under the Act. The application shall then be referred to the Judicial Committee of the Privy Council for its decision, under the Judicial Committee Act, 1833. This jurisdiction of the Privy Council is, however, limited to disqualifications incurred under the House of Commons Disqualification Act, 1957.

(b) Since the Parliamentary Elections Act, 1868 and the Parliamentary Elections and Corrupt Practices Act, 1879, cases of *election disputes* (as distinguished from questions relating to disqualification of members where the election is not disputed by a petition under these Acts) are determined not by the House but by two Judges of the High Court who are appointed to hear election petitions. The Judges report their decision to the House and the House then passes orders for giving effect to the decision. [See, further, under Art. 324, *post*]. The distinction is clearly brought out by the following observations in *Anson's Law and Custom of the Constitution*:¹²

"The House has given over to the Law Courts the right to determine controverted elections: that is to say, which are called in question on the ground that candidate, otherwise properly qualified for a seat, has been returned in an informal manner, or by persons who are not entitled to vote, or by votes procured through improper inducements. But it retains the right to pronounce at once on the existence of legal disqualifications in those returned to Parliament, and will declare a seat to be vacant, if the member returned is

(11) *Michael Davitt's Case*, (1882) 137 C.J. 140; *Wensleydale Peerage Case*, (1856) 140 Hans 3; Keith, *Constitutional Law*. pp. 71, 86.

(12) *Anson's Law and Custom of the Constitution*, 1922, Vol. II, pp. 181-2.

In *India*, the privileges of the Legislature are given a constitutional foundation by Arts. 105 and 194, in respect of the Union Parliament and a State Legislature, respectively.

Scope of Cls. (1)-(2) : Freedom of Speech and Publication.

Our Constitution itself lays down the privileges of the Indian Parliament relating to two matters; viz., freedom of speech and publication of speeches and proceedings in clauses (1) and (2). Outside the scope of these two clauses, the privileges of members of *our* Parliament shall be the same as those of members of the English House of Commons as they stood on 26-1-50,^{8a}—until *our* Parliament itself takes up legislation relating to privileges in whole or in part.

Cl. (1) : Freedom of Speech.

As in *England*, there will be freedom of speech within the walls of each House in the sense of immunity of action for anything said therein.

"There could be no assured government by the people . . . unless their representatives had unquestioned possession of this privilege."⁹

Limitations upon the Freedom of Speech.

The present clause does not mean that there is an unrestricted license to speak anything within the walls of the House. The freedom conferred by this clause is "subject to the other provisions of the Constitution", such as Arts. 19 (1) (a); 118; 121 [and Arts. 208 and 211 in the case of a State Legislature].¹⁰ The restictive words "subject to the provisions of this Constitution . . ." at the beginning of cl. (1) have, however, been omitted from cl. (2).¹⁰ The result is, that while the freedom of speech within the House is subject to the restrictions imposed by Arts. 19 and 121 or by the relevant Rules of the House, no action in a Court of law lies for violation of any of the foregoing provisions, say, for contempt of Court, defamation, etc. The remedy against such utterances is the power in the hands of the Speaker to prevent or to take action against the violation of these provisions.¹⁰⁻¹¹

It follows that the freedom of speech is 'subject to the rules' framed by the House under its power to regulate its internal procedure.

The relevant rules of the House of the People, imposing limitations upon the freedom of speech of a member, are Rr. 352-4, which are reproduced under Art. 118, *post*. If a member violates these limitations, the Speaker may take action against the member under the Rules of the House, e.g., directing withdrawal of the member from the House [r. 373]; or his suspension [r. 374]; or ordering expunction of the offending words from the proceedings of the House [r. 380]. Thus, even a Minister who had made derogatory remarks about another Member as well as the Auditor-General (who was not in the House) was asked to withdraw his remarks and he complied.¹²

Speech in one Legislature casting aspersions on another Legislature.

As has been held in *our* Parliament,¹³ under Arts. 105 and 194 of *our* Constitution, each House of the Union or a State Legislature is equally entitled to the freedom of speech within its walls and each House is "supreme as far as its own proceedings are concerned". Hence, though it is desirable that a Member of any such House shall not cast any aspersion upon another House or its Members, one House cannot hold the Member of *another* House guilty of breach of its

(8a) Subject to certain differences [Ref. under Art. 143, A. 1965 S.C. 745 (761).

(9) White, *English Constitution*, p. 440.

(10) *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (407, 409); (1959) 1 S.C.R. 806.

(11) Ref. under Art. 143. A. 1965 S.C. 745 (761).

(12) (1960) Privileges Digest, Vol. IV, p. 4.

(13) (1959) Privileges Digest, pp. 79-80.

privilege for having said anything in the House of which he is a Member and within which he has absolute freedom of speech. In this case,¹³ aspersions on Members of Parliament had been made in a State Legislative Assembly.¹³

Cl. (2) : Immunity from legal action.

The restrictive words 'subject to the provisions . . . Rules' at the beginning of cl. (1) have been omitted from cl. (2). It means that while the freedom of speech within the Houses guaranteed by Cl. (1) is subject to the restrictions imposed by Arts. 19 (2), 121, 211 or by the relevant Rules of the Houses, Cl. (2) gives *absolute* immunity from action in Courts against a member of Parliament for anything said or any vote given by him in Parliament or in any committee thereof. So far as *legal liability* is concerned, the freedom of speech in Parliament is thus free from the restrictions contained in Art. 19 (2), which are imposed upon the freedom of speech of an ordinary citizen, or even Art. 121. Hence, no action, civil or criminal, would lie against a member for defamation, obscenity, contempt of Court¹⁴ or the like.¹⁵ For the violation of Art. 121 or the Rules of the House relating to freedom of speech within the House, similarly, there is no remedy before a Court of law. Power lies in the hands of the Speaker to take proper action to prevent or to take action against such violation.¹⁵

Extent of the immunity.

In *England*, an opinion has been expressed by *Wade and Phillips*¹⁶ that the freedom of speech in Parliament relates only to words spoken by a member in the performance of his duties as a member of Parliament and does not extend to casual conversation amongst members on *private* affairs. But the words "anything said by him in Parliament" in clause (2) of the present Article seem to be wide enough to cover even conversation on private affairs. So, under *our* Constitution, a member who is aggrieved by insulting words used by another member in private conversation *within the House*, while he may have his remedy from the House itself, may not get redress in a Court of law. But the privilege does not extend to anything said *outside* the House or any committee thereof.¹⁷

The words 'freedom of speech in Parliament' in cl. (1) and 'anything said . . .' in cl. (2), *prima facie*, raise the question as to whether they would include immunity from legal action for written words or other acts which are ancillary to the debate or proceedings in the House or a Committee thereof, but which do not directly come within the ambit of 'spoken words'. In *England*, the question has been settled by Art. 9 of the Bill of Rights, 1688, which asserted—

"That the freedom of speech, and debates or *proceedings* in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

The word 'proceedings' has been liberally interpreted to include any formal action of the House, including the whole process leading up to the debate, by which it reaches a decision.¹⁸ It follows, therefore, that the immunity from legal action includes not only words spoken in the House or a Committee thereof, but also to any kind of formal *action*, e.g., giving notice of a Motion or of Question¹⁹ or Resolution, presenting a petition, writing a report, circulating copies of such papers to members,²⁰ and so on. The immunity is thus formulated by the Select Committee of the House of Commons on the Official Secrets Acts.^{20a}—

(14) For criminal contempt committed by a member by an act done outside the House, there is no immunity in India, as in England [vide May, 16th Ed., pp. 82-3; see next caption].

(15) Ref. under Art. 143, A. 1965 S.C. 745 (761).

(16) *Wade & Phillips*, Constitutional Law, 6th Ed., p. 147.

(17) Cf. *R. v. Abington*, (1794) 1 Esp. 226; (1958) 591 H. C. Deb, c.c. 208-346 [*Strauss Case*].

(18) May, 16th Ed., p. 62.

(19) Cf. *Chenard v. Arissol*, (1949) A.C. 127.

(20) *Lake v. King*, (1667) Saund., 131.

(20a) (1938-9) H.C. 101, p. v.

"It covers both the asking of a question and the giving written notice of such question, and includes everything said or done by a Member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of Parliamentary business."

It also includes the part taken by strangers in the proceedings of the House or a Committee thereof, e.g., in giving evidence, presenting petitions etc.¹⁸

In India, the words 'anything said' in Art. 105 (2) have been interpreted similarly.²¹ But questions which are disallowed never form part of the proceedings,²¹ and cannot be said to be covered by the words 'anything said in Parliament'.

The words 'anything said or any vote given' also make it clear that there is no question of immunity for any criminal act committed within the walls of the House.^{21a} The true scope of the privilege is that a Member of the Legislature is not amenable to the ordinary Courts "for anything he may say or do within the scope of his duties in the course of parliamentary business",²² in Parliament or any Committee thereof.

Whether the immunity extends to letters written by Members to Ministers on public affairs in course of discharge of members' duties.

(A) *England*.—Under the ordinary law of libel, a Member of Parliament is entitled to qualified privilege if he publishes a defamatory matter relating to public affairs; in other words, he would be protected if it is shown that the publication relates to a matter of public interest and that the Member was actuated by good faith. There would be no privilege if it was false and actuated by malice.

Under the Bill of Rights (see p. 581, *ante*), a Member of Parliament is entitled to Parliamentary privilege for defamatory utterances made in a 'proceeding in Parliament'. In *Strauss's case*,²³ the question arose whether a Member was entitled to the Parliamentary privilege (which was absolute) if, instead of asking a question in the House relating to a public matter, e.g., the conduct of nationalised industries, he embodied his allegations in a letter addressed to the Minister who had a statutory duty to enquire into such allegations. The question was referred to the Committee of Privileges which answered the question in the affirmative on the grounds—

(a) That it had become an established practice for Members to write to Ministers on certain matters instead of putting questions in the House;

(b) Though the privilege of Parliament related only to proceedings in Parliament which, ordinarily, meant things said or done within the walls of Parliament, there might be circumstances when matters said or done outside those walls might be so connected with the proceedings of the House as to become a part of such proceedings, e.g., "where a Member sends to a Minister the draft of a Question he is thinking of putting down or shows it to another Member with a view to obtaining his advice as to the propriety of putting it down". This principle, according to the Committee, extended to all communications "between one Member and another or between a Member and a Minister, is closely related to some matter pending in, or expected to be brought before, the House", and, therefore, included a Member's letter addressed to the Minister, relating to the nationalised industries with respect to which he had the right to put a Question in the House.

If this Report of the Committee of Privileges had been accepted by the House of Commons, the result would have been that a communication to the Minister, outside the House, would have been protected *even though actuated by malice*.

But, at the intervention of the Attorney General, the House refused to accept the Report of the Committee of Privileges and held that a letter written by a

(21) *Jatish v. Harisadhan*, A. 1961 S.C. 613.

(22) *R. v. Bunting*, (1884-5) 7 Ontario Rep. 563.

(21a) Vide May, 16th Ed., pp. 82-3.

(23) (1958) 591 H. C. Deb., 208-346 [*Strauss's Case*].

Member to a Minister, outside the House, was "*not a proceeding in Parliament*", and that an action of libel or threat thereof by the person defamed by the contents of such letter did not constitute a breach of the Privilege of Parliament.²⁴

(B) *India*.—As has been just stated, there is lesser scope for such a question being raised in India, because the immunity, under Cl. (2) of Art. 105 or Art. 194 of the Constitution, is expressly limited to "anything said or any vote given by him in the Legislature or any committee thereof" and cannot, therefore, be extended to anything said or done outside the walls of the Legislature.^{24a} Since the Constitution itself defines this particular privilege, namely, the immunity of legal action with respect to freedom of speech in Parliament, it is useless to speculate whether in *England* the corresponding privilege is higher in any respect or whether anything said or done outside the walls of the House is constructively connected with 'proceedings of the House', for, that expression does not occur in the relevant Clause of *our* Constitution.

After the *Strauss's case*,²⁴ an attempt was made in *our* Parliament, by a private Member, to include within the Parliamentary privilege, letters written to Ministers, by legislation. But the Bill was opposed by the Law Minister and the Bill was rejected.²⁵

In the result, neither in India or in England, a Member can claim Parliamentary privilege in respect of letters written by him to a Minister, outside the House, though relating to public matters and in the discharge of duties as a Member.

Disclosure of Official Secrets.

(A) *England*.—In England, a Select Committee of Parliament¹ has laid down the following propositions—

(i) By reason of the privilege of freedom of speech in Parliament, disclosures by members in course of debate or proceedings in Parliament cannot be made the subject of proceedings under the Official Secrets Acts.

(ii) As no evidence can be given in relation to any debates or proceedings in Parliament except by the leave of the House, a member cannot be interrogated for divulging the source of his information with respect to any such disclosure.

(iii) The receipt of such information, though it is an offence under the Acts, may be necessary for the due discharge of the duties of a member of Parliament. Hence, any action which obstructs or impedes the receipt of such information by a member of Parliament may constitute a contempt of Parliament.

On the other hand, since *soliciting* of such information is not a 'proceeding in Parliament', a member of Parliament may be charged under the Official Secrets Acts for 'soliciting, inciting or endeavouring to persuade a person holding office under the Crown to disclose information' which comes under the Act.

(B) *India*.—Since the Official Secrets Act of 1923 is similar to the English statutes, the position in India should be similar to that stated above.

Right to publish.

The words 'by or under the authority of either House of Parliament' in Cl. (2) indicate that the provision in this respect is similar to that in England (see p. 582, *ante*), viz., that the constitutional immunity covers only publications by the House or under its authority and that publication by a member, privately, will come under the ordinary law. In short, the privilege relating to freedom of speech does not extend to publication outside the House except through the medium of official reports.² This does not mean that a Member of Parliament has no right to publish his speech; it only means that if he does so, he cannot claim any

(24) (1958) 591 H. C. Deb., cc. 208-346.

(24a) Cf. *Jatish v. Harisadhan*, A. 1961 S.C. 613.

(25) (1959) Privileges Digest, p. 13.

(1) (1939) H. C. Papers, 101.

(2) *Suresh v. Punit*, A. 1951 Cal. 176.

immunity from the ordinary law relating to publication of a statement to which ordinary citizens are subject. Hence, if a Member publishes his speech, *separately* from the rest of the debate in the House, it becomes a separate publication, unconnected with the proceedings of the House and the Member would be *fully* liable for any defamatory statement contained in that speech, and no plea of privilege would be available to him.²⁻³

The publication of an unofficial report of the proceedings of the House should, however, be distinguished from the publication by Member of his speech *only*, separately from the debate in the House. The reason is that the ordinary law of libel gives some protection to the publication of reports of proceedings or debates in a House of the Legislature, even though it is made by a private person without the authority of the Legislature. It has already been seen that under the ordinary law, publication of parliamentary proceedings by any person (other than a person acting under authority of a House of Parliament), has a 'qualified privilege', so that no action would lie for defamation if the report is fair and accurate and is not actuated by malice (see p. 582-3, *ante*).

So far as publication in newspapers and broadcasting programmes is concerned, civil as well as criminal immunity in this behalf, in India, has now been provided for by the Parliamentary Proceedings (Protection of Publication) Act (24 of 1956). [See *below*].

Legislation by Parliament.—Ss. 3-4 of the Parliamentary Proceedings (Protection of Publication) Act (24 of 1956)⁴ provide—

"3. (1) Save as otherwise provided in sub-section (2), no person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament, unless the publication is proved to have been made with malice.

(2) Nothing in sub-section (1) shall be construed as protecting the publication of any matter, the publication of which is not for the public good.

4. This Act shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station situate within the territories to which this Act extends as it applies in relation to reports or matters published in a newspaper."

The net result of the enactment of the foregoing statute is to codify the common law of qualified privilege for publication of parliamentary proceedings in newspapers and radio broadcasts.

The immunity conferred by the statute is qualified by three conditions—

- (a) The publication must be a *substantially true* report;
- (b) It must be a report of the *proceedings* of either House of Parliament;
- (c) The publication must be *for the public good*;
- (d) The publication must not be actuated by *malice*.

The Act has been passed to counteract the decision of the Calcutta High Court⁴ that since the immunity conferred by Cl. (2) of Art. 105 or 194 is confined to a publication by or under the authority of the House and there is nothing else to except newspaper reports from the criminal law of defamation as contained in s. 499 of the I.P.C., a newspaper report, however fair or faithful, is not immune from criminal liability for defamatory statements in such reports. The Act of 1956, was, accordingly, enacted to provide for this immunity, as in England, and the Act is modelled on s. 4 of the (English) Law of Libel Amendment Act of 1888 and the Defamation Act of 1952.

Publication of expunged proceedings.

But the immunity conferred by the Act of 1956 relates only to 'proceedings' of the House. The question arises whether the immunity is available in respect

(3) Abington's case, (1795) Esq. 228; May, 16th Ed., p. 57.

(4) This has been followed by similar

legislation in the State of Orissa,—the Orissa Legislative Assembly Proceedings (Protection of Publication) Act, 1960.

of portions of debates which may have been withdrawn from the 'proceedings'⁵ by order of the House.

A power to expunge objectionable words from the proceedings has been expressly conferred upon the Presiding Officer by the Rules of the House of the People (rr. 380-1) and of the Council of States (r. 221-2). The Rules of the House are as follows—

"380. If the Speaker is of opinion that words have been used in debate which are defamatory or indecent or unparliamentary or undignified, he may, in his discretion, order that such words be expunged from the proceedings of the House.

381. The portion of the proceedings of the House so expunged shall be marked by asterisks and an explanatory footnote shall be inserted in the proceedings as follows:

'Expunged as ordered by the Chair.'

In the West Bengal Assembly, where there is no such specific rule, it has been held⁶ that the Speaker has an *inherent* power to expunge from the proceedings indecent, unparliamentary and vulgar expressions.

(i) It follows that when any portion of the proceedings of a House are thus expunged by order of the Chair, the immunity from *legal* liability, conferred by the Act of 1956 cannot be claimed.

(ii) The question is, whether any person who publishes such expunged portion of the proceedings is guilty of a *breach of privileges of the House*. This question came up before the Supreme Court in *Sharma v. Sri Krishna*,⁸ inasmuch as the constitutionality of the very power of a Legislature to withhold from publication any portion of its proceedings was questioned, as being a contravention of the freedom of speech and expression guaranteed by Art. 19 (1) (a). It was contended that 'parliamentary privilege' was not enumerated as an exception in cl. (2) of Art. 19 and, therefore, no Legislature in India had the power to prohibit the publication of its proceedings which have taken place in public. The Supreme Court rejected this contention on the following grounds—

(a) In *England*, the House of Commons has an absolute privilege to prohibit the publication of any part of its debates.⁷

(b) By reason of the latter portion of cl. (2) of Arts. 105 and 194 of the Constitution, so long as the privileges are not codified by the respective Legislatures, each House of an Indian Legislature has the same privilege as of the British House of Commons at the commencement of the Constitution. It follows, therefore, that each House of an Indian Legislature possesses the absolute privilege of prohibiting the publication of any portion of its proceedings and anybody who publishes such expunged or prohibited portion, without the authority of the House, is guilty of contempt of that House.

Analogous Provision.—The provisions of Cls. (1) and (2) of Art. 194, relating to the State Legislature, are exactly similar to those of the present Clauses.

Other restrictions upon members' right to publish.

In this connection, it would be useful to note some other restrictions upon a member's right to publish which are imposed by the Rules or conventions of Parliament:

(i) A member should not publish questions or resolutions which he intends to put or move, before they are admitted by the Chair.⁸⁻¹¹

(ii) Answers to questions which Ministers propose to give in the House should not be released for publication until the answers have actually been given on the floor of the House or laid on the Table.¹²

But there is no rule that every information that the Minister wants to give to the House must not be disclosed to the Press before placing it before the House.

(5) (1957) 16 W.B.L.A. Deb., pp. 46-61.

Ed., Vol. 28, pp. 458-9; (1939-40) H. C. Deb., 1031-2.

(6) *Sharma v. Sri Krishna*, A. 1959 S.C.

(8-11) Cf. L. A. Deb. 27-3-33, p. 2655.

395.

(7) May, 16th Ed., p. 54; Halsbury, 3rd

(12) R. 53 of the Rules of the House.

It is for the Minister to decide whether a piece of information or document is of such importance that it must be disclosed first to the House.¹³

(iii) Except when authorised by the House, proceedings or decisions of a secret sitting of the House should not be disclosed by any person in any manner.¹⁴

(iv) The evidence, report and proceedings of a Committee should not be published by any person until it has been laid on the Table of the House.¹⁵

'Publication by or under authority of either House'.

The rules of both Houses of Parliament authorise the printing and publication of the reports of proceedings and other documents in connection with the proceedings. Thus, rr. 379 and 382 of the Rules of the House provide—

"379. The Secretary shall cause to be prepared a full report of the proceedings of the House at each of its meetings, and shall, as soon as practicable, publish it in such form and manner as the Speaker may, from time to time, direct.

382. (1) The Speaker may authorise printing, publication, distribution or sale of any paper, document or report in connection with the business of the House or any paper, document or report laid on the Table or presented to the House or a Committee thereof.

(2) A paper, document or report printed, published, distributed or sold in pursuance of sub-rule (1) shall be deemed to have been printed, published, distributed or sold under the authority of the House within the meaning of clause (2) of Art. 105 of the Constitution.

(3) If a question arises whether a paper, document or report is in connection with the business each of its sittings and shall, as soon as practicable, publish it in such form and manner as the Speaker may from time to time, direct."

The immunity under cl. (2) is confined to a publication by or under the authority of a House. A newspaper is not privileged *under this clause* even though its report be faithful, unless it is authorised the House.¹⁶⁻¹⁷

Even a member, who has absolute immunity for anything said within the House, has no immunity if he *causes* his speech to be published in a newspaper.¹⁸ Of course, he is not liable if a newspaper publishes his speech without any inducement from him.¹⁹

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England*.—Though the English Constitution is unwritten, and the law of privileges is not codified, it is largely well-settled, partly by custom, partly by decisions of the Presiding Officers of the two Houses and partly by standard treatises, the foremost amongst which should be mentioned May's Parliamentary Practice, and Halsbury's Laws of England. Now, some of the privileges of the House of Commons are enjoyed by the members *individually* and some belong to the House *collectively*. The justification for the individual privileges is the same as the collective privileges, namely, the effective discharge of the functions of the House, which is not possible unless the members are allowed to participate in its functions without disturbance or interruption.

(I) PRIVILEGES OF MEMBERS INDIVIDUALLY

(i) *Freedom from Arrest*.—A member of the House of Commons is immune from arrest in *civil proceedings*, during a session of Parliament and for a period of forty days before and forty days after the session.¹⁸⁻²⁰ It is available even when Parliament is dissolved or prorogued¹⁹ and even though the member in question is not elected in the new Parliament.²⁰ The immunity does not extend to¹⁸—

(a) Bankruptcy proceedings; (b) Proceedings for criminal contempt of

(13) (1960) L. S. Deb., cc. 10376-80.

(14) R. 252, *ibid.*

(15) R. 275, *ibid.*

(16) *Suresh v. Punit*, A. 1951 Cal. 176.

(17) The immunity conferred by legislation has been already noticed (p. 589, *ante*).

(18) May, 16th Ed., pp. 74, 78-81; Halsbury, 3rd Ed., Vol. 28, p. 455.

(19) *Goudy v. Duncombe*, (1847) 1 Exch. 430.

(20) *Re Anglo-French Co-operative Society*, 14 Ch. D. 533.

Court ;²¹ (c) Preventive detention under statutory powers, but not for words spoken in the House ; (d) Criminal charges of treason, felony, seditious libel or breach of the peace ;²² (e) Refusal to give security for good behaviour ;²² (f) Preventive detention under the Defence Regulations, 1939.²³

More generally, the "privilege is not claimable for any *indictable offence*".^{22,24} In short, the privilege from arrest has come to be confined to *civil* cases only.^{21,25} But though there is no privilege against arrest and *conviction* for criminal offences, a process under criminal law cannot be served upon a member *within the precincts* of Parliament, whilst the House of which he is a member is sitting, without *leave* of the House.¹

By a number of statutes, the immunity of members of the House of Commons from arrest in civil cases has now become a 'legal right rather than a Parliamentary privilege'.² The arrest is irregular *ab initio*, and the arrested member is entitled to be discharged immediately upon motion in the Court from which the writ was issued.²

Not only is a member immune from arrest in civil action,—a person who has already been arrested in execution of a civil process, is entitled to be released if he *becomes* a member of Parliament during the period of his imprisonment, unless, of course, he is disqualified by law to sit in Parliament or is undergoing imprisonment for an indictable offence or criminal contempt of court.³ The principle is that "service in parliament is paramount to all other claims."

Finally, it should be noted that under the existing law in England, it is possible to commence and prosecute actions in any Court against members of Parliament and also to coerce them by every legal process, save arrest.² Further, on the *expiry* of the period of the privilege mentioned above, the member is liable to be re-arrested on a fresh writ.

(ii) *Exemption from service as jurors*.—Under the Juries Act, 1870, which codifies the ancient privilege, members of Parliament are exempted from serving on juries, without reference to the sitting of Parliament.

(iii) *Exemption from attendance as witnesses*.—Members of the House of Commons have the privilege of exemption from being summoned as witnesses *while Parliament is in session*.² But this privilege is usually waived, by the House granting leave of absence to its members so summoned, in order to aid the administration of justice. The Court also sees if it is possible to arrange for the attendance of the member after the session is over.⁴ But no member is entitled to give evidence in relation to any debates or proceedings in the House, except by its leave.⁵

In *India*, under s. 133 of the C. P. Code, the Chairman of the Council of States, the Speaker of the House of the People, the Chairman and Speaker of a State Legislature have been absolutely exempted from personal appearance in *Civil Courts*.

(II) PRIVILEGES OF THE HOUSE COLLECTIVELY

We have already discussed one of the collective privileges, *viz.*, the right to publish proceedings. The others are:

(i) *The right to exclude strangers*.—The House has the right to secure privacy

(21) (1831) 86 C.J. 701 ; (1882) C.J. 487. When a member commits a *crime* he is liable to be arrested like any one else, and on conviction the Court notifies that to Parliament and the House then considers the question of expelling him. Except in the case of these *indictable offences*, a member of the House cannot be imprisoned or restrained without order of the House. [The privilege, thus, extends to proceedings for civil contempt—*Stourton v. Stourton*, (1963) 1 All E.R. 606].

(22) (1950-51) 244 H.C. viii-ix.

(23) Captain Ramsay's Case, Report of Committee of Privileges of the House of Commons, October, 1940.

(24) (1830-31) C.J. 701.

(25) The same view has been taken in the United States also [*Williamson v. U. S.*, (1908) 207 U.S. 425].

(1) May, 16th Ed., p. 120.

(2) May, 16th Ed., pp. 68, 76.

(3) *Phillips v. Wellesley*, (1830) 1 Dowl. 9.

(4) (1950) H. C. Deb., 1973.

(5) *Chubb v. Solomans*, 3 Car. & Kir. 75.

of debate by holding a secret session,⁶ but this is not resorted to except for imperative reasons, e.g., in time of war. But strangers may be excluded at any time in the interest of order, by the Sergeant on his own initiative or at the Speaker's directions. Any member dissatisfied by the presence of strangers may also draw the Speaker's attention to that fact and in that case, the Speaker will immediately put the question to vote and order withdrawal of the strangers if the vote is carried.⁶

In India, under the Rules, the Speaker or Chairman may, whenever he thinks fit, order the 'withdrawal of strangers from any part of the House'.⁷

(ii) *Right to regulate its internal affairs, and to decide matters arising within its walls.*

1. Each House of Parliament has the right to control and regulate its proceedings and also to decide any matter arising within its walls, without interference from the Courts. What is said or done within the walls of Parliament cannot be inquired into in a Court of Law.⁸ The House has thus the exclusive power of interpreting a statute, so far as the regulation of its own proceedings is concerned; even if that interpretation be erroneous, the Courts have no power to interfere with it directly or indirectly.⁸ Similarly, if a member is turned out of the House by the Sergeant-at-Arms under Orders of the House, he has no remedy from the Courts.⁸

2. The right of the House to settle its own procedure is so absolute that even where a particular procedure is laid down by a rule of the House or by a statute, the House is free to depart from that procedure and no Court can interfere on the ground that the proper procedure has not been followed.⁹

3. It has even been held that the House of Commons has absolute authority to determine whether any statute should apply to any matter taking place within its walls. Thus, neither the members of a Committee of the House nor an officer of the House were liable to be summoned, for selling liquor within the precincts of the House without licence as required by the Licensing Act. For,

"in the matters complained of, the House of Commons was acting collectively in a matter which fell within the area of the internal affairs of the House, and, that being so, any tribunal might well feel, on the authorities, an invincible reluctance to interfere."¹⁰

4. But there is no authority for holding that the House would also be competent to deal with crimes committed within the House. On the other hand, Stephen, J., in *Bradlaugh v. Gossett*,¹¹ expressed the opinion that "the line must be drawn somewhere and that the House could not try, say, a murder which took place under its roof". In *Eliot's case*,¹² the charge of assault was held combined with the charge of seditious speech and so the question was left open whether the House could exclusively deal with a simple assault committed within the House.

From the Report of the Select Committee on the Official Secrets Act¹³ it would appear that the House is not going to claim that a crime committed by a Member within the House would be immune from the jurisdiction of the Courts of law, for, the Report stated that the freedom of 'proceedings' in Parliament included "... everything done by a member in the exercise of his functions as a member ...". The commission of a criminal act can, in no sense, be said to be included within the functions of a member or to form part of the proceedings of the House and, accordingly, the House could not claim that the criminal act should be outside the jurisdiction of the criminal courts. Of course, in the marginal cases, where it may be doubtful whether the act in question constitutes a crime or a criminal act has in fact been committed, the House may hold a

(6) May, 16th Ed., pp. 240, 335.

(7) R. 265 of the Rules of the Council and r. 387 of the Rules of the House.

(8) *Bradlaugh v. Gossett*, (1884) 12 Q.B.D. 271.

(9) May, 16th Ed., p. 60.

(10) *R. v. Graham-Campbell*, (1935) 1 K.B. 594.

(11) *Bradlaugh v. Gossett*, (1884) 12 Q.B.D. 271.

(12) *Eliot's case*, (1629) 2 St. Tr. 294; *Burdett v. Abbott*, 12 Q.B.D. 283.

(13) (1938-39) H.C. 101, p. v.

preliminary inquiry before surrendering a Member to the Court. In the 16th Ed. of *May* (p. 66), it is stated—

"With regard to a crime committed in Parliament, the House in which it was committed might claim the right to decide whether to exercise its own jurisdiction or to hand over to the criminal courts. In taking this decision, it would no doubt be guided by the nature of the offence, and the adequacy or inadequacy of the penalties, somewhat lacking in flexibility, which it could inflict."

But in so far as the above observation suggests that the House has the right to withhold a member charged with a criminal offence committed within the House from the arms of the ordinary law of the land and the courts established by law, its correctness cannot be accepted as free from doubt. Of course, the House would be perfectly entitled to claim the privilege where the alleged criminal act takes place in pursuance of some order of the House or in course of its execution, in which case, it becomes a part of the 'proceedings' of the House, as it has been interpreted (see p. 587, *ante*).

Again, the liability of a member for a crime does not warrant the service of a criminal process on a member within the precincts of Parliament, whilst the House to which the member belongs is sitting, without obtaining leave of the House.¹⁴

5. As a corollary from the right of the House to control its own proceedings and the right of a member not to be answerable elsewhere for anything said or done in connection with the proceedings in the House, it has been established that no member or officer of the House can give evidence or produce any document relating to the proceedings in the House before any Court or any other authority, including the other House, unless the leave of the House of which he is a member or officer has been taken.¹⁵ It follows, therefore, that a Court cannot compel the production of a document in the custody of an officer of the House; the party who seeks to use it in evidence must apply to the House itself for directing its officer to attend and produce the document.¹⁵

(iii) *The right to punish parliamentary misbehaviour.*—From the right to regulate its internal affairs follows the right of the House to maintain order and to reprimand disorderly conduct on the part of its members, which power is exercised by the House through the Speaker or through the Chairman of the Committee, when the House sits in a Committee.

The Speaker's power to stop speeches which are improper or irrelevant has already been noted. Besides, the House may *suspend* or *expel* a member for obstruction of the Speaker or objectionable behaviour. In such a case, the Speaker, or the Chairman may be asked to 'name' the offending member. The question of suspension is then put and if carried, the member may be suspended for a limited period, or expelled for the rest of the session.¹⁶ Expulsion, however, would not debar a member to sit if he is re-elected as happened in the case of John Wilkes in 1774.¹⁷

(iv) *The right to punish members and outsiders for breach of its privileges.*—This is by far the highest of the privileges of the Houses of Parliament. It can punish for contempt or breach of its privileges in the same way as Courts of record can punish for contempt of their judicial authority [Vol. I, p. 644]. This is a judicial power and this power gives to the British Parliament the epithet—'High Court of Parliament.'¹⁸ The power to punish for contempts is to be distinguished from the power to control or remove disorderly conduct or obstruction within the House, which has just been noticed. The power to commit for contempt is the judicial power to inflict a *penal sentence* for the offence and extends even

(14) *May*, 16th Ed., p. 79.

(15) *May*, 16th Ed., p. 63.

(16) Rr. 373-4 of the Rules of Procedure and Conduct of Business in our House of the People (rr. 215-6 of the Rules of the

Council of States) provide for expulsion and suspension of a Member (see p. , *post*).

(17) Cf. Anson, *Law and Custom of the Constitution*, 1922, Vol. II, p. 183.

(18) *Kielley v. Carson*, (1842) 4 Moo. P.C. 63.

against strangers¹⁹ who may not set their foot on the floor of the House. In other words, the House has the power to punish for all acts which constitute contempt according to law of Parliament, whether committed by a member or an outsider,—within the House or beyond its walls.

The modes of punishment which may be imposed by the House of Commons are—admonition, reprimand, imprisonment and fine.²⁰

Instead of itself punishing an offender, the House may direct a prosecution by the Attorney-General, where the House considers a proceeding in a court of law to be proper or necessary.²¹

In many cases, though finding a person guilty of contempt, the House may accept his unqualified apology and drop the proceedings.²²

(B) U.S.A.—Art. I, s. 5 (2) of the Constitution provides—

“Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.”

As to rules of procedure, see under Art. 118, *post*.

As to the power to *punish and expel*, each House has the sole authority to determine what conduct on the part of a member is ‘inconsistent with the trust and duty of a member’²³ and courts will not interfere with authority of Congress even to make it a legal offence.²⁴ While investigating into the conduct of a member²⁵ or the validity of an election,²⁶ each House has the power to compel the attendance of witnesses and to compel them to give testimony.²⁷

Each House also possesses a general investigatory power in aid of its legislative function.

The privilege of members from *arrest* is provided for by Art. I, s. 6 (1) which says—

“The Senators and Representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same”.

It is evident that the exception takes away from the privilege arrests for all criminal offences.¹ The privilege is confined only to arrest in execution of civil decrees, for it has been held that it does not give immunity from arrest in execution of a process in a civil case.²

In our *Reference case*,³ there is an observation that “contempt committed outside the four-walls of the legislative chamber by a citizen who is not a Member seems to be outside the jurisdiction of the American Legislature”. With respect, this assumption is not correct. Though Art. I, s. 5 (2) of the Federal Constitution specifically empowers each House of Congress to punish its ‘members’ for contempt, it has been judicially acknowledged since the early case of *Anderson v. Dunn*,⁴ it has been judicially acknowledged that each House of Congress has the inherent power to punish a non-member for contempt of its authority, *e.g.*, to bribe one of its members,⁵ or ignoring its process⁶ or refusing to answer its inquiries,⁶ for,

“from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself; that, to deal by way of contempt with direct obstruction to its legislative duties”.⁷

(19) May, 16th Ed., p. 89.

(20) The fact that the House has not imposed this punishment for a number of years does not preclude the possibility of its being used in future [cf. Rep. of the Select Committee of the House of Lords in relation to the Attendance of Members, H. L. 7 (66-1) (67)].

(21) May, 16th Ed., p. 104.

(22) Cf. 563 H. C. Deb., 407-9; (1956-7) H. C. 39.

(23) *In re Chapman*, (1897) 166 U.S. 661 (669).

(24) *Burton v. U. S.*, (1906) 202 U.S. 344 (356).

(25) *Barry v. U. S.*, (1929) 279 U.S. 597.

(1) *Williamson v. U. S.*, (1908) 207 U.S. 425 (446).

(2) *Long v. Ansell*, (1934) 392 U.S. 76.

(3) Ref. under Art. 143, A. 1956 S.C. 745 (788).

(4) *Anderson v. Dunn*, (1821) 6 Wh. 204.

(5) *Jurney v. MacCracken*, (1935) 294 U.S. 125 (150).

(6) *McGrain v. Daugherty*, (1927) 273 U.S. 135.

(7) *Marshall v. Gordon*, (1917) 243 U.S. 521 (537).

The contempt power of the American Congress, however, is narrower than the contempt power of the British Parliament in so far as no act is punishable as a contempt of the American Congress as does not directly and immediately obstructs its legislative process,⁵ i.e., the performance of its duties as a Legislature.^{5,7}

The following act, for instance, is not punishable as contempt of the American Congress—

To write a defamatory letter regarding members of the Legislature.^{5,7}

(C) *Australia*.—Sec. 49 of the Australian Constitution Act provides—

"The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

It should be pointed out that no legislation has yet been undertaken by the Commonwealth Parliament in exercise of the power conferred by this section, so that the position in Australia as regards the privileges of the Commonwealth Parliament is similar to that under Art. 105 (3) of our Constitution. It has been held that the Commonwealth Parliament has the same power to punish for contempt as the House of Commons by virtue of this section even though the 'judicial power' is vested by the Constitution elsewhere.⁸

(D) *Canada*.—s. 18 of the British North America Act, 1867 (as substituted in 1875) provides—

"The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof."

The principal Dominion statute is of 1868 which, however, does not codify the privileges but provides that the privileges of the Canadian Parliament shall be the same as those of the British House of Commons in 1867.

Read with the principal Canadian statutes, the present position of the privileges of the Dominion Parliament are as follows—

(i) Each of the Houses of the Canadian Parliament possesses all the powers, immunities and privileges which were enjoyed by the British House of Commons at the time of the passing of the British North America Act, 1867, so far as the same are consistent with and not repugnant to that Act.⁹

(ii) It is competent for the Dominion Parliament to abolish any of the privileges of the British House of Commons as they existed in 1867.

(iii) It is competent for the Canadian Parliament to adopt any of the new privileges which are added to those of the British Parliament, by common or statute law, by specific legislation to that effect, but no legislation of the Dominion Parliament can introduce a privilege not possessed by the British House of Commons for the time being.

(iv) No action shall lie in respect of the publication of any proceedings of either House under the authority of the House concerned.⁹

(v) Any committee of either House has the power to examine witnesses on oath.⁹

(vi) No member of the Senate or of the House of Commons shall receive any compensation, directly or indirectly, for services rendered or to be rendered, to any person, either by himself or another, in relation to any Bill, proceedings, contract, claim, controversy, charge, accusation, arrest or other matter before the Senate or the House of Commons, or before a committee of either House, or in order to influence or to attempt to influence any member of either House.⁹

(8) *R. v. Richards*, (1955) 92 C.L.R. 157.

(9) *Can. Statutes*, (1868) 31 Vict., c. 23.

(vii) Any person who gives, offers or promises to any such member any compensation for such services as aforesaid, shall be guilty of an indictable offence. . . .¹⁰

(E) *Fifth French Republic*.—Art. 26 of the Constitution of 1958 says—

"No member of Parliament may, during parliamentary session, be prosecuted or arrested for criminal or minor offences without the authorisation of the Chamber of which he is a member, unless caught in the act (*flagrante delicto*).

When Parliament is not in session, no member of Parliament may be arrested without the authorisation of the Secretariat of the Chamber of which he is a member, except when caught in the act or in the case of authorised prosecution or final conviction.

The detention or prosecution of a member of Parliament shall be suspended if the Chamber of which is a member so demands".

(F) *Japan*.—Art. 50 of the Constitution of Japan, 1946 says—

"Except in cases provided by law, members of both Houses shall be exempt from apprehension while the Diet is in session. And any members apprehended before the opening of the session shall be freed during the term of the session upon demand of the House."

(G) *Government of India Act, 1935*.—S. 28 (2)-(3) of the Act of 1935 was:

"(2) In other respects, the privileges of members of the Chambers shall be such as may from time to time be defined by Act of the Federal Legislature and, until so defined, shall be such as were immediately before the establishment of the Federation enjoyed by members of the Indian Legislature.

(3) Nothing in any existing Indian Act, and, notwithstanding anything in the foregoing provisions of this section, nothing in this Act, shall be construed as conferring, or empowering the Federal Legislature to confer, in either Chamber or on both Chambers sitting together, or on any committee or officer of the Legislature, the status of a Court, or any punitive or disciplinary powers other than a power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner."

It is to be noted that the power of the Federal Legislature under the above provision related to the privileges of the members individually and not of the Houses collectively and it was subjected to the specific limitation imposed by sub-section (3).

INDIA

✓ Cl. (3): Privileges in other respects.

Cls. (1)-(2) deal only with two matters, viz., freedom of speech and right of publication. Outside the scope of these two clauses, the privileges of members of our Parliament shall be the same as those of members of the House of Commons, until our Parliament itself takes up legislation relating to privileges in whole or in part.¹¹ In other words, if Parliament enacts any provision relating to any particular privilege at any time, the English law will to that extent be superseded in its application under our Constitution.

Since no such legislation has yet been undertaken by Parliament, in matters outside cls. (1) and (2), the privileges of Parliament and its members are the same as those of the House of Commons and its members, as they existed at the commencement of this Constitution.¹²

Under our Constitution, both the Houses of the Legislature will be on the same footing as regards privileges, and each of them shall have the privileges enjoyed by the House of Commons, in the same manner and to the same extent.¹³

The Legislature under the Government of India Act, 1935, suffered from a serious disability, viz., that it had no power to commit for contempt [Sec. 28 (3)], just as colonial Legislatures do not possess this power.¹⁴ But the Constitution, by adopting the privileges of the House of Commons, confers the power upon each

(10) Can, Statutes, (1876) 39 Vict., c. 7.

(11) Ref. under Art. 143. A. 1965 S.C. 745 (761). No such law has been enacted by any of the Legislatures in India, by the time of printing of this page (October, 1965).

(12) *Sharma v. Sri Krishna*, A. 1959 S.C.

395 (subject to the exceptions specified under the next caption).

(13) In *England*, the privileges of the House of Lords are different from those of the Commons, on some points.

(14) *Kielley v. Carson*, 4 Moo. P.C. 63; *Doyle v. Falconer*, (1866) 1 L.R. P.C. 328.

House of the Union Parliament [Art. 105 (3)] as well as of the State Legislatures [Art. 194 (3)], subject to certain limitations,¹⁵ to be stated hereafter.

"At the commencement of this Constitution".

1. It is to be noted that the powers, privileges and immunities of *our* Parliament, its members and Committees shall be such as are enjoyed by the members of the House of 'Commons *at the commencement* of this Constitution'. Hence, any subsequent *change* in the law of Parliament in England, either by case-law or by statute, will not extend to India.

2. The same expression, according to *our* Supreme Court,¹⁶ also indicates that if any privilege of the House of Commons had become *obsolete* by desuetude¹⁷ or if the claim of the House as regards any privilege had been refused to be recognised by the Courts prior to 26-1-50, such privilege would not be available to *our* Legislatures by virtue of Cl. (3) of the present Article.¹⁶

3. Our Supreme Court has also held¹⁸ that though the language of the second part of cl. (3) of the present Article is wide enough to extend all the existing privileges of the House of Commons to an Indian Legislature, some of those privileges cannot obviously extend to India, owing to the difference in the constitutional set up and other provisions of the Constitution which limit the powers of the different organs under the Constitution. Thus, a Legislature in India, cannot claim the following privileges, though belonging to the House of Commons—

(i) The right to petition the Sovereign, in a body, through the Speaker.¹⁹

(ii) The right to pass an Act of Attainder.²⁰

(iii) The right of the House to determine its own constitution,²¹ namely, "by the order of new writs to fill vacancies that arise in the Commons; by the trial of controverted elections; by determining the qualifications of its members in case of doubt".²²

(iv) The Legislatures under *our* Constitution cannot claim to be 'superior courts of record',²³ even though they have the power to punish for contempt. Consequently, and having particular regard to the provisions in Art. 32 and 226 of *our* Constitution, the privilege of issuing a 'general warrant', excluding the jurisdiction of the Courts altogether, cannot be claimed by *our* Legislatures.

Privileges of the Legislature and Fundamental Rights.

I. It is now settled²⁴⁻²⁵ that if a Legislature under the Constitution undertakes to legislate on the subject of its own privileges under the first part of Art. 105 (3) or 194 (3), such law must conform to Art. 13, and must be held to be void if it contravenes any of the Fundamental Rights of a person included in Part III of the Constitution.¹

II. But the position is not so clear upon the question whether the *uncodified* existing privileges under the latter part of Art. 105 (3) and 194 (3) must, in order to be valid, be consistent with the fundamental rights.—

(A) In *Sharma v. Sri Krishna*,²⁴ a majority of the Supreme Court (Das C.J., Bhagwati, Sinha & Wanchoo JJ.,—Subba Rao J., *contra*) held that

(15) Ref. under Art. 143, A. 1965 S.C. 745 (786).

(16) Ref. under Art. 143, A. 1965 S.C. 745 (761).

(17) E.g., the freedom of a member from being impleaded [May, 16th Ed., p. 75].

(18) Ibid., p. 764. [The wide observations, on this point, in *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (403), now stand modified by *ibid.*].

(19) May, 16th Ed., p. 86.

(20) Ibid., p. 40.

(21) Ibid., p. 175.

(22) These matters, under *our* Constitu-

tion, are dealt with by different provisions of the Constitution or statute, [e.g., Arts. 103, 192; 329 (b)].

(23) Ref. under Art. 143, A. 1965 S.C. 745 (784, 786).

(24) *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (409).

(25) Ref. under Art. 143, A. 1965 S.C. 745 (766).

(1) Rules Made by the Legislature under Art. 118 (1) [or 208 (1)] of the Constitution, are expressly made subject to the other provisions of the Constitution [Ref. under Art. 143, A. 1965 S.C. 745 (767)].

(a) The existing privileges under the second part of Arts. 105 (3) and 194 (3) were not affected by anything in Art. 13, because the source of such privileges was not any law made by a Legislature but the Constitution itself (p. 410 of AIR);

(b) Art. 105 (3) or 194 (3), being a special provision, must prevail over the general provision under Art. 19 (1) (a), so that it could not be contended that a citizen could not be arrested for breach of privilege of a Legislature if it meant an inroad upon the freedom of speech guaranteed to the citizen under Art. 19 (1) (a) (p. 410, *ibid*).

(B) At p. 491 of Vol. I of this Commentary, the Author respectfully protested against the foregoing interpretation of the relevant Articles relating to the privileges of the Legislature and submitted that if the law made by a Legislature relating to privileges were to be subject to Art. 13, it could not have been the intention of the framers of the Constitution that the Legislature could enlarge its powers by simply not exercising its powers in terms of the Constitution, though the Constitution imported the privileges of the House of Commons only as a temporary phase pending legislation.

(C) In the later case on the Reference under Art. 143,² the majority of the Supreme Court has substantially accepted the Author's contention³ even though the decision in *Sharma's case*⁴ has not been overruled. The result has been anomalous and the question whether the existing privileges are subject to the fundamental rights has to be answered piecemeal, with reference to the different Articles in Part III.

(i) As regards Art. 19 (1) (a), the decision in *Sharma's case*⁴ stands, because it has not been overruled by the Opinion in the *Reference case*. Hence, it is not open to question the validity of any of the privileges of a Legislature or anything done in pursuance thereof, on the ground that it contravenes Art. 19 (1) (a).⁴

(ii) Art. 21 would extend to the uncodified privileges.⁵ The reasoning of the majority in the *Reference case*,⁵ on this point, is that in *Sharma's case*,⁶ it had been assumed that the privileges of the Legislature were subject to Art. 21, but that on the merits the Court had held that the Rules of Procedure made by the Legislature constituted 'law', so that arrest or detention in exercise of powers conferred thereby could not be said to be violative of Art. 21. Whatever be the reasoning, the opinion in the *Reference case*⁵ is that no Rule made by a Legislature or any privilege claimed by it would be valid, if it is in contravention of Art. 21. Even where the power of arrest or detention is founded on a 'law', the superior Courts can interfere where the use of the power is *mala fide*,⁵ so as to constitute a contravention of Art. 21. Of course, the Courts cannot sit as a revisional body over the Legislature to hold that the charge did not amount to contempt.⁷

(iii) On a parity of reasoning, it has been held in the *Reference case*,⁵ that the uncodified privileges are subject to Arts. 20 and 22.

As to the applicability of Art. 22, the Court⁸ referred to its view in *Gunapati v. Nafisul*⁸ that the protection under cls. (1) and (2) of Art. 22 extends to arrest

(2) Ref. under Art. 143, A. 1965 S.C. 745 (765) (Gajendragadkar C.J., Subba Rao, Wanchao, Hidayatulla, Shah & Ayyangar JJ.—Sarkar J., *contra*).

(3) Holding that, even though cl. (3) of Art. 105 or 194 does not expressly make the provision 'subject to the other provisions of the Constitution, it must be read along with the provisions relating to Fundamental Rights, according to the rule of harmonious constitution [Ref. under Art. 143, A. 1965 S.C. 745 (761)].

(4) With great respect, it is difficult to see why Art. 19 (1) (a) would not, in particular, apply to control the second part

of Art. 105 (3) or 194 (3), if the other provisions in Part III would apply to that effect, according to the rule of harmonious construction, or at least, because Art. 32 would extend to privileges of Legislature, according to either of these two cases.

(5) Ref. under Art. 143, A. 1965 S.C. 745 (786).

(6) *Sharma v. Sri Krishna*, A. 1959 S.C. 395 (410-11).

(7) *Keshav Singh v. Speaker*, A. 1965 All 349 (355).

(8) *Gunapati v. Nafisul*, A. 1954 S.C. 636: (1952-54) 2 C.C. 309.

and detention in pursuance of an order of the Speaker of a Legislature on a charge of breach of privilege, and refused to agree with the majority in *Sharma's case*⁹ that the decision in *Gunapati's case* was not a considered decision.

In the result, a person arrested under a warrant of a Speaker may complain to the High Court or the Supreme Court that he has not been produced before a Magistrate within 24 hours of such arrest or has been denied the opportunity to get legal advice.⁸⁻⁹

A Bench of the Allahabad High Court¹⁰ has, however, held that the protection under Art. 22 (2) can be claimed only at the stage of arrest but would not be available once the person has been adjudged guilty of contempt by a Legislature and detained under its sentence of imprisonment. The High Court¹⁰ founded this conclusion upon the observation in *State of Punjab v. Ajaib Singh*¹¹ that the protection under Art. 22 is not available where a person is arrested or detained under a warrant issued by a Court and the observation in *State of U. P. v. Abdul Samad*¹² that the provision in Art. 22 (2) was designed to enable the person arrested or detained to be released on bail "pending the investigation into the offence with which he is charged or pending an inquiry or trial". But both the observations apparently refer to a charge brought before a Court. In the *Reference Case*,¹³ the Supreme Court has clearly laid down that the Legislatures in India cannot claim to be a Court of Record and that their power to punish for breach of its privileges is derived not from any judicial status but from the necessity of such power to enable it to function properly as a Legislature. If that be so, the observations in the two decisions¹¹⁻¹² relied upon by the Allahabad High Court are not relevant.

The other reason relied upon by the Allahabad High Court¹⁰ is that a production before a Magistrate in such cases would be futile because the Magistrate would have no power to release on bail any person who is detained under a sentence passed by a Legislature. The argument has great force but still it cannot be accepted as conclusive until the Supreme Court considers the question in some future case, because even though the Magistrate himself may not have any power to intervene, a production before him would enable the convict to have legal counsel at the earliest opportunity and to make an application under Art. 32 or 226 for *habeas corpus*. Such production would be highly useful in those cases where a person may have been convicted by a Legislature of contempt without any previous arrest. Once the jurisdiction of the Supreme Court or High Court to inquire into the validity of a conviction by a Legislature is conceded,¹³ a production before the Magistrate may be regarded as a condition in aid of that jurisdiction.

(iv) Art. 32 (and 226) extends to the exercise by a Legislature of its uncodified existing privileges.¹³

Both the Supreme Court and a High Court have jurisdiction to interfere not only where a person has been arrested to be produced before a Legislature to answer a charge of contempt but also after he has been committed for contempt under a sentence of imprisonment and have the jurisdiction to inquire into the validity of such conviction.¹³

Scope of the immunity from arrest.

The principle upon which the freedom from arrest rests is that Parliament is entitled to have a first claim upon the services of its members and that any person who, by any action of arrest or hindrance, prevents a Member from attending in his place to do his duty is guilty of contempt of the whole House.¹⁴

Not being specially enumerated in the Constitution, members of Parliament and the State Legislatures in India shall have the immunity from arrest

(9) *Sharma v. Sri Krishna*, A. 1959 S.C. 395.

(10) *Keshav Singh v. Speaker*, A. 1965 All. 349 (354-5).

(11) *State of Punjab v. Ajaib Singh*, A. 1953 S.C. 10.

(12) *State of U. P. v. Abdul Samad*, A. 1962 S.C. 1506.

(13) Ref. under Art. 143, A. 1965 S.C. 745 (786; 788-9).

(14) (1959) 601 H. C. Deb., cc. 223-7.

to the same extent as it is available to members of the House of Commons, by virtue of Arts. 105 (3) and 194 (3). Thus,

As in *England*, the immunity from arrest applies only to arrest under civil process and does not extend to arrest under the criminal law.¹⁵

The immunity from arrest under civil process exists during a session of Parliament or of the State Legislature (as the case may be) and forty days before and after each session. The privilege cannot be claimed when the Legislature has been prorogued and has not yet been summoned for the next session.¹⁶

It follows from Cl. (3) of Art. 105 that any provision of the existing law which provides a rule contrary to a privilege of the House of Commons shall be void, unless Parliament incorporates the provision in a fresh legislation enacted after the commencement of the Constitution. Thus, under the existing law, we have a provision exempting members of Legislatures from arrest or detention in prison under civil process, in s. 135A of the Code of Civil Procedure, 1908, inserted in 1925. The above provision exempts a member from arrest during the continuance of a meeting of the Chamber or Committee thereof of which he is a member or of a joint sitting of the Chambers, and during a period of 14 days before and after such meeting or sitting. Since the duration of immunity in the case of members of the House of Commons is longer, viz., 40 days before and after session, it is obvious that members of our Parliament will enjoy the 40 days' immunity notwithstanding the above Act.¹⁷ The period of immunity of members of the House of Commons in "40 days after every prorogation and 40 days before the next appointed meeting".¹⁸ In the case of dissolution, a 'convenient and reasonable' time is allowed for returning home.¹⁹ Anson¹⁹ puts the period as "the continuance of the session, and for 40 days before its commencement and after its conclusion".

Where a member has been arrested in breach of this privilege, he is entitled to be released by a proceeding for *habeas corpus*.²⁰

No immunity from arrest under law of preventive detention.

Following the English precedents (p. 591, *ante*), it has been held in India, both by the Courts²⁰ and in Parliament²¹ that the immunity from arrest does not extend to other than civil cases, and, accordingly, it does not extend to arrest under a law of preventive detention.

For the same reason, though during his period of detention under the Preventive Detention Act, a member of a Legislature has a right to correspond with the Legislature as a sitting member, he is not entitled to attend the sittings of the House.²²

Communication to Speaker of arrest, detention and release of a Member.

Even though the arrest of a Member otherwise than on a civil process has been held not to be included within the privilege of freedom of arrest, it has been established in England as well as in India, that in such cases, the House concerned has a right to be informed of the fact of arrest and detention and the reason why the House is being deprived of the participation of a member in its deliberations.

(A) *England*.—In England, it has been held that a Magistrate or a Judge has the duty to inform the Speaker of the fact of arrest or detention with its causes, in the following cases.²³

(15) *Venkateswarlu v. D. M.*, (1950) 2 M.L.J. 207; A. 1951 Mad. 269.

(16) *Ansumali v. State of W. B.*, (1952) 56 C.W.N. 711 (720).

(17) It would be expedient to amend the above inconsistent provision in the C. P. Code. If it is intended to curtail the period in India, fresh legislation by 'Parliament' would be required.

(18) 1 Blackstone's Commentaries, p. 165; May, 16th Ed., p. 74.

(19) Anson, *Law & Custom of the Constitution*, Vol. I, p. 163.

(20) In the matter of *Venkateswarlu*, (1950) 2 M.L.J. 207; *Ansumali v. State of W. B.*, (1952) 56 C.W.N. 711 (720).

(21) *Deshpande's case*, H. P. Deb., Pt. II, 23-7-52, col. 4425.

(22) *Anandan Nambiar, In re*, (1952) 1 M.L.J. 1.

(23) May, 16th Ed., pp. 80-1; 121.

(a) When a Member is taken into custody to be tried by any Court-Martial.

(b) When a Member is committed to prison after arrest on a criminal charge, bail not being granted.

(c) Upon a Member's conviction on trial.

But no such duty arises when a person already in prison under the sentence of a Criminal Court is elected a Member of Parliament.

(d) When a Court proceeds against a Member for contempt of court.

Failure of a Judge or Magistrate to inform the Speaker in the foregoing cases constitutes a breach of privilege.²³

(B) *India*.—In India, Rules have been made by the House of the People²⁴ on this subject. Rules 229-31 provide:

"229. When a member is arrested on a criminal charge or for a criminal offence or is sentenced to imprisonment by a court or is detained under an executive order, the committing judge, magistrate or executive authority, as the case may be, shall immediately intimate such fact to the Speaker indicating the reasons for the arrest, detention or conviction, as the case may be, as also the place of detention or imprisonment of the member in the appropriate form set out in the Third Schedule.

230. When a member is arrested and after conviction released on bail pending an appeal²⁵ or otherwise released such fact shall also be intimated to the Speaker by the authority concerned in the appropriate form set out in the Third Schedule.²⁴

231. As soon as may be, the Speaker shall, after he has received a communication referred to in rule 229 or rule 230 read it out in the House if in session, or if the House is not in session direct that it may be published in the Bulletin for the information of the members:

Provided that if the intimation of the release of a member either on bail or by discharge on appeal is received before the House has been informed of the original arrest, the fact of his arrest, or his subsequent release or discharge may not be intimated to the House by the Speaker."

The following points should be noted in connection with these rules:

(i) The duty of the Magistrate or Court to inform the Speaker by a letter in the prescribed form arises in the following cases:

(a) When a member is arrested on a criminal charge or for a criminal offence.

(b) When a member is sentenced to imprisonment by a criminal court.

(c) When a member is detained under an executive order, e.g., under the law of preventive detention.

(d) When a member is released on bail or otherwise, after conviction.

(ii) As to the precise time within which the duty to communicate must be performed, the R. 229 says that it must be done 'immediately'. The communication should, therefore, be made at the earliest opportunity after the fact of arrest or conviction and in case of delay, it would be for the Committee of Privileges of the House to determine whether there has been undue delay or whether the explanation of delay is satisfactory.¹⁻²

In one case,² the Committee of Privileges had held that the Magistrate had no duty to inform the Speaker where a member had been arrested on a criminal charge and immediately released on bail. In view of Rule 229, inserted thereafter, it seems that even in such a case, the intimation should be made.

Limits of the Privileges of Members in the matter of arrest.

Save the privileges already mentioned, a member of Parliament has no higher privileges than those enjoyed by an ordinary citizen in the matter of the application of the laws.³ In other words, the "privileges do not exalt the Member above the ordinary restraints of law which apply to his fellow citizens".⁴

(24) No corresponding Rules have been framed in the Council of States. Hence, the English precedents are to be followed.

(25) In England, there is no obligation to communicate the fact of such release [May, 16th Ed., p. 81].

(1) In two cases, the House has not taken any action even though the intimation was

received by the Speaker after the case had been referred by the Speaker to the Committee of Privileges [H. P. Deb., Pt. II, 28-5-52, cols. 701-2].

(2) H. P. Deb., Pt. II, 27-6-52, cols. 261-5.

(3) (1958) The Clerks-at-the-Table, p. 110 (*Kangsari Haldar's case*).

(4) (1959) 601 H. C. Deb., cc. 454-64.

Hence, if the law relating to arrest for certain offences so authorise, a Member arrested on the charge of committing such offences may be put on handcuffs.^{3,4} Similarly, under the Prison Rules, proper restrictions may be imposed upon his communications with private persons or even other members of Parliament, outside the prison.⁵ Though a Member in prison is entitled to receive Parliamentary papers issued to other members, the Speaker cannot intervene if they are withheld under valid legal provisions relating to correspondence with prisoners.⁶ Nor can a Member, during a valid imprisonment or detention, claim his right to attend the session of the Legislature, even though he is liable to lose his seat owing to non-attendance.⁷⁻⁸

If a Member commits an offence for which a person may be arrested without warrant under the law, the Member cannot claim any special privilege in this respect.⁹

But in respect of one matter, the Prison authorities cannot withhold the correspondence of a prisoner Member of Parliament, because that affects the privilege of the House, namely, the privilege of the prisoner Member to correspond without let or hindrance with the Speaker and the Committee of Privileges of the House. He has this privilege so long as he remains a member of the Legislature.⁷ In a Madras case,⁷ the High Court issued a writ of *mandamus* against the executive authorities to forward to the House any letters addressed to the Speaker or the Committee of Privileges by a Member of the State Legislature while under preventive detention. But there is no similar privilege to correspond with a brother member.¹⁰

Though the immunity from arrest is a personal immunity, like all other privileges, it is a privilege of the House and the individual Member is entitled to it only as a member of the House¹¹ and does not, therefore, carry his privileges wherever he goes unless, of course, he is acting as a delegate of the House. The immunity from arrest cannot, therefore, be claimed by a Member when he is outside the jurisdiction of Parliament, on an errand of his own.¹¹

Immunity from Service of Process and Arrest within the House.

(A) *England*.—The entire position relating to these matters in England has been clarified by the Committee of Privileges of the House of Commons in 1945,¹² as follows:

(a) The service or execution of any process (civil or criminal) either upon a member or upon any other person within the precincts of any House of the Legislature, on a day on which the House or any Committee thereof is to sit, is sitting or has sat, will constitute a breach of privilege of the House, unless the leave of the House is obtained through the Speaker for such action.¹³

The reason is that such action on the part of a stranger would be a violation of the dignity of the House, and would be an abuse of the privilege of admission on the part of the serving or executing officer, unless the permission of the House is specifically obtained for the purpose.

It follows, therefore, that neither a member nor a stranger can be arrested within the precincts of the House on such a day. But this would not prevent the police officers on duty in the House itself to arrest strangers who, after having been admitted to the precincts of the House, commit a criminal offence or are about to do so, for it is the duty of such officers to maintain order within the precincts of the House. If, however, they want to enter the House itself while

(5) (1958) 4th Rep. of the Committee of Privileges.

(6) (1908) 183 Hansard, c. 540 (*Ginnell's case*).

(7) *Anandan Nambiar, in re*, A. 1952 Mad. 119.

(8) *Kunjan v. State*, A. 1955 T.C. 154.

(9) (1953) Rep. of the Privileges Com-

mittee of the Bombay Legislature re. the arrest of Shri Patel.

(10) (1958) 4th Rep. of the Committee of Privileges, House of the People, p. 11.

(11) (1959) 601 H. C. Deb., cc. 40-59; 223-7.

(12) (1945-46) H.C. 31.

(13) (1888) H.C. 411.

it is sitting, for effecting the arrest, they must take the previous permission of the House.

(b) It would, however, be permissible to serve or execute a process within the precincts of Parliament even on a member, on any day when Parliament is *not sitting*, or during its periodical recesses (as distinguished from the intervals between its daily sittings).

The reason is that on a day when the House is not sitting or going to sit, the service cannot be said to be taking place in the presence of the House, actual or constructive, and hence, there cannot be any violation of the dignity of the House.

"To hold that it is would be to confuse *what* the House is with *where* the House is."¹⁴

Thus, a Member of Parliament as such is not privileged from service of process.¹⁵ But service of process on a Member may constitute a breach of privilege of the House only when it amounts to a violation of the dignity of the House.

(B) *India*.—Rules 232-3 of the Rules of the House of the People provide—

"232. No arrest shall be made within the precincts of the House without obtaining the permission of the Speaker.

233. A legal process, civil or criminal, shall not be served within the precincts of the House without obtaining the permission of the Speaker."

As has been stated earlier (p. 601, *ante*), though the immunity of a Member from arrest does not extend to arrest under criminal law, no arrest can be made or other process under criminal law served within the precincts of a House without the permission of its Presiding Officer. A breach of this rule is an interference with the business and dignity of the House itself.

The 'precincts' of the House would, according to common parlance, include the buildings where the Legislature or its Committees hold their sittings and their appurtenances and also the space enclosed by its compound walls, if any.

The Madras Legislative Assembly has adopted a definition of its 'precincts'.¹⁶

A request made by an executive officer to the Speaker to serve summons upon a member when the House is *in session* constitutes a breach of privilege of the House.¹⁷

Service and execution of legal process within the precincts of the House.

A violation of the privilege in this behalf, explained at p. 596, *ante*, constitutes contempt.

Immunity from service as juror.

Exemption from service as jurors is already provided by Sec. 320 (aa) of the Criminal Procedure Code, which will hold good under the Constitution. It will, however, be of no use after the system of jury trial is abolished in all the States.

Production of Evidence in the possession of the House.

(A) *England*.—It has been deduced from Art. 9 of the Bill of Rights that Members of Parliament cannot be compelled to give evidence regarding proceedings in the House without the permission of the House. Art. 9 says—

"Freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament."

Officers of the House are similarly prohibited, by a resolution of the House of Commons in 1818, to give evidence elsewhere in respect of any proceedings before the House or any Committee thereof, without special leave of the House.^{17a}

Parties to an action who require such evidence, oral or documentary, are, therefore, required to petition the House for permission. If the House is in session, a motion for leave is moved, for which no notice is required. During

(14) (1945-46) H.C. 31.

(15) (1951) H.C. 244.

(16) (1958) The Table, pp. 151-2.

(17) (1958) XIV Madras L.A. Proceedings, No. 7.

(17a) 486 H. C. Deb. 1973: *Dingle v. Associated Newspapers*, (1960) 2 Q.B. 405.

recess, the Speaker exercises the power to permit, in his discretion, and during a dissolution it is the Clerk of the House who exercises the power, according to the principle followed by the Speaker.

As to the practice regarding the permission, it may be said that permission is usually granted unless the action involves a question of privilege of the House itself or the privilege of a witness.¹⁸

(B) *U.S.A.*—The English principle is followed in the House of Representatives, so that no officer of the House can produce before any court any paper from the files of the House nor furnish any copy thereof, without the authority of the House or of a statute.¹⁹

(C) *India.*

I. R. 383 of the Rules of the House of the People says—

"The Secretary shall have custody of all records, documents and papers belonging to the House or any of its Committees or Lok Sabha Secretariat and he shall not permit any such records, documents or papers to be taken from the Parliament House without the permission of the Speaker".

The usual practice is that when a request is received from a Tribunal for the production of such a document, the Speaker refers the matter to the Committee of Privileges and further action takes place in accordance with the decision of the House on the Report of the Committee of Privileges. If the leave of the House is obtained the Speaker nominates one of the officers of the Parliament Secretariat to produce the document before the Tribunal. Though the House can decide whether the public interest should suffer by the disclosure of the document called for, the question whether the document would be relevant to the inquiry before the Tribunal is one for the Tribunal itself, under the law of evidence, and not for the House.²⁰

II. In the Council of States, there is no rule corresponding to R. 383 of the House of the People. But the Committee of Privileges of the Council has come to the same conclusion and laid down that in the Council, the practice of the House of Commons (p. 597, *ante*) as to obtaining permission should be followed.²¹

Right to exclude strangers.

Each House of *our* Parliament can exercise this privilege which collectively belongs to the House of Commons (p. 592, *ante*).

(a) The House of the People has made Rules (248-252) to provide for the holding of a sitting in secret, as follows:

"248. (1) On a request made by the Leader of the House, the Speaker shall fix a day or part thereof for sitting of the House in secret.

(2) When the House sits in secret no stranger shall be permitted to be present in the Chamber, Lobby or Galleries:

Provided that members of the Council may be present in their Gallery:

Provided further that persons authorised by the Speaker may be present in the Chamber, Lobby or Galleries.

249. The Speaker may cause a report of the proceedings of a secret sitting to be issued in such manner as he thinks fit, but no other person present shall keep a note or record of any proceedings or decisions of a secret sitting, whether in part or full, or issue any report of, or purport to describe, such proceedings.

250. The Procedure in all other respects in connection with a secret sitting shall be in accordance with such directions as the Speaker may give.

251. (1) When it is considered that the necessity for maintaining secrecy in regard to the proceedings of a secret sitting has ceased to exist and subject to the consent of the Speaker, a motion may be moved by the Leader of the House or any member authorised by him that the proceedings in the House during a secret sitting be no longer treated as secret.

(2) On adoption by the House of the motion under sub-rule (1), the Secretary shall cause to be prepared a report of the proceedings of the secret sitting, and shall, as soon as practicable, publish it in such form and manner as the Speaker may direct.

(18) May, 16th Ed., pp. 63-4.

(19) Jefferson's Manual, 1957, p. 122.

(20) (1958) Privileges Digest, pp. 50-51.

(21) The Table, 1958, Vol. XXVII. pp. 98-99; (1958) Privileges Digest, p. 62.

252. Subject to the provisions of rule 251, disclosure of proceedings or decisions of a secret sitting by any person in any manner shall be treated as a gross breach of privilege of the House."

There are no such in the Rules of the Council of States.

(b) The Rules of either House²² authorise the Chair to order the withdrawal of strangers from any part of the House "whenever he thinks fit".

Refusal to withdraw after such order, constitutes a contempt of the House.

'Defined by Parliament by law'.—This expression refers to express legislation on the subject of privileges and immunities. The Representation of the People Act, 1951, laying down qualifications and disqualifications for membership of the Legislature, is not such legislation.²³

Publication of Parliamentary proceedings in newspaper and by means of broadcasting.

In exercise of the power conferred by the present clause, the Parliamentary Proceedings (Protection of Publication) Act (24 of 1956) has been enacted with a view to protect the *bona fide* publication of the reports of proceedings of Parliament through newspapers and broadcasting.

CONTEMPT OF PARLIAMENT

The power to punish for contempt.

(A) *England*.—The power of Parliament to punish for its contempt is, in *England*, regarded to be as essential as the inherent power of a Court of record to punish for its contempt:

"As it is an essential part of the execution of every court of judicature and absolutely necessary for the due execution of its powers, that persons resorting to such courts, whether as judges or as parties, should be entitled to certain Privileges to secure them from molestation during their attendance; it is more peculiarly essential to the Court of Parliament, *the first and highest court in this kingdom*, that the Members who compose it, should not be prevented by trifling interruptions from their attendance on this important duty. . . ." ²⁴⁻²⁵

The theory of Parliament acting as a Court was asserted by the House of Commons in 1593—

"This court for its dignity and highness hath privilege as all other courts have..... and as it hath privilege and jurisdiction too, so hath it also coercion and compulsion; otherwise the jurisdiction is nothing in a court, if it hath no coercion".⁴

It is this fiction of Parliament as a 'Court' from which the power to punish for the breach of its privileges without resorting to prosecution in a court of law, has been deduced. If each House of Parliament is supposed to act as Court, it follows that—

(i) Each House must be the sole judge of its own proceedings, without interference from the courts of law (p. 593, *ante*).

(ii) Each House must have the power to protect itself from interferences with its proceedings and the breach of the privileges which belong to it collectively as well as to its members individually, for the proper discharge of its functions.

It would also follow that each House has the power to punish not only for the breach of any of its specific privileges as have been enumerated in the foregoing pages, but also for offences against its general authority or dignity in its inherent capacity, as the 'High Court of Parliament'.⁵ Any other view would lead to the conclusion that a House of Parliament would be obliged to seek redress before a Court of law, like a private litigant, whenever there was any injury to

(22) R. 265 of the Rules of the House; rr. 387-387A of the House.

(23) *Ansumali v. State of West Bengal*, (1952) 56 C.W.N. 711 (716).

(24-25) Hatsell, Collection of cases of Privilege of Parliament, (1776), pp. 1-2.

(1-4) May, 16th Ed., p. 90.

its dignity. Such a position would have been hardly consistent with the efficiency and dignity of the highest representative body in the realm:

"Could it be expected that they should stand high in the estimation and reverence of the people, if, whenever they were insulted, they were obliged to await the comparatively slow proceedings of the ordinary courts of law for their redress? That the Speaker, with his mace, should be under the necessity of going before grand jury to prefer a bill of indictment for the insult offered to the House? They certainly must have the power of self-vindication in their hands....."

(B) *U.S.A.*—The power to punish its *own* members for contempt belongs to each House of Congress under Art. I, s. 5 (2) of the Constitution, which says—

"Each House may.....punish its Members for disorderly behaviour, and, with the concurrence of two-thirds, expel a Member".

As regards non-members, it has been held that each House possesses an *inherent* power to punish non-members for *obstruction of its business* by refusing to respond to summons or to give testimony.⁷ The foundation of this inherent power is that each House must possess "such auxiliary powers as are necessary and appropriate to make the express powers effective".⁸

From this follows the curious result that the publication of offensive or vexatious charges against either House cannot be punished as contempt unless it tends to obstruct or prevent the discharge of its legislative duties.⁹ Hence, if a matter *defamatory* to the House is published by a non-member, the House cannot *punish* the offender except by a prosecution under the ordinary law.⁹

(C) *Colonial Legislatures.*—Though English common law was supposed to have been transplanted into the colonies, the law of Parliament with the power to punish was not held to have been imported because the colonial Legislatures could not be said to have been functioning as a Court of Record like the English Parliament.¹⁰ Hence, unless the Constitution Act gave the power to punish, by assimilating the privileges of the colonial Legislature to those of the House of Commons in England, as in the case of Canada or Australia (see p. 596, *ante*), a colonial Legislature could not punish for its contempt.

(D) *Government of India Act, 1935.*—The position in India, prior to the Government of India Act, 1935 was similar to that in those colonies whose Constitution Acts did not expressly confer any power to punish for contempt. The Act of 1935, as has been pointed out earlier (p. 592, *ante*), conferred the power to remove or exclude persons infringing the rules or standing orders or otherwise behaving in a disorderly manner but specifically withheld "the status of a Court or any punitive or disciplinary powers other than a power to remove or exclude person. . . ." So, the Legislatures under the Act of 1935 could not punish anybody without resorting to a prosecution [s. 28 (4)].

(E) *India.*—By inserting Cl. (3) in Arts. 105 and 194, the makers have ensured that the power to punish shall belong to *our* Legislatures to the same extent as to the British House of Commons, unless and until the appropriate Legislature in India legislates to the contrary.¹¹⁻²⁵

General considerations to guide the Legislature with respect to breach of Privilege.

While the House of Commons has plenary powers to punish for breach of its privileges, the power is sparingly used only in cases—

(a) Where the dignity of the House as a whole is affected;¹⁻² or where the dignity of a Member as a member of the House is impaired;³

(5) *Kielley v. Carson*, (1842) 4 Moo. P.C.

63.

(6) *Burdett v. Abbott*, (1811) 14 East 1.

(7) *Anderson v. Dunn*, (1821) 6 Wh. 204.

(8) *McGrain v. Daugherty*, (1927) 273 U.S. 135 (173).

(9) *Marshall v. Gordon*, (1917) 243 U.S. 521.

(10) *Fenton v. Hampton*, (1858) 11 Moo. P.C. 347.

(11-25) *Keshav Singh v. Speaker*, A. 1965 All. 349 (353-4), subject to certain limitations [Ref. under Art. 143, A. 1965 S.C. 745].

(1-2) (1953-54) 529 H. C. Deb., cc. 35-6.

(3) (1946-7) 441 H. C. Deb., cc. 2267-2305.

(b) Where the actual discharge of the duties of a Member in the transaction of business in the House is interfered with.⁴

But in determining whether in a particular case there has been a breach of Privilege in any of the above senses, the House always guides itself by the following considerations—

(i) The law of Parliamentary Privilege should not be administered in a way which would fetter or discourage the free expression of opinion or criticism, however prejudiced or exaggerated such opinions or criticism might be.⁵

(ii) The process of Parliamentary investigation should not be used in a way which would be inconsistent with the dignity⁶ of the House and give undue importance to irresponsible statements.^{5,7}

(iii) Care should be taken to distinguish legitimate political activity⁶ from illegitimate interference with the business or dignity of the House and the House should take penal action only when the right claimed as a privilege is 'absolutely necessary for the due execution of the powers of Parliament'.⁸

(iv) In most cases, an unqualified apology is considered sufficient to excuse the contemner,⁹⁻¹⁰ particularly where the breach is 'petty in scale'.⁶ The House may, however, express its displeasure at the misconduct,¹¹ while accepting the apology.

What constitutes contempt of Parliament.

(A) *England*.—As *May* observes,¹² it is not possible to exhaust the various classes of acts, which may fall within "contempt of Parliament" or constitute breach of privileges of Parliament.

"Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt, even though there is no precedent of the offence."¹²

Anyway, it would be instructive to cite some instances,¹³ which have been regarded by the House of Commons as breaches of its privileges and have been punished accordingly. Such acts of contempt may be classified under several heads:

- I. Contempt of the House itself.
- II. Contempt of a Committee of the House.
- III. Contempt in relation to the Speaker.
- IV. Contempt in relation to a Member.
- V. Misconduct of a Member.
- VI. Contempt by, and relating to, a witness.
- VII. Contempt by, and relating to an Officer of the House.
- VIII. Contempt by stranger.

I. Contempt of the House itself.

(a) Wilful obstruction of the business of the House¹⁴ or of officers of the House while discharging their duties, e.g., resistance to the Sergeant-at-Arms, and his staff in execution of the orders of the House.¹⁵ Tumultuous or riotous gathering before the House in order to offer threat or intimidation to members or to obstruct business.¹⁶

It is to be noted in this connection that all officers and subjects have the duty to aid and assist the Sergeant-at-Arms in his execution of the orders of the

(4) (1887) 311 Parl. Deb., cc. 286-8.

(5) (1947-8) 448 H. C. Deb., cc. 801-2.

(6) (1945-6) 425 H. C. Deb., cc. 1547-8.

(7) (1960) L. S. Deb., cc. 5652-4.

(8) (1946-7) 435 H. C. Deb., cc. 1077-80.

(9) Cf. (1941-2) 376 H. C. Deb., cc. 603-4;

(1959-60) 284 H. C. l.

(10) (1960) L. S. Deb., cc. 855-8; (1959) Privileges Digest, p. 13 (*Mathai's Case*).

(11) (1946-7) 433 H. C. Deb., cc. 40-42.

(12) *May*, Parliamentary Practice, 16th Ed., p. 109.

(13) See also *Halsbury*, Halsbury Ed., Vol. XXIV, p. 345.

(14) *May*, 16th Ed., pp. 109-12.

(15) 9 C.J. 341; 33 C.J. 263.

(16) *Dennis' case*, (1699) C.J. 230.

House.¹⁷ The Sergeant is also entitled to break open the doors of a private dwelling house, with the help of the civil or military forces, during the daytime (but not during night), if he has reasonable cause to suspect that any person against whom the Speaker's warrant has been issued is keeping himself concealed in that House.¹⁸ But though the Sergeant may force an entrance, he is not entitled to remain in the house, if he comes to know that the person to be arrested is away from home.¹⁹

(b) Disobedience to any of the orders or rules which regulate the proceedings of the House, e.g., tampering with witnesses or obstructing them in respect of evidence to be given to the House; giving false evidence²⁰ before the House; refusing to attend when summoned;²¹ refusing to answer questions or to produce documents in the witness's possession;²² refusing to withdraw from the House when ordered;²³ refusing to comply with order not to take note of what is passing in the House;²⁴ fabricating any false document with a view to deceive the House²⁵ or to destroy a document material to inquiry before the House.¹

Disobedience to similar orders of a Committee also constitutes a contempt of the House.¹⁴

(c) Offering of bribe² to a member is regarded as an insult not only to the member himself but to the House.

(d) Assaulting, challenging, threatening or otherwise molesting members on account of their conduct in Parliament or while coming to or going from the House; but a mistaken arrest of a member by a Police officer would not be punished as contempt.³ In order to claim this privilege, a Member must satisfy the authorities concerned that he was a member of Parliament.⁴ Again, libel upon a member, in order to constitute a breach of privilege, must concern the character or conduct *qua* member of Parliament, and based on matters arising in the actual transaction of the business of the House. Aspersions upon the conduct of members *as* magistrates, counsel, employers or in any other capacity, are not fit subjects for complaint to the House.⁵

(e) The service of a process within the precincts of the House, either upon a Member or upon an officer of the House, "on a day on which the House or any Committee thereof, is to sit, is sitting or has sat".⁶

(f) Certain acts of contempt are classified as 'constructive contempts' in *May's Parliamentary Practice*. These are—

(i) Publishing spoken or written words reflecting upon the character, conduct or proceedings of the House⁸ or upon its Members, named or unnamed, relating to his *capacity as a member of the House*.⁹

(17) C.J. 586.

(18) 65 C.J. 264; *Bardett v. Abbot*, (1811) 14 East. 157; 4 Taunt. 401.

(19) *Howard v. Gosset*, (1842) Car. & M. 382.

(20) *Colburn's case*, (1866) C.J. 239.

(21) *Horne's Case*, (1772-4) C.J. 465.

(22) *Fleming's Case*, (1842) C.J. 227.

(23) *Bradlaugh's Case*, (1880) C.J. 235.

(24) *Finnerby's Case*, (1819) C.J. 537.

(25) *Martin's Case*, (1889) C.J. 311; (1778-80) C.J. 838.

(1) *Lamb's Case*, (1819) C.J. 618.

(2) *Case of Quin*, (1714-18) C.J. 493.

(3) 143 C.J. 30.

(4) (1957) *Privileges Digest*, p. 8 [*Deshpande's case*].

(5) *May*, 16th Ed., p. 124.

(6) (1945-6) 420 H.C. Deb., cc. 2177-84.

(7) *May*, 16th Ed. pp. 117 *et seq.*

(8) As regards libels against the House itself, the House appears to have taken a liberal attitude similar to that taken by the Judiciary as regards contempt of court.

Thus, the Committee of Privileges in 1948 observed—

"The Committee is of opinion that it is not consistent with the dignity of the House that penal proceedings for breach of privilege should be taken in the case of every defamatory statement which, strictly, may constitute a contempt of Parliament. While recognising that it is the duty of Parliament to intervene in the case of attacks which may tend to undermine public confidence in and support of the institution of Parliament itself, the Committee thinks it important that, on the one hand, the law of Parliamentary privilege should not be administered in a way which would fetter or discourage the expression of opinion or criticism, however prejudiced or exaggerated such opinions or criticisms may be, and that, on the other hand, the process of Parliamentary investigation should not be used in a way which would give importance to irresponsible statements."

(9) (1946-7) 433 H. C. Deb., cc. 40-62.

(ii) Any act which even *indirectly* brings the House into 'odious, contempt or ridicule', e.g., disorderly conduct (e.g., assault⁹) within the precincts of the House while it is sitting even though it is *not calculated* to disturb its proceedings;⁹ writing an insulting letter to the Speaker.

(iii) Publishing false or perverted reports of debates or proceedings in the House or any Committee thereof. The gist of this contempt is *mala fide* publication;¹⁰ nevertheless, neither a member or a private person or the Press should, without proper verification, make or publish a statement or comment about any matter which was under consideration by the House or a Committee.¹¹

(iv) Publishing proceedings ordered to be expunged from the Journals.¹²

(v) Premature publication of the Report of a Committee or its Minutes of Dissent or of the evidence taken by it, before the Committee's report is presented to the House, constitutes contempt.^{10,13}

But there is no such contempt unless the Committee had been appointed by the House or by the Government in pursuance of a resolution of the House, or otherwise at its instance.¹⁴

(vi) To publish or give for publication, any Question, Resolution or Motion, before they are admitted by the Chair.¹⁵ The Rules also prohibit the publication of answers to Questions proposed to be given by Ministers before they have actually been given on the floor of the House.^{16,17}

But there is no breach of privilege in publishing or giving for publication a Bill before it is introduced in Parliament.¹⁸

(vii) Failure on the part of a Judge or Magistrate to inform the House when a Member is taken into custody or imprisoned on a criminal charge¹⁹ (see p. 602, *ante*).

Disclosure of secret sittings of the House.

(A) *England*.—Reporting of the proceedings may be contempt when the House or its Committee is sitting *in camera*.¹⁰

(B) *India*.—R. 252 of the Rules of the House of the People provides—

"252. Subject to the provisions of rule 251, disclosure of proceedings or decisions of a secret sitting by any person in any manner shall be treated as a gross breach of privilege of the House."

Giving evidence as to proceedings in the House.

Neither a Member nor an official of either House can give evidence as to the proceedings in the House (or any Committee thereof) before any court or other authority outside the House, except by leave of the House.²⁰

A contravention of this rule would constitute a breach of privilege.

SOME MATTERS HELD NOT TO CONSTITUTE CONTEMPT

Disclosure of Budget proposals.

The question of liability of a Minister for giving out the Budget proposals before they are presented to the House is not yet definitely settled. There is no doubt that they are *official secrets*²¹ until they are placed before the House of Commons (or the House of the People). The House has also ample power to inquire into the conduct of a Minister for the premature disclosure of such

(10) May, 16th Ed., pp. 118-9; (1951) 489 H. C. Deb., 1381-93; [cf. *Dingle v. Associated Newspapers*, (1960) 1 All E.R. 294].

(11) Report of the Committee of Privileges, H. P. Deb., Pt. II, 12-1-252, cols. 2123-4.

(12) Case of the 'Albion & Evening Advertiser', (1801) L.J. 104.

(13) L. A. Deb., 14-2-34; 14-4-34; (1958) Privileges Digest, p. 8.

(14) (1951) Parl. Deb., Part II, cc. 5981-2.

(15) L. A. Deb., 27-3-33, p. 2655; also 14-2-34.

(16) R. 59 of the Rules of the Council; r. 73 of the Rules of the House.

(17) (1948) C.A. (Leg.) Deb., Vol. I, p. 336.

(18) L. A. Deb., 2-9-35, pp. 144-7.

(19) May, 16th Ed., p. 121.

(20) May, 16th Ed., p. 63.

(21) (1956) L. S. Deb., Part II, cc. 2911-3; (1959) L. S. D., cc. 140-172.

proposals²¹ but neither in England²² nor in India²¹ has such disclosure been treated as a breach of privilege of the House, in recent cases.²³ A resignation of the Minister concerned is usually considered sufficient.²³

Statement by Minister outside the House while House in session.

Both in England²⁴ and in India,²⁵ it has been ruled that though it would not be *proper* for a Minister to make any statement of policy outside the House without first disclosing it in the House if it is in session, it is not considered to be a question of privilege.

Similarly, there is no breach of privilege if the contents of a Bill are communicated to the Press before moving for its introduction in Parliament.^{25a}

Incorrect statement made by a Minister.

When a Member thinks that a Minister has made an incorrect statement made before the House, he is entitled to bring it before the House, according to the procedure laid down in Direction 115 issued by the Speaker of *our* House of the People, which reads thus—

"(1) A member wishing to point out any mistake or inaccuracy in a statement made by a Minister or any other member shall, before referring to the matter in the House, write to the Speaker pointing out the particulars of the mistake or inaccuracy and seek his permission to raise the matter in the House.

(2) The member may place before the Speaker such evidence as he may have in support of his allegation.

(3) The Speaker may, if he thinks fit, bring the matter to the notice of the Minister or the member concerned for the purpose of ascertaining the factual position in regard to the allegation made.

(4) The Speaker may then, if he thinks it necessary, permit the member who made the allegation to raise the matter in the House and the member so permitted shall, before making the statement, inform the Minister or the member concerned.

(5) The Minister or the member concerned may make a statement in reply with the permission of the Speaker and after having informed the other member concerned."

But an incorrect statement made by a Member, *per se*, is not regarded as a contempt of the House. It may, of course, amount to a misconduct on the part of the Minister, but for that the sanction is a vote of censure or the like but not a proceeding for contempt.^{25b} Even the giving of contradictory answers to identical questions cannot be brought up as a breach of privilege.¹

Publication of Constituent's letter to Member.

The House of Commons have held that the publication of a constituent's letter to a Member does not constitute a breach of privilege of the House, though it was contended that the maintenance of the confidential nature of communications from constituents was essential to the conduct of business in the House.²

II. Contempt of a Committee of the House.

(i) As in the case of proceedings in the House itself, any disorderly, contumacious or disrespectful conduct in the presence of a Committee constitutes a contempt.³ Similarly, a conspiracy to deceive a Committee or the presenting of

(22) (1936) 321 H.C.D., c. 1345; (1948) 444 H.C.D., c. 821.

(23) There have been two instances of such disclosure in England in recent times: (a) In 1936, Mr. Thomas, Secretary of State for Dominion Affairs gave out certain budget secrets. By resolution of both Houses, there was an inquiry made by a tribunal appointed under the Tribunals of Enquiry Evidence Act, 1921 and as a result, Mr. Thomas lost his seat in the cabinet. (b) In 1947, Mr. Hugh Dalton, Chancellor of the Exchequer

inadvertently disclosed certain proposals in a talk with a press representative on his way to the House. He confessed this in the House and resigned from Chancellorship of the Exchequer.

(24) (1952) 500 H. C. Deb., cc. 390-1.

(25) (1959) Privileges Digest, pp. 159-160; (1956) H. P. Deb., 6993-7004.

(25a) (1935) L. A. Deb., Vol. V, 144-7.

(25b) (1958) Privileges Digest, pp. 10-11.

(1) (1959) Privileges Digest, p. 3.

(2) (1951) 485 H. C. Deb., cc. 2491-2544.

(3) May, 16th Ed., pp. 109, 114.

forged or fabricated documents with intent to deceive a Committee are acts of contempt in the same manner as they would be if committed against the House.³

(ii) Premature publication either by a Member or by any other person of the Report or Minute of Dissent or of the evidence taken by any Committee before they are presented to the House⁴ (see p. 610, *ante*). When a Committee sits in camera, the publication of its proceedings would also constitute a breach of privilege.⁵

There is, however, no breach of privilege if a document presented before a Committee is circulated by the Committee to the Press before it reports to the House and such a document is published.⁶

(iii) Disobedience to the *intra vires* orders of a Committee, e.g., an order to attend or produce documents, or avoiding or interfering with the execution of such orders of a Committee, constitutes a contempt of the House by which the Committee was appointed.⁷

III. Contempt in relation to the Speaker.

(i) Reflections on the conduct of the Speaker and accusation of partiality in the discharge of his duty,⁸ either by a member or by an outsider.⁹

The rule applies also to the Chairman of a Committee,⁸ or a Member nominated to be a member of a Select Committee.⁸

As to the nature of comment which would constitute a breach of privilege, the observations of the Committee of Privileges in 1950-51¹⁰ are illuminating:

"While the Committee are not prepared to go so far as to say that any comment made upon the Chairman in his conduct in the business of the House, even though such comment be adverse, is necessarily a breach of privilege of the House, undoubtedly a comment upon the conduct of the Chairman with regard to the business of the House which would be construed reasonably by those who hear or read such comment as charging him with partiality is a breach of the privilege of the House. . . . Any comment of this kind necessarily tends to lower the House in public esteem, and therefore to interfere with the full and proper discharge of its functions."

Illustration.

The wife of a member observed that the ruling of the Deputy Speaker, 'though he was within his rights' was 'deplorable'. "He refused to permit certain amendments to the proposals to increase certain taxes to be discussed which normally would have been discussed. It seemed a particularly bad thing when a government with such a small majority in power refused to admit full and free discussion". The Committee of Privileges held that the speech in question constituted a breach of privilege in the sense explained above, but recommended that "in all the circumstances the House would best conserve its own dignity by taking no further action in the matter."¹¹

It will thus appear that contempts in regard to rulings from the Chair are dealt with on principles similar to those governing contempt of Court (see Vol. I, p. 559, *ante*).

(ii) On the analogy of matters *sub judice*, it has been held that any discussion of a matter which is pending a decision from the Chair constitutes a breach of privilege, if such discussion tends to obstruct the conduct of proceedings in Parliament.¹²

IV. Contempt in relation to a Member.

Any act on the part of an outsider which lowers the dignity of a Member of Parliament or interferes with the lawful discharge of his duties, as a member, constitutes contempt and is punishable by the House, e.g.,—

(4) May, 16th Ed., p. 119.

(5) L.A.D., 14-2-34; 14-4-34.

(6) Rep. of the Select Committee on Estimates, (1951) H.C. 227.

(7) May, 16th Ed., pp. 112-3.

(8) May, 16th Ed., p. 125; (1951) 491 H. C. Deb., 396.

(9) E.g., a newspaper making insinuation of partiality against the Speaker [L. A. Deb., 15-2-26, p. 1195].

(10) (1951) H. C. 235.

(11) (1951) H. C. 235.

(12) Rep. of the Committee of Privileges, (1951) H. C. 149.

(i) Reflecting upon the conduct of a Member,¹³ in his capacity of a member (see p. 609, *ante*), e.g., to allege that members were receiving excessive supplementary allowances of rationed petrol.¹⁴ Wilful misrepresentation of a Member's conduct in Parliament has been held to be of the nature of a libel upon him.¹⁵

But in order to constitute a breach of privilege, two conditions must be satisfied—

(a) The libel must concern the character or conduct of the member in that capacity;

(b) The conduct or language on which the libel is based must be actions performed or words uttered in the actual transaction of the business of the House.¹⁶

(ii) Insulting, assaulting, threatening or otherwise molesting a Member on account of his conduct in Parliament¹⁷ or while coming to or going from the House (see p. 609, *ante*); attempting to do such acts or inciting others to do such acts against a Member;¹⁸ molestation of a member at his residence by objectionable or intimidatory telephone calls, concerning his acts or conduct in Parliament.¹⁷

(iii) Preferring to the House a false and frivolous petition against a Member or threatening a Member by a letter that the writer would make such a petition unless the Member did a certain favour to the writer.¹⁹

(iv) Offering of bribe to a Member (see p. 609, *ante*).

(v) Attempting, by improper means, to influence members in their parliamentary conduct.²⁰

(vi) Arresting a member in breach of his freedom from arrest.²¹

It will be seen from pp. 608-9, *ante*, that many of these acts are treated as contempts of the House itself.

But the privilege extends only to matters relating to the discharge of the duties of a Member and does not extend to the private affairs of Members where they must rank as ordinary citizens.²² Thus, a question of privilege was not permitted to be raised where the Police had tapped the telephone of a Member in course of their duty to maintain law and order;²² or a stranger made defamatory imputation about a member or members of a particular party but the imputation did not refer to the discharge of the duties of the members in the actual transaction of business of the House.²³

The remedy of the aggrieved member for such private injury is to take recourse to the ordinary law.²³

V. Misconduct of a Member.

The general principle underlying contempt arising out of the misconduct of a Member is that he should not do any act or be a party to any act which goes against his dignity as a member of Parliament which necessarily affects the dignity of Parliament itself.

Acts of this group may be discussed under the following heads:

(i) Acceptance of bribe or pecuniary corruption in any other way.—The acceptance of any bribe or other illegal gratification in consideration of anything to be done by a member in his capacity as a member of Parliament or for disclosure of information about matters to be proceeded with in Parliament;²⁴ or for disclosure of information obtained from fellow-members under the obligation

(13) Howard's case, (1668) 1 Grey Deb., 145; May, 16th Ed., 124-5.

(14) (1956) H. C. 28-9.

(15) (1699-1702) C. J. 767.

(16) (1951) 485 H. C. Deb., cc. 2110-11.

(17) (1956-57) H. C. 27 (an article in the Sunday Graphic inciting such molestation, by giving the telephone number of the member and asking all the readers of the newspaper to ask the member as regards a

Question tabled by the member in the House).

(18) Gardner's Case, (1699-1702) C. J. 231.

(19) Grady's case, (1819) C. J. 159.

(20) (1945-6) 425 H. C. Deb., cc. 1547-8.

(21) Butler's case, (1809) C. J. 210, 213.

(22) (1960) L. S. Deb., cc. 14709-11.

(23) (1887) 311 Parl. Deb., cc. 286-8.

(24) (1947-48) 443 H. C. Deb., cc. 1094-8.

(25) (1947-48) 443 H. C. Deb., cc. 1227-28.

of secretary,²⁵ constitutes a breach of privilege of Parliament, and the principle has been extended to any kind of indirect advantage.¹

A case of this nature has already taken place in *our* Parliament, where a Member was alleged to have received gratification from a firm in consideration of his agreement to canvass support and make propaganda in Parliament for the interests of the firm, by way of putting Question in Parliament, moving amendments to Bills affecting the firm and the like. The House accepted the finding of the Select Committee which was appointed to investigate into the conduct of the Member, that "Shri Mudgal's conduct is derogatory to the dignity of the House and inconsistent with the standards which Parliament is entitled to expect from its members".²

(ii) To guard against indirect influence, it has been provided that members cannot accept professional fees for services connected with any proceeding or measure in Parliament. Hence, a member is incapable of practising as counsel before the House or any Committee thereof. No member should bring forward or promote any proceeding or measure in which he may have acted in consideration of any pecuniary fee or reward. But this would not preclude a member to take part in a debate relating to a decided criminal case, on the ground that he was engaged as a lawyer in that case.³

Even where no illegal gratification is involved, the House of Commons has resolved that no member of Parliament should enter into any contractual agreement with any outside body which might limit his independence of action as a member of Parliament.⁴

(iii) Libel by a member against another member.—Even though a member is not liable to legal action for anything said in his speech in the House or any Committee thereof, the House itself may punish a member for breach of privilege if he makes a libellous imputation (whether within the House or outside) against another member, in relation to his conduct as a Member.⁴

In such cases, however, it is usual for the House to accept an apology, if fully and frankly offered and drop the proceedings, even where it holds that a breach of privilege had been committed.⁵

Use of offensive words in the House against strangers is also regarded as a misconduct on the part of a member, but every *abuse* of the privilege of freedom of speech in Parliament is not regarded as a breach of privilege of the House itself.⁶

(iv) Publication of the report of or evidence given before a Committee, before they are presented to the House.⁷

(v) Giving evidence as to the proceedings in the House, without leave of the House.⁸

VI. Contempt by, and relating to, witnesses.

When witnesses are summoned by the House or a Committee thereof, the witnesses themselves acquire some privileges and interference with the witnesses become, obviously, contempt of the House itself. On the other hand, if the witnesses interfere with or obstruct the business in connection with which they have been summoned, they would be guilty of contempt.

(A) Contempt in relation to a witness:

(i) Witnesses who are summoned by the House or a Committee thereof, have the same *immunity from arrest* on civil process as members of the House have got and anybody who arrests or procures the arrest of a witness in breach of this privilege would be guilty of contempt.⁹

(1) May, 16th Ed., p. 115.

(2) Parl. Deb., 24-9-51, Pt. II. col. 3250 ;
Rep. of the Committee on the Conduct of a
Member (Parl. Sectt. Pub., Aug., 1951).

(3) May, 16th Ed., pp. 115-6 ; (1946-7) 440
H. C. Deb., 284-365.

(4) May, 16th Ed., pp. 53, 125.

(5) Cf. (1951) 481 H. C. Deb., 653.

(6) (1960) H. C. Deb., cc. 385-6.

(7) (1837) C. J. 282 ; (1934-5) H. C. D.,
c. 389.

(8) (1818) C. J., 389.

(9) May, 16th Ed., p. 84.

(ii) Similarly, witnesses have the same *freedom of speech* in respect of anything said by them in their *evidence* before the House or a Committee thereof, as members of the House have in respect of the proceedings in the House or its Committees. It follows, therefore, that anybody bringing a legal action against a witness for any statement made by the witness in course of his evidence in Parliament, would be liable in contempt.⁹ Even dismissal of an employee by reason of his evidence given before Parliament, constitutes a breach of privilege.¹⁰

(iii) Any act interfering with the attendance of a witness in pursuance of the summons, such as molestation, intimidation, physical restraint or the like or any such treatment of a witness on account of his having given evidence; tampering with or corruption of a witness; and even insult or abusive language used against a witness in connection with his position as a witness or his evidence, is construed as contempt of the House.⁹

(B) Contempt by a witness.

It is a contempt on the part of a witness,¹¹ summoned by the House or its Committee,—

(i) to refuse to attend or to produce a document which has been called for; or to abscond to avoid a summons;

(ii) to refuse to take the oath or to answer a question;¹²

(iii) to answer a question in an insulting manner or wilfully suppressing the truth;¹³

(iv) to behave in a disorderly manner.

VII. Contempt by, and relating to, an officer of the House.

(A) It has already been pointed out (p. 609, *ante*) that obstruction of an officer of the House in the discharge of his duties is obstruction of the House itself. On the same principle,—

(i) Any insult or intimidation offered to an officer in the course of discharge of his duty or on account of anything done by him as such, constitutes contempt of the House.¹⁴

(ii) Since no action, civil or criminal lies against an officer of the House for anything done in execution of the orders of the House or in the conduct of proceedings of the House or any Committee thereof, anybody who brings such action is liable for contempt.¹⁴

The House may, however, direct its officer to appear in an action brought against him for any act done by him in the due discharge of his duties and direct the Government to take up his defence.¹⁴

(iii) An officer of the House enjoys the same immunity from arrest on civil process as is enjoyed by a member of the House¹⁴ (pp. 612-3, *ante*). A breach of this privilege by any person, therefore, constitutes contempt.

(B) An officer of the House may himself be guilty of contempt of the House, *e.g.*—

(i) If he gives evidence before any authority outside the House as to the proceedings in the House of which he is officer or in any Committee thereof.¹⁵ He cannot even appear as a witness before the other House of Parliament, without leave of the House of which he is officer.¹⁵

(ii) In respect of corruption in the execution of his duty or breaches of the orders of the House, the position of an officer of the House is similar to that of a member (see p. 609, *ante*).

(iii) Neglect or refusal to perform his duties would also constitute contempt of the House.

(10) But there is no breach of privilege where a person is dismissed from service on account of his giving certain *information* to a member of Parliament [(1950) 487 H. C. Deb., 576-580].

(11) May, 16th Ed., pp. 110-13.

(12) (1946-47) 441 H. C. Deb., cc. 2267-2305.

(13) (1947-48) 443 H. C. Deb., cc. 1094-1198.

(14) May, 16th Ed., pp. 127-30.

(15) May, 16th Ed., p. 117.

VIII. *Contempt by a stranger.*

(A) *England*.—A stranger may commit contempt of a House,—

(a) By refusing to give evidence (see pp. 603, 609, *ante*).

(b) By interfering with the proceedings in the House or preventing the access of members, by picketing¹⁶⁻¹⁷ or other disorderly conduct.¹⁸

(c) By obstructing the execution of any order of the House.¹⁹

(d) By casting reflections by speech or writing on the House or its Presiding Officer²⁰ or members.²¹

(e) Insulting a Member within the precincts of the House or on their way to or from the House.²²

(f) Attempting to influence, by improper means, a Member's course of action in Parliament.²⁴

(g) Taking or threatening action which is calculated to affect the Member's course of action in Parliament or is of a kind against which it is absolutely necessary that Members should be protected if they are to discharge their duties as such independently and without fear of punishment or hope of reward.²⁵

(h) By obtaining a writ from Court against a Member for his speech in Parliament.^{25a}

(B) *India*.—No one within the territory of India is outside the jurisdiction of Parliament or entitled to offend the dignity of or interfere with the privileges of Parliament.²²

The freedom of speech guaranteed by Art. 19 (1) (a) of *our* Constitution would not authorise a person from committing a contempt of Parliament.²³

The power to punish for contempt should, however, be exercised 'cautiously, wisely and with circumspection'.²⁴

In general, a House of an Indian Legislature may punish a non-member for contempt in such cases as the British House of Commons can, but, owing to specific provisions of *our* Constitution, the following are not punishable as contempt of a Legislature:

(a) The act of a Judge of a High Court to entertain a petition under Art. 226 and of a Supreme Court under Art. 32 for the release of a person who has been committed for contempt by a Legislature and to pass any orders therein,²⁴ including an interim order of release on bail,²⁴ or an order restraining the Legislature to implement its sentence or order.²⁴

(b) The act of any person to petition to the High Court or the Supreme Court to exercise its constitutional jurisdiction to interfere in cases of arrest or detention, even when such arrest or detention has been under a warrant of a House of a Legislature.²⁴

(c) No Judge or counsel dealing with a proceeding in Court as aforesaid can be directed to appear before a Legislature to answer for contempt.¹ In general, anything done or said by a Judge in the discharge of his judicial duties cannot be discussed in, nor be made the subject of action in exercise of the powers and privileges of a House of the Legislature.²⁵

(C) *U.S.A.*—In the U.S.A., the power of the Legislature to commit for contempt has been somewhat narrowed down by judicial decisions.

It has been acknowledged (p. 607, *ante*) that each House of the Legislature has an inherent right of self-preservation and to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an *inherent* legislative power to compel in order

(16-17) Rep. of the Privilege Committee of the M. P. Legislature, 10-8-51.

(18) (1946-47) H. C. 36.

(19) (1851) C. J. 152.

(20) (1887) 313 Parl. Deb. c. 371.

(21) (1926) C. J. 95.

(22) (1958) Privileges Digest, p. 7.

(23) *Sharma v. Sri Krishna*, (1959) Supp. (1) S.C.R. 806.

(24) Ref. under Art. 143, A. 1965 S.C. 745 (791).

(25) Ref. under Art. 143, A. 1965 S.C. 745 (769).

that the legislative functions may be performed.¹ Thus, it has the power to punish for contempt a private person for attempting to bribe a member of the House,² or for refusal to give evidence¹ or to produce evidence.³ This power to punish for contempt is an inherent power of the Legislature and it cannot divest itself of this power by enacting a statute enabling criminal prosecution of a witness for refusal to give evidence. The statute would be construed as imposing additional penalty.⁴

It has, however, been held that the power to punish for contempt does not extend to punish for acts which do not 'inherently' and by themselves obstruct or interfere with the legislative powers of the House. Thus, a House has no power to arrest a person for publication of a libel upon the House.¹

Refusal to answer a legitimate question¹ or to produce relevant papers⁵ before a Committee may be punished by the House as contempt. But a witness has the right to refuse a question which is not pertinent to the matter under inquiry⁶ or which is beyond the legislative jurisdiction of the Legislature to which the Committee belongs,⁷ and in a proceeding for contempt, the offender is entitled to defend himself on the ground that the resolution creating the Committee or the Committee's action under it were unconstitutional,⁸ or *ultra vires* the resolution.⁵ Further, the scope of such resolution cannot be enlarged by any action of the Legislature subsequent to the time when the refusal, which is alleged to have constituted contempt, was made.⁵ Similarly, a witness would be justified in refusing a question when the basis of the question or the purpose of the inquiry is so vague that he cannot be said to have an opportunity of knowing with reasonable certainty the offence he was committing.⁹

A witness is also entitled to refuse a question which unjustifiably abridges any of his fundamental rights.¹⁰ At any rate, such areas of individual liberty cannot be invaded unless a compelling State interest is clearly shown,¹¹ such as 'national security'.¹²

Parliamentary Privilege and the Courts.

(A) England.

In England, after a series of conflicts between the House of Commons and the Courts, the following propositions have been established:

(i) Neither House of Parliament has the right to do anything in contravention of the law, in the assertion of its privileges, so as to affect the rights of persons exercisable outside the four walls of each House.¹³

(ii) Each House of Parliament is the sole judge of the question whether any of its privileges has been *infringed*; but whether either House does in fact *possess a particular privilege* is a question for the Courts to decide.¹⁴ In other words, neither House possesses the power of declaring what are and what are not its privileges. The law of privileges is a part of the Common law of the land and must be known to the judges like any other part of the law. The House of Commons cannot,¹⁵ under cover of a declaration of its privileges, create any *new privilege*,¹⁶ i.e., a privilege which is not warranted by the *known* laws and customs of *Parliament*.¹⁷ That would be to give to the resolution of a single branch of the

(1) *Marshall v. Gordon*, (1917) 243 U.S. 521 (542).

(2) *Anderson v. Dunn*, (1821) 6 Wh. 204.

(3) *Jurney v. MacCracken*, (1935) 294 U.S. 125 (150).

(4) *In re Chapman*, (1897) 166 U.S. 661 (671-2).

(5) *U. S. v. Rumeley*, (1953) 345 U.S. 41.

(6) *Sacher v. U. S.*, (1957) 356 U.S. 576.

(7) *Sinclair v. U. S.*, (1929) 279 U.S. 263 (291-2).

(8) *Fenney v. Brandove*, (1951) 341 U.S. 367 (Black J.).

(9) *Scull v. Virginia*, (1958) 359 U.S. 344 (353).

(10) *Sweezy v. New Hampshire*, (1956) 354 U.S. 234 (255).

(11) *N. A. A. C. P. v. Alabama*, (1958) 357 U.S. 449 (466).

(12) *Barenblatt v. U. S.*, (1958) 360 U.S. 109 (129).

(13) May, 16th Ed., p. 171.

(14) Cf. Ref. under Art. 143. A. 1965 S.C. 745 (758-9).

(15) *Ashby v. White*, (1704) 14 St. Tr. 695;

(16) *Stockdale v. Hansard*, (1839), A. & E. 1; *Burdett v. Abbott*, (1811) 14 East 150.

(17) (1702-04) C. J. 555, 560.

Legislature the force of a legislative enactment. *Neither House*, therefore, is alone competent to declare the *extent* of its privileges and this is subject to judicial determination.¹⁶ (It does not affect the power of Parliament to legislate on the subject of Parliamentary privilege).

(iii) From this follows the anomalous result that if the House commits for contempt of privilege which is not *specified* in the warrant it cannot be examined by the Court,¹⁸ but if the nature of the contempt is *specified*, the Courts can enquire into it.¹⁹ Thus, the writ of *Habeas Corpus* would be available for the release of any one committed for contempt by the House, if the cause of committal stated in the return is insufficient, and it is held by the Court that the House does not possess the privilege for the breach of which the commitment has been made.²⁰ But if *no cause* for committal other than contempt of the House is shown in the return, the Court is powerless;¹⁶ and cannot interfere with the Speaker's warrant on any other ground.^{20a} The House is not bound to state in its warrant of committal the facts constituting the alleged contempt.

In short, though the House has exclusive authority to commit for contempts as is possessed by every Court of record, and the Courts cannot enquire into the grounds of a commitment for contempt by the House of Commons,¹⁸ the Courts deny the right of the House to define its own privileges.¹⁹

"But given an undoubted privilege, it is for the House to judge of the *occasion* and of the *manner* of its exercise".²¹

In other words, once it is established that the House possesses a privilege, it is the sole judge of the question whether, in a particular case, it has been violated and whether the offender should be punished for contempt.²¹

(iv) Resolution of the House is no bar to enquiry by the Court as to the *extent* of the privileges of the House.²²

(v) Commitment by the House of Commons terminates with the session, so that upon prorogation or dissolution, the prisoner is entitled to his discharge upon a writ of *habeas corpus*.²³

(vi) The Courts will not interfere with the interpretation of a statute by either House of Parliament so far as the regulation of its own proceedings within its own walls is concerned.²⁴

But the Courts are not bound by the opinion of the House as to the existence of any privilege in question or the interpretation put by the House to any statute with respect thereto.²⁵ The only means of extending the known privileges of the House is legislation by Parliament.²⁵

(vii) The validity of a resolution of a House cannot be questioned by a Court in so far as it relates to proceedings within the walls of the House²⁴ and the House is entitled to use as much force as is necessary to carry into effect its resolutions within its own walls.²⁴

(viii) As has been already pointed out (p. 595, *ante*) though each House has unquestionable authority as regards the regulation of its internal procedure and to interpret the law relating thereto, if any proceeding in the House affects the rights of any person arising out of the ordinary law of the land and exercisable *outside* the walls of the House, the ordinary courts of the land shall at once have the jurisdiction to determine whether the privilege claimed by the House exists

(18) *Case of the Sheriff of Middlesex*, (1840) 11 A. & E. 273.

(19) *Case of Aylesbury Men*, (1705) 2 Ravm. 1105.

(20) *Burdett v. Abbott*, (1811) 14 East 1.

(20a) *Howard v. Gossett*, (1845) 10 Q.B. 359.

(21) Vide Attorney-General's speech in the *Strauss case* [(1958) 591 H. C. Deb., cc. 261 *et seq.*]; *R. v. Richards*, (1955) 92 C.L.R. 15 (I).

(22) Anson, *Law & Custom of the Constitution*, 1922, Vol. II, p. 193; May, 15th Ed., p. 167.

(23) Keith, *Constitutional Law*, p. 75.

(24) *Bradlaugh v. Gossett*, (1884) 12 Q.B.D. 271 (281); see also Halsbury, *Hailsham Ed.*, Vol. XXIV, p. 345.

(25) *Queen v. Richards*, (1955) 92 C.L.S. 157.

and, if so, whether it would go so far as to justify the breach of the ordinary law of the land.¹

It follows that the resolution of a House cannot alter the law so as to affect persons outside its walls.²⁴

(B) *U.S.A.*—In *Watkins v. U.S.*,² it has been pointed out by the Supreme Court that while in England, parliamentary privilege was excluded from judicial review because it had its origin in the struggle for legislative independence against an absolute monarch, in the *U.S.A.*, so far as the power of Congress to punish for contempt is concerned, it was from the beginning deemed subject to judicial review and that the first case which came up before the Supreme Court was in 1821.³

In the result, while there have been a number of instances where the English Parliament has abused its privilege by employing its power against individual liberty,⁴ the American Courts have all along been defining the limits of this power as against the liberty of private affairs as well as the other individual rights guaranteed by the Constitution (see p. 595, *ante*). It is now established that the Bill of Rights serve as a limitation upon the exercise of the privileges of Parliament as upon other governmental action⁴ and that it is for the Courts to reconcile the congressional need for particular information with the individual and personal interest in privacy and the fundamental rights guaranteed by the Constitution, such as the First, Fifth or Fourteenth Amendments.⁴

(C) *India.*

I. Since the privileges of each House of *our* Parliament [Art. 105 (3)] and of a State Legislature [Art. 194 (3)] are the same as those of the English House of Commons, it follows that—

(a) Each House is the sole judge of the question whether any of its privileges has been infringed,⁵ and the Courts have no jurisdiction to interfere with the decision of the House on this point.⁶

(b) Each House has the power to punish for breach of its privileges⁶ or for contempt.

(c) Courts of law have no jurisdiction to interfere with a process issued by the House⁵ or by its Presiding Officer⁶ on the ground—

(i) That the process issued by the House is one which a Court could not have issued,⁵ e.g., a general warrant.⁷

(ii) That the matter for which the House is proceeding for contempt is too stale for taking action. This is a question for the House itself to decide.⁵

(iii) That the Rules of Procedure of the House relating to proceedings for breach of privilege have not been complied with,⁵ e.g., that the Speaker has issued a summons upon an alleged contemner without a resolution of the House or without even placing the question of privilege before the House or its Committee of Privileges, as required by the Rules.⁶ There is nothing to prevent the Speaker from taking notice of a contempt, summon the offender and then to set the machinery of the House in motion for taking appropriate action against the offender.⁶ At most, it would amount to an 'irregularity of procedure' within the purview of Cl. (1) of Art. 122 or 212 of *our* Constitution.

Suppose, however, the Speaker seeks to punish a man, say, by issuing a warrant of imprisonment of his own initiative and without placing the matter before the House at all. In this case, it is submitted, the action of the Speaker goes to the root of his jurisdiction;⁸ it can hardly be contended that it involves a mere 'irregularity of procedure' within the meaning of Cl. (1) of the Articles cited. The

(1) Cf. *Mav* 16th Ed., p. 171; cf. *Ashby v. White*, (1704) 2 Ld. Raym. 938 (re. right to vote).

(2) *Watkins v. U. S.*, (1956) 354 U.S. 178.

(3) *Anderson v. Dunn*, (1821) 6 Wh. 204.

(4) Instances cited in *Watkins v. U. S.*, (1956) 354 U.S. 178 (188-191, 197).

(5) *Sharma v. Sri Krishna* (No. 2), A. 1960 S.C. 1186 (1191).

(6) *Harendra v. Dev Kanta*, A. 1958 Assam 160 (165).

(7) Cf. *Victoria v. Hugh Glass*, (1871) 3 P.C. 560.

(8) Cf. *Vinod v. State of H. P.*, A. 1959 S.C. 223.

immunity of the Speaker from the jurisdiction of a Court, under Cl. (2) of the Articles, on the other hand, is confined to acts relating to 'regulating procedure or the conduct of business, or for maintaining order', and is not comprehensive enough to cover every act done by a Speaker of an Indian Legislature even though such action could not be said to relate to the matters enumerated in Cl. (2), or such action amounted to the exercise of a privilege which the House did not itself possess.⁹

II. On the other hand—

(a) No House of the Legislature has the power to create for itself any new privilege not known to the law and the Courts possess the power to determine whether the House in fact possesses a particular privilege.⁶ This is the position so long as the Privileges of *our* Legislatures are founded upon those of the British House of Commons. If and when *our* Legislatures legislate with respect to Privileges, it would not be incompetent to enact a statutory Privilege on the ground that such a Privilege is unknown to the House of Commons, provided it is not inconsistent with any provisions of *our* Constitution.

(b) The Courts can interfere where the act complained of goes to the 'root of the jurisdiction' of the House or its officer, under the Constitution* (p. 619, *ante*).

(c) By reason of the special provisions of *our* Constitution, the Supreme Court (under Art. 32) or a High Court (Art. 226) have the jurisdiction to inquire whether the fundamental right of a citizen under Art. 21 has been infringed where he has been arrested and detained under a warrant of a speaker for contempt of a House of the Legislature for something said or done outside the walls of the House,—whether it is a general warrant or a speaking warrant.¹⁰ By the exercise of such jurisdiction, no contempt of the House is committed by the Judge.¹⁰

Illustration.

K, a non-member, was committed to prison for seven days by the Speaker of the Legislative Assembly of Uttar Pradesh, for contempt of the House for writing a disrespectful letter to the Speaker, and, in execution of the warrant issued by the Speaker, was detained in jail. S, an Advocate, moved a petition under Art. 226 of the Constitution for a writ of habeas corpus for the release of K, on the ground that the sentence of imprisonment made by the Speaker was illegal inasmuch as it had been made for the same offence for which an order of reprimand had been made against K, earlier, by the Speaker. The Lucknow Bench of the Allahabad High Court released K on bail and fixed a date for hearing of the Petition.

Apprised of this order, the Assembly passed a resolution that not only K and his Advocate S had committed contempt of the Assembly by moving the Petition under Art. 226 before the High Court but that the two Judges who had interfered with the order of the Speaker in contempt were also guilty of contempt and directed that all these persons should be brought in custody before the House.

The two Judges then brought a Petition under Art. 226 before the Allahabad High Court for quashing the aforesaid resolution of the Assembly and ancillary reliefs, on the ground that the resolution was without jurisdiction in view of Art. 211, inasmuch as, in entertaining the petition for habeas corpus for release of K and in making the interim order for release on bail, the Bench had only exercised their constitutional jurisdiction under Art. 226. A similar petition was also filed by the Advocate S. Both the petitions under Art. 226 was heard by the Full Bench of the Allahabad High Court consisting of 28 Judges who issued an interim order, restraining the Speaker and the Marshal of the Assembly from implementing the resolution of the Assembly.

After the foregoing order of the Full Bench, the Assembly passed another resolution, substituting the earlier one and withdrew the warrants for the arrest of the two Judges and S and, instead, directed them to appear before the House to show cause why they should not be committed for contempt of the House for having moved and entertained the petition under Art. 226 on behalf of a person committed for contempt of the House, so as to interfere with the orders of the Speaker.

At this stage, the President of India made a reference under Art. 143 (1) of the Constitution to the Supreme Court for its opinion on five questions, which were answered by the Court, in the instant case, as follows—

(1) On the facts and circumstances of the case, it was competent for the High Court to entertain the petition under Art. 226, challenging the legality of the sentence imposed by the Assembly upon K, and to pass orders releasing K on bail pending disposal of that petition.

(9) Cf. *Stockdale v. Hansard*, (1839) 9 A. & E. 1.

(10) Ref. under Art. 143, A. 1965 S.C. 745.

(2) Neither the two Judges nor the Advocate S had committed contempt of the Assembly by moving or dealing the petition under Art. 226.

(3) It was not competent for the Assembly to direct the production of the two Judges or the Advocate before the Assembly or to call for their explanation for its contempt.

(4) A Judge who deals with a petition under Art. 226 challenging the decision of a Legislature or any penalty imposed by it upon a non-member for a contempt alleged to have been committed outside the four-walls of the House, does not commit contempt of the said Legislature.^{10,11}

Is the Legislature or its officers subject to the jurisdiction of the Courts?

In the Reference case,¹² the Supreme Court accepted the contention of the counsel for the U.P. Assembly that though he had appeared on behalf of that Assembly, it would not mean that the House had submitted to the jurisdiction of the Court to determine the question of privileges of the Assembly which, according to the counsel, was within the sole jurisdiction of the Assembly,—on the limited ground that the proceeding before the Court being one under the advisory jurisdiction under Art. 143, the opinion of the Court in this proceeding would not be binding on any party.

The other observations of the Supreme Court, however, make it clear that the Court did not accept the wider claim that the Courts had no jurisdiction on the question of privileges or that the Legislature or its officers could never be brought under the jurisdiction of the Courts. It has been amply emphasised by the Court¹² that "the sovereignty which can be claimed by Parliament in England, cannot be claimed by any Legislature in India in the literal sense", because we have a written federal Constitution which limits the powers of *our* Legislatures and any legislative action which transgresses these limitations is liable to be struck down by the Courts. In the result, "the decision about the construction of Art. 194 (3) must ultimately rest exclusively with the Judicature of this country". Hence, whenever a complaint is made to the superior courts that the action of a Legislature in exercise of its privileges or any other power has infringed the fundamental rights of a Petitioner and the Court considers it necessary to entertain that complaint, the Legislature must submit its return to the writ of *habeas corpus* or other process of the Court to determine the complaint.¹³

In the result, the Court observed—

"... we must overrule Mr. Seervai's argument that the question of determining the nature, scope and effect of the powers of the House cannot be said to lie exclusively within the jurisdiction of this Court".

In view of the definition of a 'State' under Art. 12 and the wide language

(10) Ref. under Art. 143, A. 1965 S.C. 745 (791).

(11) The conflict between the Court and the Legislature over the incident regarding K, however, did not end with the pronouncement of the Supreme Court. The Privileges Committee of the Uttar Pradesh Assembly has, subsequently (in August, 1965), proceeded, *ex parte*, and held guilty of contempt S and the two Judges and the entire Full Bench of 28 Judges for having dealt with the petition under Art. 226, thereby interfering with the orders of the House, and reprimanded them [vide LXIX C.W.N. cl. vii]. (Presumably, the Assembly took note of the observation of the Supreme Court [A 1965 S.C. 745 (763)], that the Court's opinion under Art. 143, being an advisory opinion, was distinguished from an adjudication, was not binding on any party). At the time of writing of this page, it is not clear whether the High Court or the Supreme Court would take any steps against any of the members or officers of the Assembly. An obvious difficulty in the way of any such action appears to be that the resolution of the

Privileges Committee adjudging the Judges to be guilty of contempt was passed in their absence and that the Assembly did not seek to enforce their resolution against them by doing anything outside the four-walls of the House.

The net result of the episode, thus, are two parallel and contrary decisions of the Court and the Legislature as to the privileges of the Legislature and the jurisdiction of the Court in relation thereto, and the only way out of this undesirable situation is a codification of the privileges as suggested by the Author since the commencement of the Constitution [see below].

(12) Ref. under Art. 143, A. 1965 S.C. 745 (762-763).

(13) Even in England, Parliament, in modern times, submits return to a writ of *habeas corpus*. [cf. Ref. under Art. 143, A. 1965 S.C. 745 (789)]. In the view of May (16th Ed., p. 152), the House of Commons has tacitly accepted the jurisdiction of the Courts to determine the extent of privileges of the House (pp. 168, 174, *ibid*).

of Art. 226 (1), the power conferred upon the High Court by Art. 226 (1) can, in a proper case, be exercised even against the Legislature.¹⁴

"If an application is made to the High Court for the issue of a writ of *habeas corpus*, it would not be competent to the House to raise a preliminary objection that the High Court has no jurisdiction to entertain the application because the detention is by an order of the House".¹⁴

It cannot be argued that the constitutional jurisdiction of the Supreme Courts would not extend to a case of deprivation of liberty simply because it has been ordered by a Legislature.¹⁴

It should be mentioned in this context that one sentimental factor which has influenced the attitude of the British House of Commons towards the Judiciary does not exist in India. In England, the highest judicial authority being vested in the House of Lords, the submission of the House of Commons to the jurisdiction of the Courts would eventually mean the subjection of the one House to the other. This question, however, does not arise in India, because the highest tribunal is an independent judicial body,—the Supreme Court of India.

Can interim bail be granted in cases of arrest and detention under warrant of a Legislature?

(A) *England*.—Though *habeas corpus* proceedings lie in cases of arrest for contempt, as a general rule, interim bail is not granted in cases of such arrest.¹⁵

(B) *India*.—Our Supreme Court has held that in view of the fact that the jurisdiction of our superior Courts under Art. 32 and 226 extends to arrests and detention for contempt of a Legislature and such jurisdiction is unfettered by any limitations, there is no reason why the power to grant interim bail in *habeas corpus* proceedings cannot be exercised by these Courts in India. Whether the Court, in the exercise of its jurisdiction, would exercise that power in a particular case, is a matter for its discretion, but an order of bail in such proceedings cannot be said to be without jurisdiction.¹⁵

Whether the privileges should be codified.

Ever since the time of the Constituent Assembly, the question has been agitated as to whether independent India should not have her own code of Parliamentary privileges instead of relying upon the uncodified law of the British House of Commons. But, even though the Constitution, in the present Clause, expressly envisages such legislation, it has not so far been undertaken in view of some practical considerations:

Firstly, the privileges of the House of Commons cover a wide variety of subjects and their outstanding virtue is their elasticity. Any attempt in India to exhaustively codify them must be a supremely difficult task and would be at the cost of the virtue of elasticity to meet different circumstances.

Secondly, in *England* it is *established*, at common law, that where the House does not specify any grounds for commitment for contempt, the Courts are powerless, even in *habeas corpus* proceedings, to inquire into the grounds for a commitment or the causes of detention. Hence, in cases of serious contempt of the House, the House may shield itself from judicial interference by not specifying the grounds of commitment. Any code can hardly confer such uncharted freedom to the House.

Thirdly, another ground for leaving the privileges uncodified had arisen because of the decision of the Supreme Court in *Sharma v. Sri Krishna*,¹⁶ that so long as Parliament does not exercise its legislative power to codify any of its privileges, the latter part of Cl. (3) of Art. 105 will operate to make the privileges of the British House of Commons available, regardless of any limitations imposed by the Fundamental Rights included in Part III of the Constitution; but that as soon as Parliament seeks to legislate, all the Fundamental Rights in Part III will

(14) Ref under Art. 143, A. 1965 S.C. 745 (767).

(15) *Ibid.*, p. 789.

(16) *Sharma v. Sri Krishna*, A. 1959 S.C. 394: (1959) 1 S.C.R. 806.

operate as limitations on the legislative power, by reason of Art. 13 (2). In other words, if Parliament now enacts a statute embodying any of its privileges, the Courts will be entitled to examine the constitutionality of its provisions, with reference to any of the Fundamental Rights, such as the freedom of speech and expression guaranteed by Art. 19.

The Author was, however, unable to agree with the above view and at pp. 599-600 of Vol. II of the 4th Ed. of the Commentary, the Author advanced the following arguments in favour of codification:

"As against this, it may be stated that the need for Parliamentary privilege to maintain the dignity and independence of the nation's representatives, acting as the legislative body, has to be reconciled and harmonised with the need for individual rights, which are equally essential for the development of the country. For, individual liberty is one of the very objects for which national independence is fought for. The English system of giving unfettered freedom to the Legislature in this respect is not fully applicable in India for two reasons—

(a) *England* has no written Constitution and no limitation upon the omnipotence of Parliament, and the Courts are powerless to review the acts of the sovereign Legislature. In *India*, the situation is otherwise. All the parts of the Constitution have to be equally respected. The Constitution would be meaningless if such importance is given to the privileges of Parliament as to make the Fundamental Rights nugatory in that sphere, when the Constitution has not expressly excepted the privileges of Parliament from the operation of Arts. 12-13. Secondly, if the validity of a legislative enactment, solemnly made, is open to judicial review, there is no reason why we cannot trust our Courts with similar power as regards the privileges of Parliament if they are embodied in an enactment. Take, for instance, Art. 19 (2). The Court is enjoined to uphold 'reasonable restrictions' imposed by legislation upon the freedom of speech, in the interests of 'decency', 'public order' or in relation to 'defamation', 'contempt of Parliament' and the like. If a Court can uphold a law prohibiting publication of such of its proceedings as offend against the aforesaid matters, there is no reason to suppose that the Courts would not uphold the validity of such legislation codifying the existing privilege relating to the subject.

(b) In *England*, the bulk of the ordinary law is still uncoded. On the other hand, the privileges of Parliament, though uncoded, is fairly well-settled by leading treatises and precedents in the same manner as the rest of the common law. The general public seldom complain that they are unable to follow the law because it is uncoded. In *India*, on the other hand, statute law has become the rule and very few branches of the law still rest on common law. It is habitual for the people to rely on the text of some statute, and the experience of the general public with the common law of Parliamentary privileges is also new inasmuch as the Legislatures prior to 1950 had no power to punish for contempt. In the absence of codification, the position is somewhat confusing and this itself is likely to lead to more breaches of privilege than would have taken place under a code.

(c) On the other hand, the maturity of Parliament itself is, in *England*, a safeguard against any gross abuse of privilege by Parliament itself. Can we claim the same maturity in *India*, particularly when the very power to punish for contempt is new? In this respect, it is wise to remember that

"Assemblies can be no less tyrannical and no less unscrupulous than individuals".¹⁷

Since the publication of the foregoing observations in the previous Edition, two of the supposed advantages of non-codification have been shown to be illusory by the Supreme Court's Opinion in the *Reference Case*.¹⁸ As has been explained earlier, the Supreme Court has held that—

(i) The distinction made by English Courts as between general and sneaking warrants of Parliament in a proceeding for contempt would not be available in

(17) Viscount Kilmuir, *Law of Parliamentary Privilege*, in (1960) *Privileges Digest*, p. 59.

(18) Ref. under Art. 143, A. 1965 S.C. 745.

India and that even in the case of 'general warrants', *our* superior Courts would be entitled to interfere under Art. 32 or 226 of the Constitution where a fundamental right of a citizen has been infringed with respect to contempt for anything done or said outside the four walls of a Legislature.

(ii) The earlier view of the Court in *Sharma's case*¹⁹ that so long as the privileges remain uncoded, nothing in Part III of the Constitution can be utilised against the privileges of the Legislature and the processes issued to enforce them has been modified, if not superseded, by the Opinion in the *Reference Case*,¹⁸ by holding that the uncoded privileges must be read along with the provisions of Part III (or, at least some of them, such as Art. 21).

On the other hand, the facts of the case leading to the Reference and their sequel have amply demonstrated what serious shape a conflict between the Legislature and the Courts may take and how far this is due to the fact that the existing privileges are not defined and codified and are not in tune with the basic principles of *our* written Constitution.

Procedure Relating to Breach of Privilege.

In *our* Parliament, the investigation of a question of breach of privilege of a member of the House or any Committee thereof is made by the Committees of Privileges (see *below*) in each House. The reference of the question to the Committee of Privileges may be made by the Chair *suo motu*²¹ or at the instance of a member.²² Even where an individual member has been affected by the alleged breach, the right to raise the question belongs to every member of the House.²³⁻²⁵

Since specific provision has now been made in the Rules laying down the procedure for raising a question of privilege, it follows that a question of privilege cannot be raised otherwise than in accordance with the procedure laid down below. Thus, a question of privilege cannot be discussed on a motion for adjournment,¹⁻¹² or by means of a resolution.¹⁻¹²

The procedure relating to reference at the instance of a member is as follows:

(a) *Notice*.—A member wishing to raise a *question of privilege*, must give notice in writing to the Secretary before the commencement of the sitting on the day the question is proposed to be raised.¹³ According to the Rules of the House of the People,¹⁴ if the question raised is based on a document, the notice should be accompanied by the document.

(b) *Consent of the Speaker or Chairman*.—The question cannot be raised in the House *unless the Speaker* (or Chairman, as the case may be) *gives his consent*.¹⁵⁻¹⁶

So before bringing the question on the floor of the House, the member should bring the matter to the notice privately¹⁷ of the Speaker and have the position clarified. He will give his consent only if there is a *prima facie* case that a breach of privilege has been committed, for which the time of the House may

(19) *Sharma v. Sri Krishna*, A. 1959 S.C. 394.

(20) Ref. under Art. 143. A. 1965 S.C. 745.

(21) R. 203 of the Rules of the Council; r. 259 of the Rules of the House.

(22) R. 191 of the Rules of the Council; r. 226 of the Rules of the House.

(23-25) Parl. Deb.; Pt. II, 10-3-50, pp. 1337-8; 30-11-50, cols. 937-8; also r. 222 of the Rules of the House.

(1-12) Cf. L. A. Deb., 27-2-36, pp. 1782-6; L. A. Deb., 4-9-28, pp. 149-54.

(13) R. 188 of the Rules of the Council; r. 223 of the Rules of the House.

(14) R. 223 of the Rules of the House.

(15) In *England*, however, the position is that the Speaker's ruling that there is a *prima facie* case of breach of privilege only gives precedence of business to the question

raised by the member. Where the Speaker holds otherwise, any member may, nevertheless, bring a motion for reference of the question to the Committee of Privileges, for it is the House itself which alone can determine a question of privilege [(1951) 491 H. C. Deb., cc. 395-6; (1955) 538 H. C. Deb., c. 2273]. In one case, the Leader of the House offered an early chance of debate to such a motion brought by a private member after the Speaker had given his ruling that there was no *prima facie* case of breach of privilege [485 Parl. Deb. c., 1297-1316; 2491-2544].

(16) R. 222 of the House; r. 187 of the Council.

(17) *Mav*, 16th Ed., p. 382; Parl. Deb., Pt. II, 10-3-50, pp. 1337-8; 30-11-50, cols. 937-8; (1956) H. P. Deb., Vol. IV, c. 6479.

be taken up¹⁸ and the question is also in order according to the conditions of admissibility, noted below. The previous consultation with the Speaker also enables the member to be apprised of the actual facts and it may be that after being informed of the facts, he might not think it fit to waste the time of the House over the matter.

In giving his consent, the Chair requires to be satisfied that there is a *prima facie* case that a breach of privilege has been committed.¹⁹

By *prima facie* case is meant the formal condition relating to a question of privilege, for the question of *substance*, viz., whether there has been a breach of privilege, in fact, is a matter which can be decided only by the House itself.¹⁹ The general rule established on the formal aspect in *England* is that any matter which can otherwise be properly dealt with under the practice or Standing Orders of the House, are not regarded as a 'question' or 'matter' of privilege. Thus, it has been held that—

(i) The following *cannot* be raised as questions of privilege:¹⁹

(a) Disagreement with a ruling by the Chair.

(b) Disallowance of a Question by the Chair.

(c) Refusal of a Minister to answer a Question.

(d) Breaches of order in the House.²⁰

(e) Exclusion of strangers.²⁰

(f) A motion to rescind an order of suspension of a member.²⁰

(g) A question as to 'disqualification' of a member, which is a question of privilege in *England*, is not such a question under *our* Constitution, for under Arts. 103 and 192, the decision of such question is left to the President or Governor, acting on the opinion of the Election Commission.

(ii) The Rules of *our* Parliament do not enumerate what are questions of privilege, but simply state that any question which involves a breach of privilege of a Member, or of the House itself or a Committee thereof is a question of privilege. The reason is that the Privileges of *our* Parliament are, subject to some exceptions, the same as those of the British House of Commons as have been dealt with at pp. 592 *et seq.*, *ante*.

In determining whether a question is in order, the Chair takes into consideration the following conditions of admissibility relating to questions of privilege—

(i) Not more than one question of privilege shall be raised at the *same sitting*.²¹

(ii) The question shall be restricted to a specific matter or recent occurrence;²¹⁻²³

(iii) The matter must be such as requires the intervention of the House.^{21, 24}

(c) *Leave of the House*.—(1) If the Chair gives his consent and holds that the question is in accord with the conditions of admissibility, the Chair shall call the member concerned, immediately *after the questions are over and before the list of business is entered*, to ask for leave of the House to raise the question of privilege.²⁵ In urgent cases, the Chair may allow a question of privilege to be raised at any time during the course of a sitting except during the question hour.²⁵

(18) House of the People Deb.: 13-5-53, Pt. II, col. 6479; Parl. Deb., 30-11-50, Pt. II, cols. 937-8.

(19) The House is the exclusive authority for deciding whether in a particular case, there has been a breach of privilege. The Speaker cannot prejudge it. His ruling that there is '*prima facie* case' is necessary only for referring the case to the Committee of Privileges or some other Select Committee for inquiry and report to the House [(1951) 489 H. C. Deb., cc. 1381-93].

(20) These matters are dealt with by the Rules and are dealt with immediately as they arise (cf. r. 258 of the Rules of the Council). See also r. 378 (5) of the Rules of the House.

(21) R. 224 of the Rules of the House.

(22) R. 189 of the Rules of the Council.

(23) This means that the matter should be raised at the earliest opportunity. [(1921) 142 H.C. Deb., 839]. Thus, the Speaker of the House of Commons refused to give his consent where the matter complained of had been discussed in a newspaper two days before it was raised by the Member [485 Parl. Deb., c. 1297-1316 see also (1955) 538 H. C. Deb., c. 1610].

(24) This means 'immediate intervention', for the business of the House would not be interrupted where immediate action is not needed [May, 16th Ed., p. 381].

(25) R. 190 of the Council; r. 225 of the Rules of the House.

(2) When the member is called to ask for the leave, he may make a short statement relevant to the question.

(3) If objection to leave being granted is taken, the Chair shall request those in favour of leave granted to rise in their places. (i) If less than 25 members rise, the Chair shall inform the member concerned that he has not the leave of the House. (ii) If 25 members or more rise, the Speaker shall inform him that leave is granted.

(4) After the leave is granted, the House may—

(i) itself consider the question and come to a decision; or

(ii) refer the question to the Committee of Privileges, on a motion made¹ either by the member who has raised the question of privilege or any other member.^{2,3}

(d) *Committee of Privileges.*—As stated already, there is a Standing Committee of Privileges in each House of Parliament to determine whether there has been any breach of privilege of Parliament in any case referred to it and to report to the House with recommendations for action.

In the House of the People,⁴ the Committee is nominated by the Speaker at the commencement of the House or from time to time as the case may be consisting of not more than 15 members. A question of privilege may be referred to the Committee either by the Speaker *suo motu*, or upon a motion being allowed by the House.

The Rules of the Council are substantially similar except that the Committee in that House consists of not more than 10 members.⁵

The Committee shall examine every question referred to it and determine with reference to the facts of each case whether a breach of privilege is involved and, if so, the nature of the breach, the circumstances leading to it and make such recommendations as it may deem fit.⁶ The report may also state the procedure to be followed by the House in giving effect to the recommendations made by the Committee.⁶

(e) *Consideration of the Report of the Committee of Privileges in the House.*—After the report has been presented, the Chairman or any member of the Committee or any other member may move that the report be taken in consideration, whereupon the Speaker may put the question to the House. Before putting the question to the House, the Speaker may permit a debate on the motion, not exceeding half an hour in duration, and such debate shall not refer to the details of the report further than is necessary to make out a case for the consideration of the report by the House. After the motion made under sub-rule (1) is agreed to, the Chairman or any member of the Committee or any other member, as the case may be, may move that the House agrees or disagrees or agrees with amendments, with the recommendations contained in the report.⁷

It is thus evident that the House may or may not agree with the Report of the Committee of Privileges and that the final decision rests with the House.

Questions of Privilege as between the two Houses.

(A) *England.*—The principle followed in England is that from the standpoint of privilege, the two Houses of Parliament are equal as between themselves and independent of each other.⁸ Hence, neither House can claim any authority over

(1) In the *Mudgal case*, the Speaker of our House of the People ruled [Parl. Deb., Pt. II, 6-6-51] that instead of referring a case of breach of privilege to the Committee of Privileges, the House might refer it to a Select Committee appointed *ad hoc* for the purpose.

(2) R. 226 of the Rules of the House.

(3) The corresponding rule 191 of the Rules of the Council differs on two points—
(a) it does not provide for decision by the

House itself if it so likes; (b) the motion to refer to the Committee of Privileges can be made only by the *Leader of the Council* or any other member to whom he may delegate this function.

(4) R. 313 of the Rules of the House.

(5) R. 192 of the Rules of the Council.

(6) R. 314 of the Rules of the House.

(7) R. 315 of the Rules of the House.

(8) May, 16th Ed., p. 144.

a member or an officer of the other House, or call him before its Committee of Privileges.⁹ If, therefore, a member or officer of one House commits a breach of the privilege of the other House, the latter cannot directly proceed in contempt against such member or officer. The proper procedure in such a case is that the offended House or its Committee of Privileges would inquire into the facts relating to the breach and then lay a statement before the House of which the person complained of is a member or officer. It then becomes the *duty* of the House to which the offender belongs, to take proper measures against the offender as if the offence had been committed against itself.⁸ It is also usual for a House to accept an apology from the member of the other House in such cases.⁹

(B) *India*.—There being no contrary provision in our Constitution, the position should *prima facie* be the same as in *England*.

Of course, as regards Ministers, there is a provision in Art. 88 [and Art. 177] to the effect that they shall have the right to take part in the proceedings of a House of which they are not members, but they shall not "by virtue of this Article be entitled to vote". It is obvious that though a Minister has the right to speak in and to take part in the proceedings of a House of which he is not a member, he does not, thereby, become a full-fledged member of that House. While so taking part in the proceedings of such other House, he is entitled to the privileges of a member of Parliament as enumerated in cls. (1) and (2) of Art. 105 [or cls. (1) and (2) of Art. 194], but in other respects, the privileges shall be as in the House of Commons [Arts. 105 (3), 194 (3)]. The net result is, that when a Minister commits a breach of privilege of a House of which he is not a member, he cannot be directly dealt with by that House. Such House must report the matter to the House of which the Minister is a member.

The entire question was referred to a Joint sitting of the Committees of Privileges of the two Houses and the procedure recommended¹⁰ by this joint sitting of the Committees, which has been adopted by both Houses, is as follows:—

"(i) When a question of breach of privilege is raised in any House in which a member, officer or servant of the other House is involved, the Presiding Officer shall refer the case to the Presiding Officer of the other House, unless on hearing the member who raises the question or perusing any document, where the complaint is based on a document, he is satisfied that no breach of privilege has been committed or the matter is too trivial to be taken notice of in which case he may disallow the motion for breach of privilege.

(ii) Upon the case being so referred, the Presiding Officer of the other House shall deal with the matter in the same way as if it were a case of breach of privilege of that House or of a member thereof.

(iii) The Presiding officer shall thereafter communicate to the Presiding Officer of the House where the question of privilege was originally raised a report about the enquiry, if any, and the action taken on the reference.

It is the intention of the Committees that if the offending member, officer or servant tenders an apology to the Presiding Officer of the House in which the question of privilege is raised or the Presiding Officer of the other House to which the reference is made, no further action in the matter may be taken after such apology is tendered".

Attendance of Members as witnesses before another House or Committee thereof.

In this matter, the *English*¹¹ practice has been followed in *India*.¹²

When one House of any Legislature or any Committee thereof desires the attendance of a Member of another House of the same or another¹² Legislature, the procedure is that the House or Committee which requires the attendance of the Member shall first give the Member private intimation to obtain his consent. If the Member expresses his willingness to attend, a message is to be sent by the requiring House or Committee to the House to which the Member belongs,

(9) Cf. Case of Lord Mancroft, (1951-52) H. C. Deb., cols. 499, 891-8.

(10) R. S. Deb., 23-8-54, cols. 39-42.

(11) May, 16th Ed., p. 117.

(12) (1958) The Table, pp. 108-9.

requesting permission for his attendance. The permission is, as a matter of course, granted.¹²

It would be a contempt of the House for a Member to attend as a witness before another House or the Committee thereof without the leave of the House of which he is a member.¹¹

Effect of Prorogation and Dissolution on proceedings for contempt.

Prorogation, as has been pointed out earlier, (p. 518, *ante*), means a suspension of the business of a session. The result of prorogation is that any matter which was pending in the House at the date of prorogation must be renewed in the next session after prorogation, as if the matter had never been introduced before.¹³ It has been laid down by our Supreme Court that prorogation does not debar a House from proceeding against a breach of privilege which took place during a previous session. It only means that the old proceedings which were suspended by a prorogation must be revived by a fresh motion in the new session.

As to dissolution, the Court¹⁴ pronounced no opinion but since a dissolution puts an end to the very life of a Parliament and calls for a fresh election it follows that a subsequent Parliament cannot take cognizance of a breach of privilege which took place during the life of the previous Parliament nor can it revive proceedings in contempt which may have been started during the life of the previous Parliament. While in the case of prorogation it is the *same* Parliament which reassembles after prorogation in the case of dissolution it is a *new* Parliament altogether and it cannot take upon itself the business of punishing for a contempt against the previous Parliament.

Punishment for contempt of Parliament.

I. As explained earlier the modes of punishment open to the House of Commons for contempt by strangers are—(a) Admonition; (b) Reprimand; (c) Imprisonment.

(A) *England*.

(a) When an *admonition* is contemplated, the offender is asked to attend at the bar of the House and he is then rebuked by the Speaker.

(b) Reprimand is admonition after bringing the offender to the House by force. The House has the power to direct its officers to take a person into custody for this purpose.¹⁵

(c) The power of imprisonment is technically known as commitment. The House may commit the offender to the custody of its own officers or to any of the prisons maintained by the State. When the offender is committed to a prison the Keeper of the prison is bound to comply with the warrant, even if there is no sanction of a Court of law behind it.¹⁶⁻¹⁷

Again, in the case of *imprisonment* by order of the House, *habeas corpus* does not lie if the warrant simply *expresses* the commitment to be for contempt of the House.¹⁶⁻¹⁸ This shows the magnitude of the power possessed by the House.

"When the House of Commons adjudged any thing to be a contempt or a breach of privilege, their adjudication is a *conviction*, and their commitment in consequence is in *execution*; and no court can discharge or bail a person that is in execution by the judgment of another court. The House of Commons, therefore, having authority to commit, and that commitment being in execution this court can do nothing in such case this court is not a court of appeal".

Of course, "if the warrant does not profess to commit for contempt but for *some other matter* appearing on the return which could by no reasonable intend-

(13) May, 16th Ed., pp. 279-280.

(14) *Sharma v. Sri Krishna*, A. 1960 S.C. 1186 (1191).

(15) May, 16th Ed., p. 103.

(16) Cf. *Burdett v. Abbott*, 14 East 1 (138, 150-1).

(17) *Brass Crosby's Case*, 19 St. Tr. 1147.

(18) *Case of the Sheriff of Middlesex*, (1840) 11 A. & E. 273; 113 E.R. 419.

ment be considered as a contempt," the Court would be entitled to enquire into the legality of the commitment by issuing *habeas corpus*.¹³

Any punishment imposed by the House of Commons (whatever be its nature), would, however, cease to have effect at the end of the session of the House, by prorogation or dissolution, and the prisoner may then get his release by *habeas corpus*, if not released already.¹⁹ It is, however, open to the House to commit again in the next session, if the House considers the punishment insufficient.¹⁹

(B) India.

In view of Arts. 105 (3) and 194 (3) of our Constitution, all the aforesaid modes of punishment are available to each House of our Parliament and State Legislatures.

(a) *Admonition*.—A member of the Uttar Pradesh Assembly was admonished for persisting in making baseless insinuations against the Assembly Secretariat of having tampered with records and the like.²⁰

A member of the Punjab Vidhan Sabha was 'warned' for challenging the decisions of the Speaker outside the House.^{20a}

(b) *Reprimand*.—Reprimand has been resorted to in Parliament, in the case of the Editor of the Blitz Weekly of Bombay, who had published a derogatory criticism of the speech of a Member (Acharya Kripalani) in the House of the People. The Committee of Privileges of the House reported it to be a case of gross breach of privilege and recommended that the Editor should be called to the Bar of the House and reprimanded, while the Press Gallery Card (for attending sittings of Parliament) of the New Delhi correspondent of the Journal should be cancelled until he gives a full and adequate apology. The House accepted this recommendation.²¹

After an unsuccessful attempt to move the Supreme Court under Art. 32, the Editor submitted to the notice of the House to attend and received the reprimand on the date fixed therefor. The procedure adopted by the House on this occasion may profitably be reproduced from the Press report²²—

"The ceremony, the first of its kind ever witnessed in the Indian Parliament, was brief and dignified.

It began with the Speaker, Mr. Ananthasayanam Ayyangar, calling the watch and ward officer, who presented himself at the Bar of the House—a three-tiered wooden barrier put up just inside the chamber in the doorway facing the Speaker—precisely at 12-15.

The Speaker then asked: "Is Shri R. K. Karanjia in attendance?" "Yes, Sir". "Then bring him in".

Mr. Karanjia entered and made a deep bow. The Speaker then administered the following reprimand while Mr. Karanjia stood at the Bar:

R. K. Karanjia, the House has adjudged you guilty of committing a gross breach of privilege and contempt of the House for publishing in the issue dated 15th April, 1961, of the Blitz, of which you are the Editor, a libellous despatch under the heading 'The Kripaloony Impeachment'.

That despatch, in its tenor and content, libelled an honourable member of this House and cast reflections on him on account of his speech and conduct in the House and referred to him in a contemptuous and insulting manner.

As Editor you had a high responsibility to exercise utmost caution and discretion in commenting on the speech and conduct of an honourable member of Parliament in his capacity as such member. Yet you published words calculated to bring him into odium, contempt and ridicule. This offence of yours was further aggravated by the type of explanation you chose to submit to the Committee of Privileges.

In the name of the House, I accordingly reprimand you for committing a gross breach of privilege and contempt of the House. I now direct you to withdraw.²³

Mr. Karanjia bowed again and withdrew".

(c) *Imprisonment*.—An instance of imprisonment is to be found in *Australia* where the House of Representatives issued a warrant against the Editor of a newspaper (Bankstown Observer) and committed him to imprisonment for

(19) May, 16th Ed., pp. 101-2.

(20) (1958) 204 U.P. Deb., pp. 237-40.

(20a) (1960) Privileges Digest, 67.

(21) Statesman, 20-8-61, p. 1.

(22) Ibid., 30-8-61.

(23) The Speaker's speech closely followed the English precedent, e.g., in (1947-48) 443 H.C. Deb., cc. 1197-8.

contempt and the High Court of Australia refused writ of *habeas corpus* on the ground that the Courts should not interfere in such a case as in England.²⁴

In India, eight persons were imprisoned, on 10-4-56, for 15 days, in pursuance of a motion of the Rajasthan Vidhan Sabha.

In the Madhya Pradesh Vidhan Sabha,²⁵ four persons had been removed from the visitors' gallery by the marshal, when they began shouting slogans and distributing leaflets, interrupting the proceedings of the House.

The Committee of Privileges, which met on a short notice, described the action of these persons as "objectionable and condemnable" and "against the dignity of the House". The Committee recommended that since they had refused to express regret, they should be sent to jail.

The House ordered that the four members be imprisoned 'until further orders'.²⁶

They were released after six days upon a motion of the Leader of the House.¹

(d) *Exclusion from the Press Gallery*.—Where the contemner is a representative of the Press, the House may withdraw the privileges offered to that Press or newspaper for attending the sittings of the House.²⁻³

Press facilities were withdrawn from a newspaper held guilty of contempt of the Bombay Legislature for commenting that certain questions put in the House were 'mean and petty' and that they should have been disallowed.⁴

II. When the contemner is a member of the House itself, two other punishments are available, namely (a) suspension for a specified period⁵ and (b) expulsion.⁶

(a) *Suspension*.

Provision for withdrawal from the House, and suspension, of a Member is made in rr. 373-4 of the Rules of our House of the People as follows—

"373. The Speaker may direct any member whose conduct is in his opinion grossly disorderly to withdraw immediately from the House, and any member so ordered to withdraw shall do so forthwith and shall absent himself during the remainder of the day's meeting.

"374. (1) The Speaker may, if he deems it necessary, name a member who disregards the authority of the Chair or abuses the rules of the House by persistently and wilfully obstructing the business thereof. (2) If a member is so named by the Speaker, he shall forthwith put the question that the member (naming him) be suspended from the service of the House during the remainder of the session: Provided that the House may, at any time, on a motion being made, resolve that such suspension be terminated. (3) A member suspended under this rule shall forthwith quit the precincts of the House."

A case of suspension for the rest of the session has taken place in the U.P.⁶

In England, suspension is an order either for a definite time or for an indefinite time (up to the end of the session) for disregard of the authority of the Chair or wilfully obstructing the business of the House.⁷

(b) *Expulsion*.

In England, expulsion is resorted to when a member is guilty of such an offence as renders him *unfit* to sit in Parliament even though his seat is not vacated by reason of such act or offence, e.g., engaging in open rebellion, or having been guilty of (i) forgery, (ii) perjury, (iii) fraud, (iv) breach of trust, (v) misappropriation of public money, (vi) conspiracy to defraud, (vii) fraudulent conversion of property, (viii) corruption in the administration of justice or in public offices or in the execution of duties as a member of the House, (ix) contempts, libels and other offences committed against the House itself,⁸ (x) conduct unbecoming the character of an officer and a gentleman.

The order of expulsion causes vacation of the seat of the member, but he is not debarred from being re-elected.⁸

(24) Cited in Morris-Jones, *Parliament in India*, 1957, p. 247.

(25) *Sunday Statesman* 3-4-60, p. 1.

(1) (1960) *Privileges Digest*, p. 65.

(2) *The Blitz case*, p. 629, ante.

(3) (1958) *The Table*, p. 150.

(4) The case of the *Times of India*, 1953,

Rep. of the Privileges Committee, Bombay Legislature Dept.

(5) (1947-8) 443 H.C. Deb., cc. 1094-8.

(6) The case went up to the High Court and the facts may be had from *Raj Narain v. Atmaram*, A. 1954 All. 319.

(7) (1911) C.J. 37.

(8) May, 16th Ed., pp. 105-7.

The power of expulsion has already been used both in *our* Parliament* as well as in the State Legislatures.¹⁰

Whether person arrested under warrant of Speaker must be produced before Magistrate, under Art. 22(2).—See p. 599, *ante*.

Analogous Provision.—Art. 194 (3), relating to the Houses of the State Legislature is identical.

CLAUSE (4).

Extension of privileges to persons who are not members.

This Clause extends the privileges contained in this Article to persons who have a right to speak in either House of Parliament, even though they may not be members of that House (*vide* Art. 88, p. 528, *ante*).

INDEX TO COMMENTS

ARTICLE 105.

Clauses (1)-(2).

Other Constitutions :

(A) England, 581 ; (B) U.S.A., 583 ; (C) Eire, 584 ; (D) Fourth French Republic, 584 ; (E) Fifth French Republic, 584 ; (F) West Germany, 584 ; (G) Japan, 584 ; (I) Government of India Act, 1935, 584.

India :

Need for privileges of Parliament, 584.

Scope of Cls. (1)-(2): Freedom of speech and publication, 585.

Cl. (1): Freedom of speech, 585 ; Limitations of the Freedom of speech, 585 ; Speech in one Legislature casting aspersion on another Legislature, 585.

Cl. (2): Immunity from legal action, 586 ; Extent of the immunity, 586 ; Whether the immunity extends to letters written by Members to Ministers on public affairs in course of discharge of member's duties: (A) England, 587 ; (B) India, 588 ; Disclosure of Official Secrets, 588 ; Right to publish, 588 ; Legislation by Parliament, 589 ; Publication of expunged proceedings, 589 ; Analogous provision, 590 ; Other restrictions upon member's right to publish, 590 ; 'publication by or under authority of either House, 591.

Clause (3).

Other Constitutions :

(A) England:

(i) Privileges of Members individually—(i) Freedom from arrest, 591 ; (ii) Exemption from service as jurors, 592 ; (iii) Exemption from attendance as witnesses, 592.

(ii) Privileges of the House collectively—(i) The right to exclude strangers, 592 ; (ii) Right to regulate its internal affairs, and to decide matters arising within its walls, 593 ; (iii) The right to punish parliamentary misbehaviour, 594 ; (iv) The right to punish members and outsiders for breach of its privileges, 594.

(B) U.S.A., 595 ;

(C) Australia, 596 ;

(D) Canada, 596 ;

(E) Fifth French Republic, 597 ;

(F) Japan, 597 ;

(G) Government of India Act, 1935, 597.

India :

Privileges in other respects, 597 ; Scope of Cl. 3, 598 ; Privileges of the Legislature and Fundamental Rights, 598 ; Scope of immunity from arrest, 600 ; No immunity from arrest under law of preventive detention, 601 ; Communication to Speaker of arrest, detention and release of a Member—

(A) England, 603 ; (B) India, 604.

Limits of the privileges of Members in the matter of arrest, 595 ; Immunity from service of process and arrest within the House—

(A) England, 601 ; (B) India, 602.

(9) The *Mudgal case* [(1951) XVI P.P. Deb., 3232-39 ; 3276-97. The resolution of expulsion was affirmed in an amended form when the Member sought to avoid it by tendering resignation].

(10) The *Raj Narain case* [see A. 1954 All. 319].

Service and execution of legal process within the precincts of the House, 604; Immunity from service as juror, 604; Production of evidence in the possession of the House—

(A) England, 604; (B) U.S.A., 605; (C) India, 605.

Right to exclude strangers, 605; 'Defined by Parliament by law', 606; Publication of Parliamentary proceedings in newspaper and by means of broadcasting, 599.

Contempt of Parliament:

The power to punish for contempt—

(A) England, 606; (B) U.S.A., 607; (C) Colonial Legislatures, 607; (D) Government of India Act, 1935, 607; (E) India, 607.

General consideration to guide the Legislature with respect to breach of privilege, 607.

What constitutes contempt of Parliament:

(A) England—

I. Contempt of the House itself, 608; Disclosure of secret sitting of the House, 604; Giving evidence as to proceedings in the House, 610.

Some matters not held to be contempt:

Disclosure of Budget proposals, 610; Statement by Minister outside the House while House in session, 611; Incorrect statement by a Minister, 611; Publication of Constituent's letter to Member, 611.

II. Contempt of a Committee of the House, 611.

III. Contempt in relation to Speaker, 612.

IV. Contempt in relation to a Member, 613.

V. Misconduct of a Member, 613.

VI. Contempt by and relating to witnesses, 614.

VII. Contempt by and relating to an officer of the House, 615.

VIII. Contempt by a stranger, 616.

(C) U.S.A., 616.

(B) India, 616.

Parliamentary Privilege and the Courts: (A) England, 617; (B) U.S.A., 619; (C) India, 619.

Is the Legislature or its officers subject to the jurisdiction of the Courts, 621; Can interim bail be granted in cases of arrest and detention under warrant of a Legislature, 622.

Whether the privileges should be codified, 622.

Procedure relating to breach of privilege, 624.

Questions of privilege as between the two Houses: (A) England, 626; (B) India, 627; Attendance of Members as witnesses before another House or Committee thereof, 627.

Effect of Prorogation and Dissolution on proceedings for contempt, 628.

Punishment for contempt: (A) England, 628; (B) India, 628.

Whether person arrested under warrant of Speaker must be produced before Magistrate, 631. Clause (4).

Extension of privileges to persons who are not members, 631.

106. Members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament by law and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Dominion of India.

Salaries and allowances of members.

OTHER CONSTITUTIONS

(A) *England*.—Since 1964,¹¹ the salary payable to a member of the House of Commons is £2,500 plus an allowance for Parliamentary expenses at the rate of £750/- per year. A member is not entitled to the salary until he has taken the oath. Besides the salary, a sessional allowance of £3/3 for every day on which the House sits and travelling expenses for travel between a member's residence and constituency as well as the House at Westminster are paid. An income-tax allowance is also offered for expenses incurred in the performance of their Parliamentary duties. There is also a provision for pension for a member and his family under the House of Commons Members Fund Act, 1957, subject to certain conditions.

The Leader of the Opposition gets a salary of £3,000/- plus an allowance for parliamentary expenses at the rate of £750/- per annum.¹¹

(B) *U.S.A.*—Art. I, s. 6 (1) says—

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."

Under a statute of 1946, the salary of members of either House of Congress is 15,000 dollars plus 2,500 dollars as an additional expense allowance, per annum. Besides, there are other free facilities.

(C) *Canada*.—The salaries and allowances of members of the two Houses differ.

(a) *Senate*.—A Senator receives a salary of 400 dollars per session plus a living allowance of 200 dollars a year,¹² in addition to travelling allowances, sickness and other benefits.

(b) *House of Commons*.—Though the salary and living allowance of a member of the Commons is the same as that of a member of the Senate, a member of the Commons has these additional benefits:

(i) The living allowance of 200 dollars per annum is tax free,—which means a substantial addition to the income.

(ii) The Members of Parliament Retiring Allowances Act, 1952, has provided for a contributory scheme for payment of retiring allowances to persons who had served as members of the House of Commons. This benefit is not available to Senators.

One noticeable feature of the system of payment of salaries to members of the Canadian Parliament is that attendance for a minimum number of days is insisted upon for payment of the full sessional salary and if the attendance falls below this minimum, deduction is made proportionately. Thus, the full amount payable for a session is not paid unless the session continues for at least 65 days, and a member attends at least 50 days, including days on which the House stands adjourned.¹²

(D) *Australia*.—Under the Parliamentary Allowances Act, 1959, a salary of £2,750¹³ per annum is payable to each member of the House of Representatives and Senate, in addition to a living allowance while in attendance at Canberra, and income-tax rebate. There is also a contributory pension scheme.

(E) *France*.—Art. 23 of the Constitution of the Fourth Republic provided—

"Members of Parliament shall receive payment fixed on the basis of the salary of a category of Civil Servants."

It is roughly about 280 dollars per month, with other benefits.¹⁴

(C) *Ceylon*.—The salaries of Members of the lower Chamber and upper Chamber are £540/- and £270/- per annum, respectively, with free travel and other concessions.

INDIA

Salaries and allowances of members of Parliament.

Under the Salaries and Allowances of Members of Parliament Act (XXX of 1954), as amended by Act 26 of 1964, a member of Parliament is entitled to a salary at the rate of Rs. 500/- per mensem during the whole term of his office plus an allowance at the rate of Rs. 31/- for each day during any period of residence on duty at the place where Parliament or a Committee thereof is sitting or where any other business connected with his duties as member of Parliament is transacted. Together with this, he is entitled to travelling allowance, free transit by railways and other facilities as prescribed by rules framed under the Act.

(12) Dawson, Government of Canada, 1949, pp. 395-6.

(13) (1960) Year Book of the Commonwealth of Australia, p. 65.

(14) Showell & others, Governments of Continental Europe, 1952, p. 100.

INDEX TO COMMENTS

ARTICLE 106.

Other Constitutions :

(A) England, 632 ; (B) U.S.A., 634 ; (C) Canada, 634 ; (D) Australia, 634 ; (E) France, 634.

India :

Salaries and allowances of members of Parliament, 634.

Legislative Procedure

Provisions as to introduction and passing of Bills.

107. (1) Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

(2) Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the People.

CLAUSES (1)-(2).

OTHER CONSTITUTIONS

(A) *England.*—Bills, other than money or appropriation bills may originate in either House. But by convention, bills affecting the privileges or proceedings of either House are usually introduced in the House concerned and bills dealing with the representation of the people originate in the House of Commons. The general rule is that a Bill is passed only if it is passed by both Houses either without amendments or with amendments which are agreed to by both Houses, after which the Bill is presented for the Royal assent. If a Bill is amended by the House to which it is sent by the originating House, the Bill is returned to the latter for consideration of the amendments and a compromise is then sought to be effected by communication between the Houses. If compromise fails, the Bill is lost.¹⁵

The above general statement must now be read subject to the Parliament Act, 1911, as amended in 1949 (*see* p. 484, *ante*), which has relegated the House of Lords to a subordinate position, and has deprived it of any power to throw out a measure which the Commons are determined to enact. It is to be noted that this Act applies only to Bills which are introduced in the House of Commons and then sent to the Lords. So, the foregoing general statement is still applicable to Bills originating in the House of Lords and sent to the Commons. Such Bills cannot be enacted unless the Commons agree to the Bill without amendment or with

(15) Keith, *Constitutional Law*, p. 103 ;
Hood Phillips, (1952), p. 161.

amendments which are acceptable to the Lords. The text of the Parliament Act, 1911, as amended in 1949, is as follows:

"Sec. 2.—(1) If any Public Bill (other than a Money Bill or a Bill containing any provisions to extend the maximum duration of Parliament beyond five years) is passed by the Commons in two successive sessions (whether of the same Parliament or not), and, having been sent to the Lords at least one month before the end of the session, is rejected by the Lords in each of these sessions, that Bill shall, on the second rejection by the Lords, unless the Commons direct to the contrary, be presented to the King for the Royal Assent and thereupon become an Act of Parliament without the consent of the Lords. But the foregoing provision is not to take effect unless one year has elapsed between the date of second reading in the first of the sessions in the Commons and the date of its passing the Commons in the second session."

The *procedure* for passage of a public Bill through either House is substantially the same, *viz.*, that it involves three readings:

(i) The *first reading* is also known as the 'Introduction'. The first reading is a formal step, at which no debate usually takes place. It starts with a motion for leave to introduce the Bill.¹⁶ Upon this motion being carried, the Bill is presented by the Minister or other member in charge of the Bill and the question is then put and carried 'that the Bill be read a first time and printed'. When printed, the Bill is circulated to members.

(ii) At the next stage, the member in charge of the Bill moves that the 'Bill be read a second time' and thereupon the main *principles* of the Bill are discussed. The question is then put—'the Bill be read a second time', and if this motion be carried, the Bill is said to have passed its *second reading*.

After the second reading follows what is known as the *committee stage*. The Bill is now sent to a Standing Committee of the House, unless the House orders it to be referred to a Committee of the whole House or a Select Committee. It is in the Committee that the detailed consideration of the provisions of the Bill takes place, *clause by clause*, and amendments are made. The Bill is then 'reported' to the House with such amendments as the Committee may have made.

(iii) If a Bill has passed through the Committee without amendment, it is at once put down for the *third reading*.

But if the Bill has been amended by the Committee, the report is considered by the House. At this stage, known as the 'report stage', new clauses and amendments proposed by the Committee are considered and the House may also further amend the Bill, subject to certain restrictions. When the House has considered the Bill on the report, it is read a *third* time and passed.

During the third reading, only alterations of language—not affecting the substance of the Bill—are allowed, but the Bill as a whole may be opposed.

After the third reading, the Bill is sent to the other House.

(B) *U.S.A.*—All bills for 'raising revenue' must originate in the House of Representatives [Art. I, Sec. 7 (1)]. Save this exception as regards revenue legislation, the powers of the two Houses in legislation are absolutely equal, and a Bill is presented for the signature to the President only if the Bill has been passed by both Houses in the same form [Art. I, Sec. 7 (2)]. (See further, under Art. 108, p. 657, below).

(C) *Australia*—See Sec. 53 of the Australian Constitution Act, reproduced under Art. 109, p. 674, *post*.

(D) *Canada*—Except in regard to money Bills (see under Art. 109, *post*), the two Houses have equal powers of legislation. In practice most Public Bills originate in the House of Commons, although there has been a marked increase recently in the introduction of Public Bills in the Senate. Private Bills usually

(16) In modern times, the majority of Bills are presented, under S. O. 35 (1), without any formal motion for leave to introduce. Under S.O. 35 (1), a member may present a Bill simply by giving notice. Thereupon it is placed on the notice paper,

and when the Speaker calls the name of the Member who has given notice, the Clerk of the House reads the short title of the Bill. This finishes the first reading [May, 16th Ed., p. 516].

originate in the Senate. As to disagreement between the two Houses, see under Art. 108, *post*.

(E) *Eire*.—Art. 20 of the Constitution of 1937, lays down—

"(1) Every bill initiated in and passed by Dail Eireann shall be sent to Seanad Eireann and may, unless it be a money bill, be amended in Seanad Eireann and Dail Eireann shall consider any such amendments.

(2) 1. A bill other than a money bill may be initiated in Seanad Eireann, and if passed by Seanad Eireann, shall be introduced in Dail Eireann.

2. A bill initiated in Seanad Eireann if amended in Dail Eireann shall be considered as a bill initiated in Dail Eireann.

(3) A bill passed by either House and accepted by the other House shall be deemed to have been passed by both Houses."

(F) *Fifth French Republic*.—The position of the Senate under the new Constitution has been raised to an equal level with the National Assembly but for the 'disagreement' provisions.

Excepting Finance Bills (which may be introduced only in the National Assembly), other Bills may be initiated in either House [Art. 40]. After examination and report by a Committee, there is a general discussion of the Bill in the initiating House [Arts. 43-4]. After the Bill is passed by that House, with or without amendments, it is transmitted to the other House for the adoption of the Bill in its identical text [Art. 45]. If the House to which the Bill is transmitted passes the Bill without amendment and with the identical text as it was received, it is put up before the President for promulgation.

In case the House to which it is transmitted fails to pass the Bill with an identical text, the Prime Minister *has the right* to demand a conference committee of both Houses. If that conference committee fails to effect agreement, Government may ask each House to go through the Bill once again. If the disagreement continues even at this second reading, Government *may* ask the National Assembly to exercise its final power, in which case, the Bill as passed finally by the National Assembly, shall be put up for promulgation by the President [Art. 10]. (This will be more fully explained under Art. 108, *post*).

Normally, thus, the powers of the Senate in legislation are equal to those of the National Assembly because no Bill can be passed unless the Bill is passed by it with or without amendments accepted by it. In case it rejects a Bill which has been passed by the Assembly, the Bill fails, unless the Government elects to use its power to remove the deadlock under Art. 10. It is *optional* with the Government to leave the measure to the final decision of the Assembly, overriding the wishes of the Senate, and the 'deadlock' provision is not self-operative.

(G) *Japan*.—Normally, both Houses have equal powers on Bills other than the 'Budget' and Art. 59 says—

"A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution."

The exceptional provisions relate to the resolution of a deadlock between the two Houses, as to which see under Art. 108, *post*.

(H) *Ceylon*.—The relevant provisions of the Ceylon (Constitution) Order in Council, 1946, are—

"Sec. 31 (1).—A Bill, other than a Money Bill, may be introduced in the Senate.

Sec. 32 (1).—A Bill shall not be deemed to have been passed by both Chambers unless it has been agreed to by both Chambers, either without amendment or with such amendments only as are agreed to by both Chambers.

(2) A Bill which has been passed by the Senate with any amendment which is subsequently rejected by the House of Representatives shall be deemed not to have been passed by the Senate."

The provision in sec. 32 (2) is to be read with sec. 34.

(I) *Government of India Act, 1935*.—Art. 107 of our Constitution reproduces Sec. 30 of the Act of 1935, with nominal changes only.

INDIA

CLAUSE (1).

Introduction of other than financial bills.

This clause provides that a Bill other than financial, may be introduced in either House of Parliament. The expression "and other financial Bills"¹⁷ makes a departure from the English practice. In *England*, only 'Money Bills' technically so called cannot be introduced in the House of Lords. Other Bills including financial provisions are occasionally introduced in the House of Lords with the financial provisions in the bracket and the House passes the other clauses of the Bill as if the financial clauses were not there.

But under *our* Constitution, while Art. 109 (1) says that Money Bills shall not be introduced in the Council of States, Art. 117 (1) provides that a Bill or amendment making provision for any of the matters specified in Art. 110 also shall not be introduced in the Council of States. So, under *our* Constitution the House of the People shall have the sole right of initiation of any Bill including financial provisions relating to any matter enumerated in Art. 110 (1), even though it is not a 'Money Bill' exclusively dealing with such matter, within the definition given in Art. 110 (1).

Classification of Bills.

A project of law during its passage through Parliament and until it receives the assent of the head of the State is called a 'Bill'. In *our* Parliament, the life of a Bill starts with its publication in the Official Gazette (which is equivalent to a motion for leave to introduce the Bill) or a formal leave to introduce the Bill in either House of Parliament.¹⁸ The Bill becomes an 'Act' when it receives the assent of the President, under Art. 111 (see *post*).

Before dealing with the procedure for the passing of Bills, it is necessary to distinguish between the different kinds of Bills because the procedure differs in some respect or other, according to the nature of the Bill.

I. Public and Private Bills.

In *England*, Bills are either Public or Private. (a) Public bills are those that deal with measures affecting the community or altering the general law, e.g.,; Representation of the People Act. (b) Private Bills are measures dealing with *local* matters such as railways, canals or drainage; or matters concerning *private persons* such as marriage or divorce, and bills giving special powers to municipal corporations etc. The procedure relating to the two kinds of Bills differs widely, particularly in so far as the procedure for Private Bills assume a quasi-judicial character.

Under *our* Constitution, there is no distinction between public and private bills as in *England*. All Bills other than Money Bills have the same procedure, as provided in Arts. 107-8, whether such Bills extend to the territory of the whole of India or any part thereof or relate to the entire population or a class or group of persons.¹⁹ While in *England*, Private Bills are initiated by petitions from the interested persons and are never introduced by the Government, in *India*, though there is provision for receiving petitions by Parliament and there is a Committee on Petitions in either House,²⁰ there is no system of initiation of legislation by such petition. It is for the Government or a private Member to introduce a Bill

(17) As to the distinction between these Bills, see *below*.

(18) Rr. 64-5 of the Rules of the House; rr. 61-62 of the Rules of the Council.

(19) It may also be remembered in this connection that in *India*, though a Bill may relate to a group of individuals or, in exceptional cases, one individual only, *ad hoc*

legislation against a particular individual in the nature of a Bill of Attainder or a legislation to settle private disputes between individuals which are the proper subject of an adjudication by a court of law, is not permissible by reason of Art. 14 of the Constitution [see Vol. I, pp. 429-432].

(20) Rr. 306-7 of the Rules of the House; rr. 147-153 of the Council.

in the usual manner when though the proposal for legislation may have arisen out of grievances disclosed by some petition.

In *India*, thus, all Bills are Public Bills.

II. *Government and Private Members' Bills.*

A Bill introduced by a private Member (as distinguished by a member of the Council of Ministers) is to be distinguished from a private Bill, as explained above. A member of Parliament who is not a member of the Government is called a 'private' or 'unofficial member'.

In both Houses of *our* Parliament, the procedure relating to Private Members' Bills differs from that relating to Government Bills. Even as between the two Houses, there are differences as to the procedure relating to Private Members' Bills. These will be discussed presently.

During the first decade of the working of the Constitution not more than two Private Members' Bills have earned the credit of becoming an Act, though the number of such Bills introduced has not been insignificant. The reasons for this conspicuous failure are—

(a) Lack of time allotted to private members' business;

(b) Lack of expert drafting assistance, and lack of knowledge on the part of a private member of the comprehensive legislative programme of the Government, by reason of which Government, not infrequently, presses upon the private Member to withdraw the Bill upon the assurance that a more comprehensive and effective Bill will be brought by the Government itself.

III. *Money Bills, Financial Bills and Other Bills.*

It is clear from the opening words of Art. 107 (1) that the procedure laid down in this Article is applicable to all Bills, saving the special procedure relating to two categories, namely, 'Money Bills' and 'other financial Bills'. In other words, Bills are of three classes—

(a) Money Bills,²¹—the special procedure relating to which is given in Arts. 109-110;

(b) Financial Bills,²¹ not being Money Bills,—the special procedure for which is laid down in Art. 117;

(c) Bills in general, which are neither 'Money Bills' nor 'Financial Bills'.

The distinction between Money Bills and Financial Bills which are not Money Bills will be fully explained under Art. 117, *post*.

It is to be noted that—

Cl. (1) of Art. 107 is not applicable either to a Money Bill or a Financial Bill, because these can be introduced only in the House of the People [Arts. 109 (1); 117 (1)].

Cl. (2) of Art. 107 is not applicable to a Money Bill, because special provision relating to disagreement with respect to Money Bills is provided in cls. (4)-(5) of Art. 109. But there is no such special 'disagreement' procedure relating to financial Bills other than Money Bills. Such Bills cannot, therefore, be passed unless they are passed by both Houses in an agreed form.

Cls. (3)-(5) of Art. 107, relating to lapse of Bills on prorogation or dissolution are applicable to *all* Bills, including Money and Financial Bills.

CLAUSE (2).

Passing through both Houses.

The procedure regarding Money Bills is separately dealt with in Art. 109.

As stated above, the present clause refers to all Bills excluding *Money Bills*, but including 'Financial Bills other than Money Bills'. When a Bill is passed in one House, and then sent to another,—the latter may take one of several courses :

(21) The Annual Finance and Appropriation Bills, for instance, are Money Bills, but the Dadra and Nagar Haveli Bill, 1961 was

a Financial Bill other than a Money Bill, because it contained provisions, the administration of which would involve expenditure.

(i) If the latter House agrees to the Bill without amendment, it will be deemed to have been passed by both Houses of Parliament and at once presented to the President for his assent (Art. 111).

(ii) It may reject the Bill altogether. In such a case, the provision of Art. 108 (1) (a) as to joint sitting *may* be applied by the President.

(iii) It may pass the Bill with amendments. The Bill will then be returned to the other House. If the House which originated the Bill accepts the amendments, the Bill will be presented to the President for his assent (Art. 111). If, however, the originating House cannot agree to the amendments, and no final agreement between the Houses is reached by means of negotiation, the President *may* apply the provision as to joint sitting [Art. 108 (1) (b)].

(iv) It may take no action on the Bill, *i.e.*, keep it lying on its table without returning it to the originating House. In such a case, if 6 months have elapsed since the date of its reception of the Bill, the President *may* summon a joint sitting [Art. 108 (1) (c)].

Thus, it appears that up to the stage of joint sitting, the two House of *our* Parliament shall have equal powers as regards Bills other than Money Bills. At the joint sitting, of course, the House of the People would gain a predominance owing to its numerical strength.

(A) Legislative Procedure in the House of the People.

Ch. X of the Rules of Procedure and Conduct of Business in the House of the People lays down the rules relating to the passage of a Bill through the House of the People. The Procedure is mainly similar to that in the English House of Commons (p. 616, *ante*), with the following special features:

(i) At the introduction stage, the motion for leave to introduce may be dispensed with by having the Bill published in the Gazette²² at the direction of the Speaker [R. 64].

(ii) In the House of Commons, every Bills goes to a Committee for consideration of the clauses of the Bill. But in the House of the People, it is *not obligatory* to refer a Bill to a Committee. Instead, the member in charge of the Bill may move that the Bill be taken into consideration at once [R. 74 (i)]. When a motion that the Bill be taken into consideration has been carried, the Speaker may submit the Bill to the House, clause by clause.

(iii) Of course, the member in charge may, instead, move that the Bill be referred to a Select Committee of the House or a Joint Committee of both Houses, and if such a motion is carried, the Bill is referred to a Committee. Such motion may also be made by some other member by way of amendment to a motion that the Bill be taken into consideration [R. 75(2)].

(iv) There is also an alternative provision: instead of moving for consideration of the Bill or reference to a Committee, the member in charge may move that the Bill be 'circulated' for the purpose of eliciting public opinion thereon. Such motion may also be made by way of amendment [R. 75 (2)].

The more important of the relevant rules may now be examined:

I. Bills Originating in the House.

(A) Introduction and publication of a Bill.

(i) *Publication before introduction.*—The Speaker, on request being made to him, may order the publication of any Bill in the Gazette, although no motion has been made for leave to introduce the Bill. In that case, it shall not be necessary

(22) There is no provision for such publication in the House of Commons, but no

motion for leave is required if simply notice of the Bill is given.

to move for leave to introduce the Bill, and, if the Bill, is afterwards introduced²³ it shall not be necessary to publish it again [R. 64].

(ii) *Notice of motion for leave to introduce a private member's Bill.*—(1) Any member other than a Minister, desiring to move for leave to introduce a Bill, shall give notice of his intention, and shall, together with the notice, submit a copy of the Bill and of the Statement of Objects and Reasons which shall not contain any argument.

(2) If the Bill is a Bill which under the Constitution cannot be introduced without the previous sanction or recommendation of the President, the member shall annex to the notice such sanction, or recommendation conveyed through a Minister, and the notice shall not be valid unless this requirement is complied with.

(3) The period of notice of a motion for leave to introduce a Bill shall be one month unless the Speaker allows the motion to be made at shorter notice [R. 65].

(4) A Bill involving expenditure shall be accompanied by a financial memorandum which shall invite attention to the clauses involving expenditure and shall give an estimate of recurring and non-recurring expenditure involved in case the Bill is passed into law. Clauses or provisions involving expenditure shall be printed in thick type or in italics [R. 69].

(5) A Bill involving proposals for the delegation of legislative power shall be accompanied by a memorandum explaining such proposals and drawing attention to their scope and stating also whether they are of normal or exceptional character [R. 70].

(iii) *Motion for leave to introduce a Bill.*—If a motion for leave to introduce a Bill is opposed, the Speaker, after permitting, if he thinks fit, a brief explanatory statement from the member who moves²⁴ and from the member who opposes the motion,²⁵ may, without further debate, put the question thereon:

Provided that where a motion is opposed on the ground that the Bill initiates legislation outside the legislative competence of the House, the Speaker may permit a discussion thereon [R. 72].

(iv) *Publication after introduction.*—As soon as may be after a Bill has been introduced, the Bill, unless it has already been published,¹ shall be published in the Gazette [R. 73].

(B) *Motions after Introduction.*

(i) *Motions after introduction of a Bill.*—When a Bill is introduced, or on some subsequent occasion, the member in charge of the Bill may make one of the following motions in regard to the Bill, namely:—

(a) that it be taken into consideration; or (b) that it be referred to a Select Committee; or (c) that (except in the case of a Money Bill) it be referred to a Joint Committee of the Houses with the concurrence of the other House; or (d) that it be circulated for the purpose of eliciting opinion thereon:²⁻³

Provided that no such motion shall be made until after copies of the Bill have been made available for the use of members, and that any member may

(23) When a Bill has been published, the leave stage is dispensed with, so that when the Bill is subsequently introduced in the House, there is no motion before the House and the introduction cannot accordingly, be opposed by any other member [L.A. Deb., 18-8-26, p. 66].

(24) In the absence of the member in whose name the Bill stands, the motion for leave to introduce may be moved by some other member, duly authorised [C.A. (Legis.) Deb., 26-2-48, p. 1286] cf. r. 93 of the Rules of the House].

(25) No other member may speak at this stage [L.A. Deb., 28-3-44, p. 1629].

(1) In other words, fresh publication after introduction is not required where a Bill has been already published before introduction under r. 64.

(2) The House is committed to the principle of the Bill once it has passed either of the motions (a), (b) or (c). But not so if a motion for circulation for eliciting opinion is passed [L.A. Deb., 10-1-22, p. 1452].

(3) A motion for circulation of a Bill amongst a particular section of the people was allowed in case on the ground that only that section was interested in the Bill [L.A. Deb., 24-8-33, p. 210].

object to any such motion being made, unless copies of the Bill have been so available for two days before the motion is made, and such objection shall prevail, unless the Speaker in exercise of his power to suspend this sub-rule allows the motion to be made [R. 74].

(ii) *Scope of debate and amendments.*

(1) On the day on which any of the aforesaid motions is made, or on any subsequent day to which the discussion is postponed, the principles of the Bill and its general provisions may be discussed, but the details of the Bill must not be discussed further than is necessary to explain its principles [R. 75(1)].

(2) At this stage no amendment to the Bill may be moved but—

(a) if the member in charge of the Bill moves that the Bill be taken into consideration⁴ any member may move as an amendment that the Bill be referred to a Select Committee or a Joint Committee⁵ or be circulated for the purpose of eliciting opinion thereon before a date to be mentioned in the motion, or

(b) if the member in charge of the Bill moves that the Bill be referred to a Select Committee or a Joint Committee any member may move as an amendment that the Bill be circulated for the purpose of eliciting opinion.

(3) Where a motion that the Bill be circulated for the purpose of eliciting opinion is carried and the Bill is circulated in accordance with that direction and opinions have been received thereon before the date mentioned in the motion, the member in charge of the Bill, if he wishes to proceed with the Bill thereafter, must move that the Bill be referred to a Select Committee or a Joint Committee, unless the Speaker allows a motion to be made that the Bill be taken into consideration.

(4) But if an amendment or a motion for reference to a Select Committee or a Joint Committee has been moved, any member may move that the House give instructions to the Select Committee or the Joint Committee to which the Bill is to be referred, to make some particular or additional provision in the Bill and, if necessary or convenient, to consider and report on amendments which may be proposed to the original Act, if any, which the Bill seeks to amend [R. 93].

(5) No motion that a Bill be taken into consideration or be passed shall be made by any member other than the member in charge of the Bill and no motion that a Bill be referred to a Select Committee or a Joint Committee or be circulated for the purpose of eliciting opinion thereon shall be made by any member other than the member in charge of the Bill, except by way of amendment to a motion made by the member in charge of the Bill [R. 76].

Effect of passing a motion for consideration.—When a motion that a Bill be taken into consideration is passed, the House becomes committed to the principle of the Bill,⁶ and it must ordinarily be followed by a clause to clause consideration of the Bill [R. 88]. It does not, however, preclude the members from introducing amendments, even affecting principles, during the clause to clause consideration stage.⁷

(C) *Report by Select Committee.*

(i) *Report by Select Committee.*—(1) As soon as may be after a Bill has been referred to a Select Committee, the Committee shall consider the Bill and report thereon within the time fixed or extended by the House, or within three months from the date of adoption of the motion for reference to the Committee where the House has not fixed any time for presentation of the report [R. 303].

(4) When a motion that the Bill be taken into consideration is moved, an amendment that the Bill be taken into consideration after the lapse of a particular period of time is *not* in order [L.A. Deb., 15-8-38, pp. 490-7].

(5) On a motion for reference to a Select Committee, the House can discuss the prin-

ciples of the Bill, because after either of these motions is carried, the House will be committed to the principle of the measure [L.A. Deb., 4-2-25, p. 745; vide also r. 70 of the Rules of the Council, r. 78 of the Rules of the House].

(6) (1952) H. P. Deb., Vol. V, 329-31.

(7) (1932) L. A. Deb., Vol. I, 185.

(2) The report, with the Minutes of dissent, if any, shall be presented to the House by the Chairman or in his absence by a member of the Committee. [R. 304].

(ii) *Procedure after presentation of the Report.*—(1) The report of a Select Committee may be preliminary or final.

(2) After the presentation of the *final* report, the member in charge of the Bill may move—

(a) that the Bill as reported by the Select Committee be taken into consideration, but any member may object to its being so taken into consideration if a copy of the report has not been available for the use of members for two days, and such objection shall prevail, unless the Speaker in exercise of his power to suspend this rule allowed the report to be taken into consideration; or

(b) that the Bill be re-committed⁸ either—(a) without limitation, or (b) with respect to particular clauses or amendments only, or (c) with instructions to the Select Committee to make some particular additional provision in the Bill; or

(c) that the Bill as reported by the Select Committee be circulated⁹ or re-circulated, as the case may be, for the purpose of obtaining opinion or further opinion thereon.

(3) If the member in charge of the Bill moves that the Bill be taken into consideration, any member may move as an amendment that the Bill be re-committed or be circulated for the purpose of obtaining opinion or further opinion thereon [R. 77].

(4) *Consideration of the Report of the Select Committee.*—If the motion is that the Bill as reported by the Select Committee be taken into consideration, the debate is confined to a consideration of the report of the Committee or the matters referred to in that report. Alternative suggestions *consistent* with the principle of the Bill may also be made.¹⁰⁻¹¹

But the principles of the Bill can no longer be discussed, because by carrying a motion to refer the Bill to a Select Committee, the House stands committed to the principle of the Bill.¹²

(D) *Passing of a Bill.*

Motion that a Bill be passed.—(1) When a motion that a Bill be taken into consideration has been carried and no amendment of the Bill has been made, or after the amendments are over, the member in charge may move that 'the Bill may be passed'.¹³

(2) To such a motion no amendment may be moved unless the amendment is either *formal, verbal or consequential* upon any amendment of the Bill made after the Bill was taken into consideration [R. 93].¹⁴

Scope of Debate on the motion.—The discussion on a motion that a Bill be passed shall be confined to the submission of *argument* either in support of the Bill or for rejection of the Bill. In making his speech a member shall not refer

(8) The House has the power to constitute a fresh Committee at this stage and to recommit the Bill to it [L.A. Deb., 19-2-26, p. 1546].

(9) Upon such a motion, no further discussion of the principles of the Bill can be allowed. The only question before the House is whether the Bill, as reported by the Select Committee should be considered at once or circulated for opinion [L.A. Deb., 2-6-24, pp. 2448-53]. It is not relevant to refer to the history of the measure in the debate at this stage [L.A. Deb., 24-7-23, p. 4960].

(10) R. 78 of the Rules of the House; see also r. 94 of the Rules of the Council.

(11) It is open to the House to discuss and restore clauses which may have been omitted by the Select or Joint Committee [L.A. Deb., 3-2-23, pp. 1858-9].

(12) L.A. Deb., 4-2-25, p. 745.

(13) In *England*, a formal motion "That the Bill do pass" has become obsolete. The Bill is sent to the other House after the motion "That the Bill be now read the *third time*" is carried [Campion, p. 224].

(14) See also R. 109 (4) of the Rules of the Council.

to the details of the Bill further than is necessary for the purpose of his arguments which shall be of a general character [R. 94].¹⁴⁻¹⁵

(E) *Transmission of the Bill to the Council.*

Transmission with certificate of Secretary.—When a Bill has been passed by the House of the People as above, it shall be certified to that effect on its top, by the Secretary of the House, and then transmitted to the Council of States for its concurrence, with a message to that effect [R. 96].

II. Bills originating in the Council and transmitted to the House.

So far we have discussed the procedure in the House of the People for the passage of a Bill which had been introduced in that House itself. The procedure to be followed in the Council of States as regards a Bill so passed by the House and transmitted to the Council, will be discussed hereafter.

Under the present head we are discussing the reverse process, namely, the procedure to be followed by the House when a Bill, originating in and passed by the Council, is received by it.

Laying on the Table and notice.—When a Bill originating in the Council is transmitted, after passage, to the House, the first step in the House is to lay it on the Table [R. 114].

At any time after it has been so laid on the Table of the House, any Minister, in case it is a Government Bill, may give notice of his intention to move that the Bill be taken into consideration. If it is a private member's Bill, any Member may give such notice [R. 115].

Motion for consideration.—On the day on which the motion for consideration is set down in the list of business which shall, unless the Speaker otherwise directs, be not less than two days from the receipt of the notice, the member giving notice may move that the Bill be taken into consideration [R. 116].

On the day on which such motion is made or on any subsequent day to which the discussion is postponed, the principle of the Bill and its general provisions may be discussed, but the details of the Bill shall not be discussed further than is necessary to explain its principle [R. 117].

Reference to Select Committee.—When a motion that the Bill be taken into consideration is moved, any member may, if the Bill has not already been referred to a Joint Committee of both the Houses, move as an amendment that the Bill be referred to a Select Committee and, if such motion is carried, the Bill shall be referred to a Select Committee, and the rules regarding Select Committees on Bills originating in the House shall then apply [R. 118].

Passing of the Bill.—If the motion that the Bill be taken into consideration is carried, the Bill shall be taken into consideration clause by clause and the provisions of the rules of the House regarding consideration of amendments to Bills and the subsequent procedure in regard to the passing of Bills shall apply [R. 119].

Return of Bill to the Council.

(a) If the Bill is passed without amendment, a message shall be sent to the Council intimating that the House has agreed to the Bill without any amendment [R. 120].

(b) If the Bill is passed with amendments, the Bill shall be returned with a message asking the concurrence of the Council in the amendments [R. 121].

(15) Since the House is competent to reject a Bill even at the third reading, it is open to a member to comment on the Bill as a whole. But he must not repeat the discussion which has already taken place or

go into details of the Bill. He must now confine himself to supporting or opposing the Bill as a whole [L.A. Deb., 28-2-46, p. 1691; 24-2-32, p. 1154].

Consideration of the Amendments.—If a motion that the amendments be taken into consideration is carried, the Speaker shall put the amendments to the House in such manner as he thinks most convenient for their consideration. An amendment relevant to the subject-matter of an amendment made by the Council may be moved, but no further amendment shall be moved to the Bill, unless it is consequential upon, or an alternative to, an amendment made by the Council [R. 124].

The House may either agree to the Bill as originally passed by the Council or as further amended by the Council, as the case may be, or may return the Bill with a message that it insists on an amendment or amendments to which the Council has disagreed [R. 125].

Final disagreement between the two Houses, necessitating application of Art. 108 of the Constitution.—If a Bill is returned with a message intimating that the House insists on amendments to which the Council is unable to agree, the Houses shall be deemed to have finally disagreed [R. 126] as to the amendments (within the meaning of Art. 108 (1) (b), *post*).

Rejection of the Bill by the House, either during its first or second journey.—See under Art. 108 (1) (a), *post*.

III. Returned Bill received Back in the House from the Council with disagreement to the amendments proposed in the House, or with fresh amendments.

Under the preceding head we have discussed the procedure followed in the House when a Bill originating in, and passed by, the Council is received in the House.

(a) If the House passes it unamended, there is a concurrence of both Houses and the Bill must be presented for the President's assent.

(b) If, however, the House passes the Bill *with amendments*, there has been no such concurrence and the Bill must be *returned* to the Council for its concurrence as to the amendments made in the House.

(i) If the Council agrees to the amendments made in the House, there, again, is a concurrence as between the two Houses and the Bill must be presented to the President for his assent.

(ii) If, however, the Council does not agree to the amendments made in the House or introduces fresh amendments to the Bill as passed by the House, there is a case of disagreement, so that the Bill must be transmitted by the Council to the House for the *second time*.

It is the procedure to be followed in the House in respect of the returned Bill in its second journey to the House that we are now discussing:

Laying on the Table and motion for consideration.—If the Council disagrees with the amendments made by the House with further amendments, or proposes further amendments in place of amendments made by the House, the Bill as further amended shall on receipt by the House be laid on the Table.

After the amended Bill has been laid on the Table, any Minister in the case of a Government Bill, or in any other case, any member may, after giving two days' notice, or with the consent of the Speaker without notice, move that the amendments be taken into consideration. [Rr. 122-3].

(B) Legislative Procedure in the Council of States.

I. Bills originating the Council.

The Rules of the Council¹⁶ are substantially the same as the corresponding Rules of the House and the procedure in the Council relating to Bills originating in the Council is similar.

⁽¹⁶⁾ Rr. 61 *et seq.* of the Rules of the Council.

After the Bill is passed by the Council it is transmitted to the House with a message, for its concurrence [R. 97].¹⁷

II. Procedure in the Council relating to a Bill which is transmitted to it by the House of the People.

When a Bill which originated in the House of the People is passed by the House and is transmitted by it to the Council, its course in the Council is as follows:¹⁸

(a) *Motion for consideration*: At any time after such a Bill is laid on the Table of the Council, any Minister in the case of a Government Bill, or, in any other case, any member may give notice of his intention to move that the 'Bill be taken into consideration'.

(b) *General discussion*: On the day on which the motion for consideration is made or on any subsequent date to which the discussion is postponed, the principle of the Bill and its general provisions may be discussed, but the details of the Bill shall not be discussed further than is necessary to explain its principle.

(c) *Consideration and passing*: If the motion that the Bill be taken into consideration is then carried, the Bill shall be taken into consideration, clause by clause, and the Bill will then be passed like Bills originating in the Council.

(d) *Reference to Select Committee*: Any member may move an amendment to the Motion that the 'Bill be referred to a Select Committee' and the subsequent procedure shall then be the same as in the case of Bills originating in the Council which are referred to a Select Committee.

(c) As already stated at p. 644, *ante*, when a Bill is transmitted by one House to another, the latter may take one of four courses:

(i) It may pass the Bill *without amendment*. [In such a case, a message is sent to the originating House that the Bill has been passed without amendment by the House to which it was transmitted].¹⁹

(ii) It may pass the Bill *with amendments*.

When the Bill is passed in the Council with amendments, it shall be returned to the House with a message asking the concurrence of the House to the amendments.

If the House disagrees with the amendments made by the Council or any of them or agrees to any of the amendments made by the Council with *further* amendments or proposes further amendments in place of amendments made by the Council, the Bill will again be transmitted to the Council and then laid on the Table of the Council.

Thereafter a Minister or a member (as the case may be) may move that 'the amendments be taken into consideration'. If this motion is carried, the Chairman shall put the amendments to the Council for consideration.

The Council may then—(a) agree to the Bill as originally passed in the House, or (b) agree to the Bill as further amended by the House, or (c) return the Bill to the House with a message that it insists on an amendment or amendments to which the House has disagreed.

In case (c), the Houses shall be deemed to have finally 'disagreed' as to the amendments, in which case, the procedure for joint sitting under Art. 108 may be applied by the President.

(iii) It may *reject* the Bill.

A Bill is deemed to have been rejected by the Council if any of the following motions moved in the Council with respect to the Bill is negatived by the Council:

(a) that the Bill be taken into consideration;

(b) that the Bill be referred to a Select Committee;

(17) For the procedure in the House after such transmission, see p. 634, *ante*.

(18) Rr. 121-134 of the Rules of the Council.

(19) R. 127 of the Rules of the Council.

(c) that the Bill as reported by the Select Committee be taken into consideration ;

(d) that the Bill or the Bill as amended, be passed.²⁰

In case of rejection, the President may resort to the provision for joint sitting in Art. 108.

(iv) If no member of the Council moves that the Bill be taken into consideration, there is a virtual rejection of the Bill by the Council, in which case also, the President may resort to Art. 108, after 6 months have elapsed from the date of receipt of the Bill by the Council.

Authentication of Bills.

After a Bill has been passed by both Houses, it must be authenticated by the House or the Council by which it was passed in the last instance and in whose possession the Bill is, before it is presented to the President. In the case of the House, the Bill has to be authenticated by the signature of the Speaker, and in the case of the Council, by the signature of the Chairman. In either case, the authentication can be performed by the respective Secretary, in case of urgency, when the Speaker or the Chairman may be absent from New Delhi.²¹

Procedure relating to a Bill returned by the President for reconsideration, under Art. 111.—See under Art. 111, *post*.

Special Procedure relating to Private Members' Bills.

The distinction between a Government Bill and a Private Member's Bill has been already explained (p. 638, *ante*). The special incidents of a Private Member's Bill, which cause deviations from the general procedure relating to Bills as stated in the foregoing pages, may now be discussed, particularly because the procedure relating to such Bills differs as between the two Houses, in some respects:

(A) *In the House of the People:*

(a) While Government Bills are examined by the Parliamentary Affairs Committee of the Cabinet, Private Members' Bills are examined by the Committee on Private Members' Bills.²²

(b) While in the case of Government Bills, the time that should be allocated for its discussion is recommended by the Business Advisory Committee of the House,—in the case of Private Members' Bills, it is the Committee on Private Members' Bills which does this function.

A private Member's Bill may be introduced or discussed only on a day allotted for 'private members business', and as amongst such Bills *inter se*, there is an order of precedence according to the stage of progress.²³

(c) While a Government Bill is usually introduced by a publication in the Official Gazette, in the case of a private Member's Bill, the Member must give a notice for leave to introduce it, with a copy of the Bill and a statement of its Objects and Reasons and then formally move for leave to introduce the Bill. The Bill is introduced only after such motion is carried.²⁴

(d) While in the case of Government Bills, the question of precedence amongst the Bills is determined by the Parliamentary Affairs Committee of the Cabinet,—in the case of Private Members' Bills, this is determined as follows:

(1) On a day allotted for the disposal of private members' Bills, the Bills are disposed of in the following order of precedence:²⁵

(a) Bills in respect of which the motion is that leave be granted to introduce the Bill.¹

(20) R. 134 of the Rules of the Council.

(21) R. 128 of the House, r. 135 of the Council.

(22) Rr. 40-50 of the Rules of the House.

(23) Rr. 26-7 of the Rules of the House.

(24) Rr. 65, 72 of the Rules of the House.

(25) R. 27 of the Rules of the House.

(1) In the Council, such Bills are eighth in the order of precedence.

(b) Bills returned by the President with a message under Art. 111 of the Constitution.

(c) Bills which have been passed by the Council and returned by the House with amendments.

(d) Bills which have been passed by the Council and transmitted to the House.

(e) Bills in respect of which a motion has been carried that the Bill be taken into consideration.

(f) Bills in respect of which the Report of a Joint or Select Committee has been presented.

(g) Bills which have been circulated for the purpose of eliciting opinions.

(h) Bills introduced and in respect of which no further motion has been made or carried.

(i) Other Bills.

(2) The relative precedence of Bills falling under any of the different clauses above is, generally speaking, determined by ballot, subject to the following exceptions:

(i) Bills falling under cl. (a), i.e., Bills which are to be introduced, are entered in the List of Business in the order in which notices of the motion to introduce have been received in point of time.

(ii) Bills coming under cl. (h), i.e., Bills which have been already introduced but in respect of which no further motion has been made or carried, have the following order—

(a) If the Committee on Private Members' Bills has not classified such Bills as category A or B, they will be placed in the List of Business in the order determined by ballot.

(b) If the Committee has classified such Bills, category A shall have precedence over category B and within each category, the order shall be determined by ballot.

(c) It is within the competence of the speaker to make variations in the order of precedence stated above.

(d) A private Member's Bill is removed from the Register of Bills pending in the House as soon as the member in charge becomes a Minister, because the private Member who introduced the Bill has ceased to be a private member.²

Committee on Private Members' Bills. —As stated already, in the House of the People, this Committee has to deal with Private Members' Bills just as the Parliamentary Affairs Committee of the Cabinet deals with Government Bills.

After a private Member's Bill is introduced, it is referred to the Committee on Private Member's Bills and Resolutions, for the purpose of examining and classifying such Bills according to "their nature, urgency and importance" and recommending the allocation of time for the discussion of such Bills during its various stages in the House.³

The functions of the Committee on Private Members' Bill are—

(i) To examine all Bills introduced by private members, seeking to amend the Constitution,—*before* a motion for leave to introduce the Bill is included in the list of business of the House.

(ii) To examine Private Members' Bills relating to all matters other than constitutional amendment, *after* they are introduced and before they are taken up for consideration in the House and to classify them according to their nature, urgency and importance into two categories, category A and category B. For the arrangement of business in the House in respect of Private Members' Bills, Bills classified by the Committee as category A shall have precedence over those which are classified as category B. The relative precedence amongst Bills under each category will be determined by ballot.

(2) R. 113 of the Rules of the House.

(3) R. 294 of the Rules of the House.

(iii) To recommend the time that should be allocated for the discussion of the stages of each private member's Bill.

(iv) To examine every private member's Bill which is opposed in the House on the ground that the Bill initiates legislation outside the legislative competence of the House and the Speaker considers such objection *prima facie* tenable.

(v) To perform any other function relating to private members' Bills as the Speaker may assign from time to time.⁴⁻⁵

(B) *In the Council of States:*

In the Council of States, there is no Committee on Private Bills.

The Chairman, after considering the state of business of the Council, may allot so many days as may be possible for private members' business, and allot particular classes of business to different days (R. 23).

The relative precedence of notices of Bills given by private members is determined by ballot and on a day allotted for the disposal of private members' Bills, the Bills are disposed of in the following order (R. 24), subject to any alteration in the order made by the Chairman by a special order:

(a) Bills returned by the President with a message under Art. 111 of the Constitution.

(b) Bills which have been passed by the Council and returned by the House with amendments.

(c) Bills which have been passed by the House and transmitted to the Council.

(d) Bills in respect of which a motion has been carried that the Bill be taken into consideration.

(e) Bills in respect of which the Report of a Joint or Select Committee has been presented.

(f) Bills which have been circulated for the purpose of eliciting opinions.

(g) Bills introduced and in respect of which no further motion has been made or carried.

(h) Bills in respect of which the motion is that leave be granted to introduce the Bill.

(i) Other Bills.

Generally speaking, the relative precedence of Bills coming within each of the above clauses is determined by ballot.

AMENDMENTS IN BOTH HOUSES.

Procedure relating to Amendment of a Bill.

'Amendment' is a subsidiary motion, the object of which is to put an original motion other than in the form in which it has been framed. While the procedure relating to amendments of other motions, resolutions etc. will be dealt with under Art. 118, *post*, under the present head we are discussing the procedure relating to motions for amending Bills. The stages at which amendments may be moved to different clauses of a Bill has been explained already (pp. 641, *ante*). The Rules of the two Houses relating to this topic are substantially similar. The steps to be taken with respect to a motion for amending some clause of a Bill are as follows:

Notice of Amendment.—An amendment cannot be moved unless notice is given at least one day before the day on which the Bill is to be considered. But the Chair has the power to waive this requirement.⁵ But the practice of tabling amendments as the debate develops is not encouraged except where the amend-

(4) R. 294 of the Rules of the House of the People.

(5) Besides these functions relating to Bills, the Committee on Private Members' Bills has also the function to recommend

time limit for the discussion of private members' resolutions and other ancillary matters.

(5) R. 79 of the Rules of the House; r. 82 of the Rules of the Council.

ment is an agreed one or it arises out of circumstances brought out in course of the debate.⁶

President's sanction or recommendation to be annexed to notice, where such sanction required.—The cases where the Constitution requires that a Bill or amendment relating to a subject cannot be introduced or moved without the previous sanction or recommendation of the President have already been enumerated⁷ (p. 365, *ante*).

The President's sanction or recommendation is conveyed through a Minister. A member desiring to move an amendment relating to such a subject must, therefore, obtain the sanction before giving notice of his amendment and annex it to the notice of his amendment.⁸

The Proviso to r. 81 of the Rules of the House of the People says—

"No previous sanction or recommendation of the President shall be required, if an amendment seeks to—

- (a) abolish or reduce the limits of the tax proposed in the Bill or an amendment, or
- (b) increase such tax up to the limits of an existing tax."⁹

Conditions of admissibility of amendments to a Bill.—(1) The Chair may refuse to propose an amendment if it contravenes any of the following conditions:⁹⁻¹⁰

(i) An amendment must be within the scope of the Bill¹¹⁻¹² and relevant to the subject-matter of the clause to which it relates.¹³

But if an amendment be within the scope of the Bill, though not relevant to the clause under consideration, it may be moved as an amendment to add a new clause.

(ii) An amendment must not be inconsistent with any previous decision of the House on the same question.¹⁴

(iii) An amendment must not be such as to make the clause which it proposes to amend unintelligible or ungrammatical.

(iv) If an amendment refers to, or is not intelligible without subsequent amendment or schedule, notice of the subsequent amendment or schedule shall be given before the first amendment is moved, so as to make the series of amendments intelligible as a whole. In short, an amendment which is incomplete, is not in order.¹⁵

(v) The amendment must not be, in the opinion of the Speaker, frivolous or meaningless. Thus, the Chair may disallow an amendment if it is vague, trifling or tendered in a spirit of mockery.¹⁶

(6) Last minute amendments are not usually admitted unless agreed to by the mover of the Bill [Parl. Deb., Pt. II, 20-11-50, cols. 309-10; L.A. Deb., 5-2-46, p. 511].

(7) See, further, under Art. 117, *post*.

(8) R. 81 of the Rules of the House; R. 97 of the Rules of the Council.

(9) Rr. 80-81 of the Rules of the House; r. 96 of the Rules of the Council.

(10) May, 16th Ed., pp. 553-4.

(11) Thus,—

(a) An amendment which seeks to *enlarge* the scope of a Bill is not in order. Thus, on a Bill for protection of the Bamboo Paper Industry, an amendment to include all kinds of paper would not be in order [L.A. Deb., 14-9-25, p. 1216].

(b) An amendment which seeks to *negative* the Bill is out of order; the proper course for the member in such a case is to vote against the Bill and not to move an amendment. The principle has also been extended to clauses [May, 16th Ed., p. 554].

(12) The scope of a Bill has to be determined on a consideration of all its provisions [L.A. Deb., 29-9-37, pp. 2675-85], but not from its the statement of its objects and reasons [(1933) L.A. Deb., Vol. III, 2161]. It is for the Speaker to determine what is within the scope of a Bill [(1956) H.P. Deb., Vol. VIII, 6095].

(13) Since a marginal heading is not a part of the Bill, no amendment thereof can be moved [Parl. Deb., Pt. II, 10-2-50, pp. 409-410].

(14) Thus, an amendment would be out of order if it is inconsistent with any words already agreed to by the House, or seeks to insert in a *different* form words which the House has agreed to leave out [Campion, 1950, p. 175]. Similarly, an amendment is out of order if it is dependent upon an amendment which has already been *negated* by the House [May, 16th Ed., p. 554], or is *caused* by a previous decision of the House [*ibid.*, p. 422].

(15) May, 16th Ed., p. 556.

(vi) An amendment may be moved to an amendment which has already been proposed by the Speaker.

(vii) If any member desires to move an amendment which under the Constitution cannot be moved without the previous sanction or recommendation of the President, he must annex to the notice of the amendment such sanction or recommendation conveyed through a Minister. (See p. 649, *ante*, and also under Art. 117, *post*).

(2) Even after admission, the Speaker shall have power to select the new clauses or amendments to be proposed, and may, if he thinks fit, call upon any member who has given notice of an amendment to give such explanation of the object of the amendment as may enable him to form a judgment upon it.¹⁶

Order of Amendments. —The Rules of the House¹⁷ provide that—

(1) Amendments shall ordinarily be considered in the order of the clauses of the Bill to which they respectively relate.

(2) In arranging amendments raising the same question at the *same* point of a clause, precedence may be given to an amendment moved by the member in charge of the Bill. Subject as aforesaid, amendments *may* be arranged in the order in which notice of the amendments were received. The Chair has, however, an unfettered discretion to select amendments and to determine the order in which amendments will be taken up for discussion and is not bound to call them in the order in which notices were received.¹⁸

(3) The Chair may, if he thinks fit, put as *one* question similar amendments to a clause. But if a member requests that any amendment be put separately, the Chair *shall* put that amendment separately.

(4) An amendment which seeks to substitute an *entire* scheme should have priority over amendments limited to a part only of the matter to be amend.¹⁹ Thus, an amendment which seeks to substitute a different clause for the clause in the Bill is to be taken first. If that is thrown out, the other amendments are to be moved.²⁰

Moving and withdrawal of Amendment. —(1) A Member who wants to move an amendment must formerly move it before proceeding to speak on it.²¹

(2) A member who speaks on the original motion without moving an amendment and resumes his seat, is not entitled to move an amendment at any subsequent stage.²² The general rule is that an amendment of which notice has been given, must be moved after the clause is placed before the House for consideration and *before* the general discussion began. It cannot be moved after the general discussion is over and the clause is about to be put to vote.²³

(3) The member who has given notice of an amendment must be in his seat and move it when called upon by the Chair. If he remains absent at that time, he cannot subsequently move his amendment, but he does not thereby lose his right to speak on the original motion.²⁴

(4) An amendment may be moved only by the member who has given notice of it.²⁴

There is nothing to prevent the mover of a Bill from moving an amendment to his own Bill,²⁵ or to prevent a member of a Select Committee from moving an amendment to the Bill as reported by the Committee.¹

(16) R. 83 of the Rules of the House ; R. 99 of the Rules of the Council.

(17) Rr. 84-5 of the Rules of the Council ; r. 100 of the Rules of the House.

(18) L.A. Deb., 9-9-25, pp. 1013-5 ; 7-2-35, pp. 567-8 ; May, 15th Ed., p. 461.

(19) L.A. Deb., 12-4-34, p. 3695.

(20) L.A. Deb., 19-9-39, pp. 734-5.

(21) L.A. Deb., 3-9-25, p. 732.

(22) L.A. Deb., 17-9-29, p. 965 ; Parl. Deb., Pt. II, 10-3-50, pp. 1364-5.

(23) But it can be moved at any time while a member is *in possession of* the House after the original motion has been placed before the House for its consideration and before it is put to vote (Campion, p. 174).

(24) L.A. Deb., 4-4-46, p. 3561. L.A. Deb., 23-2-44, p. 449 ; r. 124 of the Rules of the House ; r. 102 of the Rules of the Council.

(25) L.A. Deb., 3-3-43, pp. 729-30, 741.

(1) L.A. Deb., 5-9-38, pp. 1610-12.

(5) When an amendment has been moved, it cannot be withdrawn except with the leave of the House.²

Further, if an amendment has been proposed to an amendment, the original amendment cannot be withdrawn until the amendment proposed to it has been disposed of.²

Debate on Amendment.

(i) The Chair has the discretion to direct a single discussion on a number of inter-dependent amendments, in order to save time and repetition.³

(ii) When the amendment seeks to leave out, modify, or to substitute certain words, the debate is not allowed to be extended to the other words of the original motion which are not affected by the amendment.⁴ Similarly, when certain words are sought to be added, the debate should be restricted to the desirability of the words sought to be added.

(iii) When an *alternate* amendment is moved, the old ground is not allowed to be covered, because that is repetition. Thus, where in the first amendment the member proposed that the Local Government should be authorised to apply to the High Court and thereafter made an alternative amendment that the Local Government may authorise any person to file a complaint before a Magistrate, the member, while speaking on the alternative amendment, must restrict himself on the new matter introduced, *viz.*, authorisation to file complaint before a Magistrate.⁵

A Bill to extend an expiring Act.

1. Following the *English* practice,⁶ it has been ruled in *our* Parliament^{7,8} that when only the duration of an expiring law is sought to be *extended* by a Bill, no amendment should, generally, be allowed to modify the substantive provisions of the expiring law itself. The reasons given are—

(a) The scope of the continuance Bill is only to extend the duration of an expiring law and the House may either accept the proposal or reject it if they do not like the provisions of the expiring law. A modification of the substantive provisions of the expiring Bill is outside the scope of the continuance Bill which is before the House.

(b) To allow amendments to the substantive law would be to open controversy on points already discussed and conclusions already arrived at.

This, however, would not prevent *discussion* by way of general review of the working of the substantive law, to point out its defects and to suggest improvements. It may be expected that if the House expresses itself in favour of modifying the substantive laws, Government would subsequently bring a separate Bill for the purpose.

(c) For the same reason, an amendment is not admissible to refer such Bill to a Select or Joint Committee with instructions to modify the original Act,⁸ though a *discussion* as to the defects of the original Act or suggestions for improvement are not barred.⁷

The *exceptions* to the above general limitation as to amendments on a continuance Bill are—

(a) An amendment may be moved to the provisions of the continuance Bill itself, *e.g.*, to alter the date to which the expiring law is proposed to be continued.⁶

(b) When the continuance Bill contains a Schedule including several expiring laws, an amendment may be moved to the Schedule to exclude from the continuance any Act or distinct provisions of any Act included therein.⁸

(2) R. 87 of the Rules of the House ;
r. 103 of the Rules of the Council.

(3) Proviso to r. 86 of the Rules of the House.

(4) May, 15th Ed., p. 398.

(5) L.A. Deb., 2-10-31, p. 1429.

(6) May, 16th Ed., pp. 556-7.

(7) Parl. Deb., 20-3-51, Pt. II, cols. 4859-62 ; R.S. Deb., 18-12-54.

(8) (1957) H.P. Deb., Vol. X, 4235-45.

(c) When the Bill to extend the expiring Act is not a pure 'Expiring Laws Continuance Bill' but also an Amending Bill, the above restrictions as to motions for amendment will not apply.⁹

2. It is also out of order to propose an amendment that any temporary Act which is sought to be extended should be made *permanent*,⁶ for this is obviously outside the scope of the Bill.

A Consolidating Bill.

1. When a Bill is brought simply to consolidate existing statutes, an amendment to alter the substantive provisions of the statutes sought to be consolidated is obviously out of order as it is outside the scope of the consolidating Bill.¹⁰

The following amendments to such a Bill are, however, admissible in England:

(i) An amendment to change the date of commencement of the consolidating Bill.

(ii) A drafting amendment which would make the words of the Bill express more clearly the law as it stands, without seeking to alter it.

(iii) Where the title of the Bill is only to consolidate the law, but, in the opinion of the Chair, it seeks to alter the law *in effect*, the Chair may admit an amendment which seeks to bring the Bill into conformity with the existing law.

2. When however, the title of the Bill is to consolidate *and amend* the law, substantive amendments to the law, *i.e.*, to the statutes which are sought to be consolidated, would be in order.

An Amending Bill.

A Bill which seeks to amend an existing Act is called an Amending Bill. To such a Bill, the following motions of amendment are out of order—

(i) An amendment which is not within the scope of the Amending Bill¹¹ but seeks to amend the original Act which is not *per se* for the consideration of the House.¹²

(ii) For the same reason if the Amending Bill seeks to amend a portion of a section, the rest of the section, relating to a *distinct subject*, is not open to amendment,¹³ unless the Member-in-charge agrees.¹⁴

It follows that in a debate on an amending Bill, it is not permissible to discuss the principles involved in the original Bill which are not affected by the Amending Bill.¹⁵

COMMITTEES GENERALLY.

The Committee system is now an essential part of the parliamentary mechanism wherever it exists though, of course, there are differences in its working in different countries. The object of referring a matter to a Committee by the House itself is to have the matter better dealt with by a smaller group of members or in a body which is not so much fettered by the technical rules of debate and procedure like the House itself. The Committee system adopted in our Parliament is based on the Rules of Procedure, for, while the Constitution refers to Committees in some Articles (*e.g.*, Art. 105), it does not itself lay down any provisions relating to the organisation or working of the Committees. Since the system adopted by us is more or less similar (differences to be noted in proper places) to the system of Committees existing in the House of Commons, it would be profitable to notice the main features of the English system (as distinguished from some other foreign systems) before taking up our own system.

(9) (1952) H.P. Deb., 4209-14.

(10) May, 16th Ed., p. 557.

(11) (1934) L.A. Deb., Vol. III, 2902.

(12) (1933) L.A. Deb., Vol. III, 2185.

(13) (1954) H.P. Deb., Vol. IV, 5376;

(1954) H.P. Deb., Vol. VIII, 708.

(14) (1954) H.P. Deb., Vol. VIII, 359.

(15) (1946) L.A. Deb., Vol. I, 709-710.

(A) *England*.—In the House of Commons, Committees are of the following different kinds:

(i) *Committees of the whole House*.—A Committee of the whole House is the House itself, sitting in a less formal manner, and having a Chairman instead of the Speaker in the Chair. Such Committees are:

(a) Committee of Supply.¹⁶

(b) Committee of Ways and Means.¹⁶

(c) Bills for imposing taxes or Consolidated Fund Bills are automatically referred to a Committee of the Whole House after they have been read a second time.

(d) Other Public Bills may be referred to a Committee of the Whole House if, after the second reading, a resolution for such reference is passed by the House in view of the importance of the measure.

(ii) *Standing Committees on Public Bills*.—Excepting Bills which are referred to a Committee of the Whole House or Bills which are referred to a Select Committee or a Joint Committee of both Houses by a specific motion to that effect, all Public Bills are now automatically referred to a Standing Committee.

These Standing Committees are provided for by Standing Orders or sessional orders of the House and there is no limit to the number of Standing Committees that may be set up by the House though usually they are four in number. A Standing Committee differs from a Committee of the Whole House in that it consists of only 30 to 50 members and from a Select Committee in that the members of a Standing Committee are not nominated by the House itself but by a Committee of Selection which is itself a Select Committee. The Standing Committees are set up at the opening of the first session of a parliament and last till that parliament is prorogued.

(iii) *Select Committees*.—These are *ad hoc* Committees, set up from time to time, to consider specific matters and they cease to exist after that business is done. While a Standing Committee is appointed at the opening of the first session of a Parliament and subsists during the life of that Parliament, a Select Committee is appointed in the course of a session and for the consideration of the specific matter committed to it.

A matter may be referred to a Select Committee only on the motion of a member carried by the House. The members of a Select Committee are similarly appointed by the House itself on the proposal of the Member who moves for reference to such Committee. No Select Committee shall consist of more than 15 members without the leave of the House (S.O. 66).

A reference to a Select Committee is now made for the purpose of making some inquiry. Prior to 1907, all Public Bills which did not go to a Committee of the Whole House were referred to a Select Committee. But since 1907, the Standing Committees have taken up this business and, unless the House orders otherwise, all such Bills stand committed to a Standing Committee. It is only when a specific motion for reference to a Select Committee is made that a Public Bill is referred to a Select Committee.

(iv) *Sessional Committees*.—There are, however, some specific purposes which are referred to Sessional Committees. These 'Sessional' Committees resemble the Standing Committees in so far as they are constituted at the beginning of a session and have a tenure during the session. The method of nomination, however, is that of a Select Committee. The more important of these Sessional Committees now are—

(a) The Committee of Selection. (b) The Committee of Privileges. (c) The Estimates Committee. (d) The Public Accounts Committee. (e) The Select Committee on Statutory Instruments. (f) The Public Petitions Committee. (g) The Standing Orders Committee.

(16) See under Art. 112, *post*.

(v) *The Business Committee.*—The business of this Committee is to make recommendations for the allocation of time for the consideration of Public Bills. This is in the nature of a sessional Committee but it consists of members of the chairmen's panel together with not more than 5 other members to be nominated by the Speaker (S.O. 41).

(B) *U.S.A.*—The Committee system in the *American Congress* has to be studied in the present context only by way of contrast. It differs from the *British* system in the following respects:

(a) A Committee of the *American Congress* has the power not only to examine the provisions of a Bill but to decide whether it should come before the Legislature at all. The position is just the reverse of that in *England*, where a Bill is referred to a Committee only after a general discussion of the Bill is held in the House and the Committee has no power to withhold the Bill from the House. In the *American Congress*, on the other hand, as soon as a Bill is introduced it automatically goes to one of the Standing Committees which has the power, *inter alia*, to 'pigeon-hole' the Bill, i.e., to withhold it from a consideration of the House at all, either by doing nothing or by sending it to the House so late in the session that it gets no time to consider it.

(b) A Committee of the *American Congress* also possesses the power not only to amend the clauses of a Bill but to re-write the whole Bill except its title, even contrary to the wishes of the Administration where it is sponsored on behalf of the President, or to the wishes of the House as a whole. The long and short of this is that in the absence of the Parliamentary system of government, in the United States, much of the power of initiation and piloting of a Bill which belongs to the *British Cabinet* is taken up by the appropriate Standing Committee in the *American Congress*.

(c) The procedure in a Committee of the *American Congress* is much more elaborate than that of a Committee of the *British House of Commons* in the case of Public Bills. An American Committee hears evidence in the same way as a British Committee on Private Bills and hears not only interested parties and the public in general but even the executive departments themselves. In a sense, this system is more democratic in as much as it ensures a greater publicity and a greater degree of participation of the public in the enactment of a measure. On the other hand, it takes away the responsibility for initiating a measure according to the policy of the administration from the Government and vests it in the Congressional Committee.

(C) *France.*—The Committee system in France resembles the American type rather than the British but the Constitution of the Fifth Republic has minimised the deviation from the British system.

Art. 15 of the Constitution of 1946 itself provided for the Committee stage in legislation thus:

"The national Assembly shall study in its committees the bills laid before it . . ."

As a result of this constitutional provision, almost every bill, whether introduced by the Government or a private member had to be referred to one of the Committees in either House, which were chosen by proportional representation by the various political groups according to their numerical importance in the Chambers. The number, size and method of choice of the Committees were governed by the Rules of each House. The author of the measure as well as the Ministers were given a hearing in the Committee and one of the members of the Committee was appointed 'reporter' for preparing the report of the Committee which was sent to the President of each of the Chambers of the National Assembly. Even in the Chambers it was the President and reporter of the Committee and not the Minister who took a leading part in the discussion and the power of withdrawing any provision also belonged to the Committee.

Since, owing to election by proportional representation, the Government did not usually command a majority in the Committees, it might be said that the

Committees played substantially the same part in the French legislative process as was played by the Cabinet in England.

The Constitution of the Fifth Republic (1958) makes a distinction between special and permanent committees. Unless the Government or the National Assembly desires that a particular bill be referred to a special committee, every bill goes to one of the six permanent committees of the Assembly. Art. 43 says—

"Government and Parliamentary bills shall, at the request of the Government or of the Assembly concerned, be sent for study to committees specially designated for this purpose.

Government and Parliamentary bills for which such a request has not been made shall be sent to one of the permanent committees, the number of which is limited to six in each Assembly."

The right of the Government to designate a special committee has been introduced in order to save the Government from the embarrassment resulting from amendments made by an obstructive committee as happened so frequently under the previous Constitutions. The number of permanent Committees has also been reduced to six in each House. The Committees are, however, still elected according to proportional representation and though the Constitution now ensures more stability to the Government, the hold of the Government over the permanent Committees is still uncertain and the Committees are free to criticise the Government.¹⁷

(D) *India*.—The Committee system in India closely follows the *British* system. A Select Committee to which a Bill is referred to has no power to withhold a Bill from the House or to "destroy" it. Nor has it the power to mutilate a Bill or to alter the legislative policy underlying a Bill as determined by the Government. This will be evident from the powers of a Select Committee on Bill which will be presently discussed.

One departure from the English system, however, is that in India, there is no provision for reference to a Committee of the Whole House. Nor is there any Standing Committee on Bills. If a Bill is referred to a Committee, it will be a Select Committee, unless it is referred to a Joint Committee of both Houses.

Besides Select Committees on Bills, we have in *our* Parliament, several Sessional Committees and Committees having a particular term and object. It would be convenient to take them up together.

I. Committees in the House of the People.

In the Rules of the House of the People, all these Committees are grouped together under the head '*Parliamentary Committee*', to lay down certain general rules applicable to all such Committees. The expression *Parliamentary Committee* comprises all Committees which are appointed or elected by the House or nominated by the Speaker and which work under the direction of the Speaker [R. 283] and present its report to the House or to the Speaker and the Secretariat for which is provided by the Lok Sabha Secretariat.¹⁸

The general rules relating to all '*Parliamentary Committees*', in short, are:

The function of such a Committee is to investigate and report on the matter referred to in the motion by which it was set up. The Committee may itself set up one or more sub-committees to investigate into particular points specified by the Committee (r. 263).

Such Committee may sit whilst the House is sitting but on a division being called in the House, the Chairman of the Committee shall suspend the proceedings in the Committee for such time as will in his opinion enable the members to vote in a division (r. 265). A *Parliamentary Committee* may make a special report on any matter that comes to light in the course of its work even if it does not fall within its terms of reference (r. 276).

(17) Neumann, *European & Comparative Government*, 1960, pp. 278-9.

(18) R. 2 (1) of the Rules of the House.

Every Parliamentary Committee has the power to send for persons and papers [R. 270] and to examine witnesses on oath and may permit the witnesses to be heard by counsel [rr. 271-2].

Special rules have been framed in the House of the People as to the effect of prorogation and dissolution on the business of a Committee. These will be discussed under Cls. (3)-(5), *below*.

We may now mention the different classes of Parliamentary Committees in our House of the People:

(1) *Select Committees on Bills:*

The Rules of both Houses relating to Select Committees are similar.¹⁹ A Select Committee is appointed by either House when a motion that a Bill be referred to a Select Committee is made.²⁰ It is the mover of the motion who names the members of the Committee and only those who are willing to serve on the Committee are then appointed by the House.²¹ The Chairman of a Select Committee is appointed, from amongst the members, by the Speaker of the House of the People or the Chairman of the Council, as the case may be. The Select Committee reports to the House or the Council, as the case may be (see p. 653, *ante*, as to the functions and powers of a Select Committee on Bills).

Scope of the functions of a Select Committee.—The primary principle in legislation is that the determination of the legislative policy and the decision of the principle involved in a Bill is that of the House itself and the reference to a Select Committee is also made after a discussion of the principles of the Bill has taken place in the House.²² It is for a consideration of the details of the Bill, clause by clause, and for suggesting amendments, as may be necessary, that a Bill is referred to a Select Committee.²³

It is not within the power of a Select Committee to withhold a Bill indefinitely. Like other Parliamentary Committees, it must report within the time specified by the House itself, or where the House has not fixed any time for the presentation of a report by a Committee within one month of the date on which reference to the Committee was made [R. 277].

From the rule that the decision of the principle is that of the House, several consequences follow:

(i) The Committee is bound by the decision of the House in favour of the principle of the Bill made before it was committed to the Committee.²⁴ Formerly, a member who had spoken against the principle of a Bill at the general discussion was not allowed to be a member of a Select Committee on the Bill. This restriction is, however, no longer enforced.²⁵ But the modern application of the rule is that in the Committee no amendment may be moved which is *contrary* to the principle underlying the Bill. This does not, however, prevent the Committee from negating a clause, even though the effect of that would be to negative the Bill altogether. It is, therefore, open to the Committee to negative the Question 'That the Clause stand part of the Bill', notwithstanding any importance of the Clause in the Bill. In this way, the Committee can negative every clause

(19) Rr. 72-92 of the Rules of the Council ; rr. 298-305 of the Rules of the House.

(20) R. 298 of the House and rr. 72-3 of the Rules of the Council.

(21) The Mover of a motion to refer a Bill to a Select Committee must furnish with his motion a list of Members proposed to be appointed and also inform the House that he has the authority of those members for so proposing their names [L.A. Deb., 22-2-21, p. 332]. If another member seeks to make any change in that list which is not accepted by the Mover, the former can propose the change in the form of an amendment [L.A. Deb., 5-4-32, p. 3003]; otherwise, the change cannot be suggested when

the question for reference to the Select Committee is being put to the House [L.A. Deb., 23-9-32, p. 1285].

(22) Cf. r. 75 (1) of the Rules of the House.

(23) Campion, Introduction, p. 210 ; May, 15th Ed., p. 515.

(24) The House itself is committed to the principle of the Bill, once a motion to refer to a Select Committee or Joint Committee has been carried [L.A. Deb., 4-2-25, p. 745]. This rule restricts the scope of the debate on the report of the Select Committee [cf. r. 78 of the Rules of the House].

(25) Cf. R. 298 of the Rules of the House, which provides for no exception.

of the Bill committed to it or even substitute them by new clauses provided they are within the scope of the Bill or are relevant to it. But, nevertheless, an amendment that is contrary to the principle of the Bill cannot be made.

(ii) No amendment can be moved in the Committee which is outside the scope of the Bill as outlined by its long title.¹

"The Select Committee has a right to add to or to delete from or to improve upon the provisions of the Bill referred to, provided the additions, deletions or improvements suggested by the Select Committee are within the scope of the Bill."²

(iii) The Bill cannot be withdrawn in the Committee; it can be withdrawn only in the House.³

(iv) Though the Committee cannot itself put an end to the Bill, it can make a special report to the House that in the opinion of the Committee, the Bill ought not to pass into law.⁴⁻⁵

The present-day application of the old rule that "No Committee can destroy a Bill" is thus restricted to the prohibition of amendments contrary to the principle of the Bill.

Relations between a Select Committee and the House.

(i) When the Committee returns the Bill to the House with its report, the House has a right to examine all the papers and records available to the Select Committee⁷ and all evidence tendered before the Committee. If, however, a witness had specifically desired that any part of his evidence should be kept confidential, that part would not be published.⁶

(ii) The discussions taking place in the Committee are, however, confidential. What took place during the deliberations of the Committee cannot be published and cannot be discussed even on the floor of the House.⁷ Though members of the Select Committee are at liberty to refer on the floor of the House to all documents and information given to the Committee, they cannot refer to remarks made by members during the course of discussion of the Committee or to any negotiations that took place amongst the members in the course of the sittings of the Committee.⁸

(iii) The evidence tendered before the Committee, oral or documentary, as well as the Report of the Committee, are liable to be published, but not before they have been presented to the House.⁸⁻⁹ It would be a breach of the privilege of the House if these are published, in any form,¹⁰ by a member or any other person before they are laid before the Table of the House. No member of the Select Committee should have any communication with the Press regarding the deliberations of or the conclusions arrived at, finally or tentatively before the report has been presented to the House.¹⁰

(iv) While a Select Committee is bound by the decisions of the House, the House cannot possibly be bound by the decisions of the Committee. The result is, that amendments which were rejected in the Committee may be moved again in the House at the report stage and where a Bill has been amended by the Committee amendments to restore the original text of the Bill are not out of order in the House.¹¹

Even a Member of a Select Committee can move amendments to clauses which have been agreed to in the Select Committee. There is nothing to prevent a Member of the Select Committee to change his opinion.¹²

(1) The House may, however, instruct it to make some particular or additional provision [Proviso to r. 75 (3) of the Rules of the House].

(2) C.A. (Leg.) Deb., 17-2-49, pp. 614-21.

(3) Cf. r. 146 of the Rules of the House.

(4) Campion, Introduction, p. 213.

(5) It was ruled in an old case in India that the Committee cannot report that it does not agree with the principle of the Bill.

but it can report that the House should not proceed with the Bill [L.A. Deb., 19-2-26, pp. 1541-5].

(6) L.A. Deb., 15-3-34, pp. 2251-2.

(7) L.A. Deb., 12-3-40, pp. 1183-4.

(8-9) May, 16th Ed., p. 119.

(10) L.A. Deb., 12-3-40, pp. 1183-4.

(11) Campion, Introduction, p. 221.

(12) L.A. Deb., 5-9-38, pp. 1610-2.

(2) *Sessional Committees:*

(i) *Business Advisory Committee.*—At the commencement of the House or from time to time, as the case may be, the *Speaker* may nominate a Business Advisory Committee consisting of not more than 15 members including the Speaker who shall be Chairman of the Committee (r. 287). The Committee so constituted shall hold office until a new Committee is nominated [R. 256]. The functions of this Committee are—

(i) To recommend the time that should be allocated for the discussion of the stage or stages of such Government Bills or other Government business as the Speaker in consultation with the Leader of the House may direct for being referred to the Committee.

(ii) To indicate in the proposed time-table the different hours at which various stages any such Bill or business shall be completed.

(iii) Such other functions as may be assigned to it by the Speaker from time to time (r. 288).

The Committee reports to the House and on its adoption by the House, the allocation of time made by the Committee takes effect as if it were an Order of the House (r. 290A) and no variation in the allocation of time made by that Order shall be made except on a motion made, with the consent of the Speaker and accepted by the House (r. 292).

(ii) *Committee on Petitions.*—At the commencement of the House or from time to time as the case may be, the Speaker shall nominate a Committee on Petitions consisting of not less than 15 members and the Committee so nominated will hold office until a new Committee is nominated [rr. 306].

Every petition received by the House shall be referred to this Committee. The Committee shall examine every petition, and if the petition complies with the rules, the Committee may direct that the petition be circulated. The Committee shall report to the House stating the subject-matter of the petition, the number of persons by whom it is signed and whether it is in conformity with the rules and whether it has been circulated. If there is any specific complaint in a petition, it shall be the duty of the Committee to suggest remedial measures on taking such evidence as it deems fit [r. 307].

(iii) *Committee of Privileges.*—See p. 626, ante. It will hold office until a new Committee is nominated [R. 256].

(iv) *Committee on Rules.*—This is a Committee consisting of 15 members nominated by the Speaker with the Speaker himself as the ex-officio Chairman. A Committee so nominated shall hold office until a new Committee is nominated. The function of this Committee is to consider matters of procedure and conduct of business in the House and to recommend to the Speaker any amendments or additions to the Rules of Procedure and Conduct of Business in the House as may be deemed necessary (rr. 329-330).

(3) *Committees for a limited term.*

(i) *Committee on Private Members' Bills and Resolutions.*—This Committee consists of not more than 15 members nominated by the Speaker who hold office for one year. The functions of this Committee have already been explained (see p. 647, ante).

(ii) *Committee on Public Accounts.*—This Committee will be fully dealt with under Art. 151, post. Shortly speaking, the function of this Committee is to see that public money is spent under the authority of law. The term of the Committee shall not exceed one year [R. 309(2)].

(iii) *Committee on Estimates.*—See p. 697, post, where the composition and functions of this Committee have been fully discussed. The term of the Committee shall not exceed one year [R. 310(2)].

(iv) *Committee on Subordinate Legislation.*—This Committee of the House of the People is nominated by the Speaker for a term of one year [R. 318(2)].

consisting of not more than 15 members (r. 318). The functions of this Committee have already been discussed at Vol. I, pp. 297.

(v) *Committee on Government Assurances*.—This is a Committee consisting of not more than 15 members, nominated by the Speaker, for a term of one year, [R. 324 (2)]. The function of this Committee is to scrutinise the assurances, promises and undertakings etc. given by Ministers, from time to time, on the floor of the House and to report on—

(a) the extent to which such assurances have been implemented; and (b) where implemented whether such implementation has taken place within the minimum time necessary for the purpose (rr. 323-4).

(vi) *Committee on Absence of members from sittings of the House*.—This is a Committee consisting of 15 members nominated by the Speaker and remains in office for a period of one year (r. 325). The business of this Committee is to assist the House in the discharge of its function under Art. 101 (4) of the Constitution, and to examine all applications from members for permission to remain absent as also to consider every case of absence without permission and to recommend to the House as to whether the leave should be granted or the absence condoned or not (r. 326).

II. Committees in the Council of States.

There are fewer Committees in the Council of States than in the House of the People owing to the difference in the nature of functions of the two Houses. Thus, the Council has no Committee on Public Accounts or on Estimates. It has also not got any Committee on Subordinate legislation, on Government Assurances.

The Council of States has the following Committees:

1. *Business Advisory Committee* (rr. 30-37).
2. *Committee on Petitions* (rr. 147-153).
3. *Committee of Privileges* (rr. 192-198).
4. *Committee on Rules* (rr. 216-219).
5. *Select Committees on Bills* (rr. 72 et seq.).
6. *Committee on Subordinate Legislation* (rr. 204-212).

The composition and functions of these Committees are similar to the corresponding Committees of the House of the People as explained in the foregoing pages. It is to be noted, however, that all Committees of the Council, other than Select Committees, hold office until another such Committee is nominated.

III. Joint Committee of both Houses.

When a Bill is introduced, or at some subsequent stage, the member in charge may, instead of moving that the Bill be taken into consideration or circulated or be referred to a Select Committee, move that the Bill be referred to a Joint Committee of both Houses,¹³ with the concurrence of the other House.

The procedure for the constitution of a Joint Committee is, briefly, as follows: The House, in which a motion for the reference of a Bill to a Joint Committee of the Houses is passed, also nominates those of its members who are to serve on the Committee and recommends to the other House that that House do join in the Joint Committee. A corresponding motion is then moved in the other House by the member-in-charge of the Bill that House do concur in the recommendation, nominating its own members who are to be on the Committee. If this motion is carried, a message conveying the motion is sent to the House from which the recommendation was received and thereafter the Joint Committee functions under the general control of the House which made the recommendation. The Chairman of the Joint Committee is also, by convention, appointed

(13) A Joint Committee of both Houses should be distinguished from a joint sitting of both Houses which is provided for by

Art. 108 of the Constitution in order to dissolve a deadlock between the two Houses over a Bill.

by the presiding officer of the House which made the recommendation. But, otherwise, neither House can direct the other House as to the manner of selecting members of the latter House of the Committee.¹⁴

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England*.—In *England*, not only pending questions and motions, but also all pending bills lapse on prorogation (see p. 518, *ante*).

The result is that at the end of each session, there is an end of many measures over which much time and effort has already been spent. The work on such bills has to be renewed from the beginning at the next session.

It is not merely Bills or motions, but *all proceedings* pending in either House or a Committee¹⁵⁻¹⁶ thereof at the time of prorogation are quashed by it, and they must be initiated afresh in the next session, if they are sought to be resumed.¹⁵ The only exceptions to this rule of lapse are—

(i) Proceedings for impeachment;¹⁵

(ii) Orders for the production of documents. These orders do not lapse and the documents must be produced before the next session of the House.¹⁵

(iii) Appeals before the House of Lords.¹⁶

(B) *Government of India Act, 1935*.—S. 30(1) of the Act of 1935 was to the same effect as Cl. (3) of the present Article.

INDIA

Effect of Prorogation on pending Bills.—Our Constitution seeks to improve upon the position in *England* (p. 518, *ante*) and saves pending Bills from being lapsed on prorogation.

Under our Constitution pending motions would lapse but *not pending Bills*, even though both Houses have been prorogued. Hence, on the termination of a session, Bills which have been introduced and are still pending shall be carried over to the pending list of business for the next session and they will require no fresh introduction in the next session.

It would follow that a Bill pending before a Committee is also not affected by prorogation and that the Committee can meet and consider the Bill at any time during the recess,¹⁷—contrary to the practice in *England*.¹⁸

How long is a Bill 'pending in Parliament'.

From a reading of Arts. 107 and 111, it would be clear that a Bill is pending in Parliament from the moment of its introduction in either House till it is passed by both Houses and receives the President's assent under Art. 111.¹⁶ What is meant by passage of a Bill both Houses is explained in Arts. 107 (2), 108 (4) and 109 (3-5). Thus,—

(A) A Bill other than a Money Bill is deemed to be passed by both Houses when—

(i) It is agreed to by both Houses without amendments; or

(ii) One House makes amendments which are agreed to by the other House; or

(iii) It is passed at a joint session, which may be summoned in any of the following cases:

(a) The House to which a Bill is sent after passage in one House either rejects the Bill or keeps it on its Table for more than 6 months;

(14) L.A. Deb., 13-9-33, p. 1508.

(15) May, 16th Ed., pp. 34, 273. 279-280.

(16) Halsbury, 3rd Ed., Vol. 28, p. 372.

(17) (1956) H.P. Deb., Vol. VI, 425; 978-87.

(18) *Purushothaman v. State of Kerala*, A. 1962 S.C. 694 (701).

(b) The two Houses 'finally disagree' as to the amendments to be made in the Bill.

From the foregoing analysis, it would seem that under *our* Constitution, when a Bill is passed by one House and rejected by the other, the Bill is still 'pending in Parliament' for the purposes of Art. 107 (3), for, otherwise, the President could not have placed a dead Bill before a joint session. In the case of dissolution, the President has no power to revive a lapsed Bill to have it passed by a joint session [Art. 108 (1)].

It is obvious that a Bill is pending in Parliament during the process of its transmission from one House to the other,¹⁸ or where it is pending the assent of the President.¹⁸

(B) A Money Bill is deemed to be passed by both Houses—

(i) If the Council returns the Bill within 14 days of its receipt, without any recommendations.

(ii) If the Council does not return it within 14 days.

(iii) If the Council makes recommendations which are accepted by the House, at a further sitting.

(iv) If the Council makes recommendations which are rejected by the House, at a further sitting.

Hence, a Money Bill is 'pending' in Parliament until any of the above contingencies takes place.

Effect of Prorogation on motions, resolutions and notices.

It would be convenient, in this connection, to note the effect of prorogation on business of the Legislature *other than Bills*.

It is to be noted that the language of Cl. (3) of the present Article is negative. Its only object is to save pending Bills from lapse by reason of prorogation. There is no provision in the Constitution to provide what other matters will lapse on prorogation. It is, therefore, within the competence of each House of *our* Parliament to make rules in this behalf, under Art. 118(1), *post*, even though such rules are contrary to the British practice, provided no provision of *our* Constitution is contravened. The following Rules made by the House of the People are relevant—

(a) A motion, resolution or an amendment, which has *already been moved* and is pending in the House, does not lapse by reason of prorogation but is carried over to the next session.²⁰

(b) But all pending *notices*, whether of a motion, resolution, amendment or otherwise, which have not been moved, *other than* notices of intention to move *for leave to introduce a Bill*, lapse on prorogation and fresh notice must be given in the next session, if the matter is to be pursued.²¹

Even a notice of intention to move for leave to introduce a Bill would require to be renewed in the next session if the Bill relates to a matter in respect of which sanction or recommendation of the President is required, and the sanction previously given has ceased to be operative.²¹

(c) It has been stated earlier (p. 519, *ante*) that the business of a Committee relating to a *Bill* pending before it shall not lapse on prorogation.²²

Effect of Prorogation on Proceedings for Breach of Privilege.

This being a matter relating to Privileges of Parliament, will be governed by the law of privileges in the British House of Commons, according to Art. 105 (3) [see p. 593, *ante*].

The English law on this point is that since *all* proceedings pending in the House lapse on prorogation,²³ proceedings for breach of privilege also lapse. But there is nothing to bar the proceedings being revived by a fresh motion in the

(19) Cf. *Suryapalsingh v. U. P. Govt.*, A. 1951 All. 674 (680).

(20) R. 336 of the Rules of the House.

(21) R. 335 of the Rules of the House; R. 225 of the Council of States is identical.

(22) (1956) H.P. Deb., Vol. VI, 978-87.

next session and even where a person has already been imprisoned for contempt in the previous session, the House may commit him again in the next session if the House considers that the imprisonment which terminated with the prorogation of the previous session was insufficient.²³⁻²⁴

Following the above English law, *our* Supreme Court²⁵ has held that it is possible for a House of *our* Legislature to revive the proceedings for breach of privilege which had lapsed owing to prorogation, by a fresh motion to carry on or renew the proceedings. R. 284 of the House of the People which says that any business pending before a Committee shall not lapse on prorogation, must be understood to refer to Committees other than the Committee of Privileges, or, it will offend against Art. 105 (3).

In Bombay, a question arose whether the warrant of arrest issued by the Speaker in one session can be executed after prorogation of that session and the High Court answered in the affirmative.¹ This decision, it is submitted, is not in consonance with the English law and cannot, therefore, be taken as sound, under Art. 105 (3) of *our* Constitution. The law in the British House of Commons is that not only proceedings for breach of privilege lapse on prorogation but even the punishment awarded by the House automatically terminates on prorogation. The following statement from *May*² will explain:

"... the Commons ... are now considered as without power to imprison for a period beyond the session" ... Persons committed by the Commons, if not sooner discharged by the House, are immediately released from their confinement on a prorogation ... If they are held longer in custody, they would be discharged by the courts upon a writ of *habeas corpus*. Where, however, the House considers that an offender who has thus regained his liberty has not been sufficiently punished, he may again be committed in the next session ..."

From the above it would follow that the warrant issued by the Speaker of the House of Commons in a session cannot be executed after the prorogation of that session. It can be executed thereafter only if the proceedings are renewed by a motion in the next session and the warrant is re-issued.

CLAUSES (4)-(5).

OTHER CONSTITUTIONS

Government of India Act, 1935.—Cls. (4)-(5) of the present Article substantially reproduce sub-secs. (4)-(5) of s. 30 of the Act of 1935.

INDIA

Effect of dissolution on pending Bills.

Under the *English* system, the effect of dissolution is the same as that of prorogation (see above), and it puts an end to all pending business.

But *our* Constitution departs from the English practice and follows the *Government of India Act, 1935*, and provides as follows:—

(i) A Bill which originated in the Council of States and is still pending there (not having been passed by the House of the People) will not lapse at all on account of dissolution [Art. 107 (4)]. The reason is that it is the House which has been dissolved and not the Council which, being a permanent body, cannot be dissolved.

(ii) But a Bill, which is pending in the Council after having been passed by the House of the People, will lapse. Similarly, a Bill which is pending in the

(23) *May*, 16th Ed., pp. 102. 279-80.

(24) (1750-54) C.J. 303.

(25) *Sharma v. Sri Krishna* (II), A. 1960 S.C. 1186 (1191).

(1) *Homi Mistry v. Nafisul*, I.L.R. (1957) Bom. 218 (249).

(2) *May*, 16th Ed., pp. 100-102.

(3) Per Lord Denman, C.J., in *Stockdale v. Hansard*, (1839) 9 A. & E. 114.

House of the People, whether originating in that House, or sent to it by the Council of States, shall lapse on dissolution [Art. 107 (5)].

(iii) But in the cases under (ii) above, the Bill will not lapse if the President has, *prior* to the dissolution, notified his intention to summon a joint sitting of the two Houses [Art. 108 (5)]. In other words, a Bill may be passed at a joint sitting of the two Houses notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the joint sitting. But he cannot summon a joint sitting after a Bill has lapsed owing to the dissolution of the House [Art. 108 (1)].

(iv) Another point of difference is that under the English rule Bills pending for the assent of the Crown lapse on dissolution⁴ but Cl. (5) of Art. 107 of *our* Constitution makes it clear that it is only Bills pending in the *Houses* that lapse and not Bills which have been passed by the Houses and are pending for the assent of the President.

As contrasted with cls. (3)-(4), cl. (5) is clothed in affirmative language. The result is that cl. (5) must be taken to have exhaustively enumerated the cases in which a Bill would lapse by reason of dissolution of the House. It follows, therefore, that a Bill which is pending with the President for his assent, not being covered by cl. (4), will not lapse and may be assented to by the President notwithstanding the dissolution.

Effect of dissolution on pending business other than Bills.

Besides cls. (4)-(5) of Art. 107, there is no other provision in the Constitution as to the effect of a dissolution of the House of the People on pending business.

(A) *House of the People*.—The matter, not being dealt with in the Constitution, must be governed by Rules, made under Art. 118 (1). Since dissolution puts an end to the life of the House itself [Art. 83 (2), *ante*], it follows, *prima facie*, that all pending business must be wiped away by dissolution. To this general rule, only one exception has been engrafted by r. 285 of the Rules of the House of the People, as follows:

"A Committee which is unable to complete its work before the expiration of its term or before the dissolution of the House may report to the House that the Committee has not been able to complete its work. Any preliminary report, memorandum or note that the Committee may have prepared or any evidence that the Committee may have taken shall be made available to the new Committee."

It is clear from the above Rule that the business pending before a Committee will be quashed by dissolution, but the Rule saves two things specifically, for the use of the corresponding Committee which may be appointed by the new House, for the same purpose, namely,—(a) any preliminary report, memorandum or note that the dissolved Committee may have prepared; (b) any evidence that the dissolved Committee has already recorded.

The above Rule will not, however, extend to the Committee of Privileges, because as to that Committee, Art. 105 (3) will come into operation, so that the practice in the House of Commons shall prevail and such practice cannot be modified anything short of legislation by Parliament, under the first part of Art. 105 (3).

(B) *Council of States*.—On this point, there is a marked divergence from the English system.

In *England*, though the House of Lords contains a large hereditary element, it is not supposed to be a permanent body in the sense in which *our* Council of States is, under Art. 83 (1). In *England*, the Crown dissolves 'Parliament' and not the House of Commons alone. Hence, a dissolution puts an end to the House of Lords as well and all business in that House is wiped away, excepting the judicial functions of the House of Lords as a Court of appeal, for the continuance

(4) Halsbury, 1912, Ed., para. 1282.

of which during dissolution has been made by statute (Appellate Jurisdiction Acts, 1876, 1887).

In *India*, on the other hand, it is only the House of the People which can be dissolved [Art. 85 (1)], and the duration of the Council of States as a body is not interrupted by dissolution even though a portion of its members have to retire after the prescribed period [Art. 83 (1)]. In the result, outside cl. (5) of Art. 107, there is no question of any other business being lapsed owing to dissolution. Though the Council itself cannot sit unless summoned by the President, there is nothing to prevent its Committees carrying on their business during dissolution.

But the question relating to the business of the Privileges Committee of the Council would have to be considered in a different manner because Art. 105 (3) extends the law of privileges in the British House of Commons to *both* the Houses of *our* Parliament. The result is somewhat anomalous, because the law on the point in question in the House of Commons rests on the fact that dissolution puts an end to both Houses, whereas in India, the Council of States is not dissolved at all. The question in India is not what is the effect of a dissolution of 'Parliament' but what is the effect of a dissolution of the House of the People. This anomaly will continue until Parliament enacts a law regulating the matter of privileges, under Art. 105 (3). But the riddle will be solved in a different way: Because the Council will almost invariably be prorogued simultaneously with the dissolution of the House of the People, the effect on the Committee of Privileges of the Council will be the same as in the case of a prorogation of the Council itself, which has already been discussed (pp. 662, *ante*).

INDEX TO COMMENTS

ARTICLE 107.

Legislative Procedure.

Clauses (1)-(2).

Other Constitutions: (A) England, 634; (B) U.S.A., 635; (C) Australia, 635; (D) Canada, 635; (E) South Africa, 636; (F) Eire, 636; (G) France, 636; (H) Japan, 636; (I) Ceylon, 636; (K) Government of India Act, 1935, 636.

India:

Cl. (1): Introduction of other than financial bills, 637; Classification of Bills, 637.

Cl. (2): Passing through both Houses, 638.

(A) Legislative Procedure in the House of the People:

I. Bills Originating in the House.

(A) Introduction and publication of a Bill.

(i) Publication before introduction, 639.

(ii) Notice of motion for leave to introduce a private member's Bill, 640.

(iii) Motion for leave to introduce a Bill, 640.

(iv) Publication after introduction, 640.

(B) Motions after Introduction.

(i) Motions after introduction of a Bill, 640.

(ii) Scope of debate and amendments, 641.

(C) Report by Select Committee.

(i) Report by Select Committee, 641.

(ii) Procedure after presentation of the Report, 642.

(D) Consideration of the Report of the Select Committee, 642.

(E) Passing of a Bill.

Motion that a Bill be passed, 642; Scope of Debate on the motion, 642.

(E) Transmission of the Bill to the Council, 643.

II. Bills originating in the Council and transmitted to the House, 643.

Final disagreement between the two Houses, necessitating application of Art. 108, 644.

Rejection of the Bill by the House, either during its first or second journey, 644.

III. Returned Bill received back in the House from the Council, 644.

(B) Legislative Procedure in the Council of States.

I. Bills originating in the Council, 644.

II. Procedure in the Council relating to a Bill which is transmitted to it by the House,

645.

Authentication of Bills, 646.

Procedure relating to a Bill returned by the President for reconsideration, 646.

Special procedure relating to Private Members' Bills: (A) In the House of the People,

646; Committee on Private Members' Bills, 647; (B) In the Council of States, 648.

Amendments in both Houses:

Procedure relating to Amendment of a Bill, 648 ; Notice of Amendment, 648 ; President's sanction or recommendation to be annexed to notice, where such sanction required, 649 ; Conditions or admissibility of amendments to a Bill, 650 ; Order of Amendments, 650 ; Moving and withdrawal of Amendment, 650 ; Debate on Amendment, 651.

Scope of Amendment of particular Bills:

A Bill to extend an expiring Act, 651 ; A Bill to extend an expiring Act, 651 ; A Consolidating Bill, 651 ; An Amending Bill, 652.

Committees Generally:

(A) England, 653 ; (B) U.S.A., 654 ; (C) France, 654.

(D) India—

I. Committees in the House of the People, 655.

II. Committees in the Council of States, 659.

III. Joint Committee of both Houses, 650.

Clause (3).

Other Constitutions : (A) England, 660 ; (B) Government of India Act 1935, 660.

India :

Effect of Prorogation on pending Bills, 660 ; How long is a Bill 'pending in Parliament', 660.

Effect of Prorogation on motions, resolutions, notices, 661.

Effect of Prorogation on Proceedings for breach of Privilege, 661.

Clauses (4)-(5).

Other Constitutions : Government of India Act. 1935, 662.

India :

Effect of dissolution on pending Bills, 662 ; Effect of dissolution on pending business other than Bills, 663.

Joint sitting of both Houses in certain cases. **108.** (1) If after a Bill has been passed by one House and transmitted to the other House—

(a) the Bill is rejected by the other House ; or

(b) the Houses have finally disagreed as to the amendments to be made in the Bill ; or

(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it, the President may, unless the Bill has lapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill :

Provided that nothing in this clause shall apply to a Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses :

Provided that a joint sitting—

(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in

which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill ;

(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed ;

and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

OTHER CONSTITUTIONS

(A) *England*.—We have already seen (p. 634, *ante*) that, subject to the Parliament Act, 1911, a Bill is enacted only if it is passed in an identical form⁵ by both the Houses. If, however, one House makes amendments to which the other House cannot agree, some means must be devised to overcome the difference. Formally, it is sought to be solved by exchange of written messages between the two Houses. But in effect, the agreement is reached by informal discussion between the different party leaders or on the intervention of the Cabinet itself which is composed of members from both Houses.⁵ Conferences between the two Houses have fallen into disuse.^{5a}

If all this fails and the Cabinet is intent upon the enactment of the measure in the face of opposition of the Lords, the procedure under the Parliament Act, 1911 (p. 635, *ante*) is resorted to.

(B) *U.S.A.*—It has already been noted (p. 635, *ante*), that in the case of other than revenue legislation, the two Houses of the American Congress have equal powers, and no Bill which has not received assent of both Houses in the same form can become law. Further, there is no provision in the Constitution itself, for solving deadlocks or disagreements between the two Houses. The absence of constitutional provision has, however, led to the *practice* of conferences between the two Houses. When a Bill has passed either House, it is transmitted to the other. If the latter amends the Bill, it must return it to the former for reconsideration of the Bill and for adoption or rejection of the amendments. If the former is unable to accept the amendments, either House may propose a joint conference and such proposal being agreed to by the other House, each House would then appoint representatives on a joint conference committee which, meeting in secret, would try to compromise the difference as much as possible. The Conference committee has unlimited power over the Bill and may even rewrite it, if necessary. The Committee would then report to the respective Houses and the Houses may either accept the report of the committee in whole or reject it. If the report of the committee be rejected by either Houses, there would, of course, be an end of the Bill. According to *Bryce*⁶—

"In a contest the Senate usually, though not invariably, gets the better of the House. It is smaller, and can therefore more easily keep its majority together. its members are more experienced ; and it has the great advantage of being permanent, whereas the House is a transient body."

(5) May, 16th Ed., p. 582. Halsbury.
3rd Ed., Vol. 28, pp. 393-4.

(5a) May, 16th Ed., p. 835.

(6) Bryce, American Commonwealth. Vol. I, p. 185.

(C) *Australia*.—Sec. 57 of the Australian Constitution Act provides for solution of a deadlock⁷ between the two Houses by means of a double dissolution followed by a joint sitting, if necessary. If the House of Representatives passes a Bill which the Senate rejects and again after an interval of 3 months passes the same Bill and it is again rejected by the Senate, the Governor-General may dissolve both the Houses simultaneously. If after the double dissolution, the two Houses do not agree on that Bill as passed by the House of Representatives, the Governor-General may convene a joint sitting of the Houses, and if the Bill is passed by an absolute majority of the members sitting together, it will be deemed to have been passed. There have been two instances of the application of this provision,—in 1914 and 1951 when the Government had a majority in the House but *not* in the Senate.

S. 57 reads as follows—

"57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of Parliament, and shall be presented to the Governor-General for the Queen's assent."

(D) *Canada*.—In the Canadian Constitution Act, there is no provision for resolving a deadlock between the two Houses. Every Bill must be passed by both Houses (s. 55) and if the Houses fail to come to an agreement, the Bill is lost. But, in practice, agreement is sought to be reached through the medium of conferences of members of the two Houses.⁸

(E) *Eire*.—Arts. 23-24 of the Constitution of Eire, 1937, contain provisions similar in principle to those of the Parliament Act, 1911 (of England). The substance of these provisions is that if a Bill other than a Money Bill is not returned to the *Dail* in such form as the *Dail* approves within 90 days after being sent to the *Seanad Eireann* (i.e., the Senate) the Bill will be deemed to have been passed by both Houses if the *Dail* passes a resolution to that effect within 180 days thereafter. But if the Prime Minister certifies that a Bill, other than a constitutional amendment, is designed to meet some public emergency,—the President may, after consulting the Council of State, abridge the above periods of 90 and 180 days; but a law so passed shall remain in force only for 90 days from the date of its enactment or for such longer time as both Houses may agree upon.

But the provision in Art. 27 of the Constitution of Eire is novel. It says that if a Bill is passed over the head of the Senate by the *Dail*, under Art. 23 (above), the President may, at the request of a majority of Senators and a third of the *Dail*, decline his assent to the Bill on the ground that it is of such national

(7) The Standing Orders of both Houses also provide for conferences between the two Houses to prevent deadlocks, but such conferences rarely take place,—the only two occasions in the past were in 1930 and 1931

[Nicholas, *Australian Constitution*, 1952, p. 83].

(8) Dawson, *Government of Canada*, 1949, p. 420.

importance that the will of the people ought to be ascertained. Thereafter the Bill shall drop, unless within 18 months of the President's decision, the *Dail* reaffirms the Bill after a general election, or the Bill is approved by a referendum, held under Art. 47 (2).

(F) *Fourth French Republic*.—The relevant provision in Art. 20 of the Constitution was amended in 1954.

Prior to the amendment of 1954, the power of enactment was vested in the National Assembly alone so that there was little scope for any 'deadlock' between the two Houses.

The amendment of 1954 conferred co-ordinate powers upon the Council except on specified matters and, therefore, introduced a procedure for the resolution of a deadlock between the two Chambers. The procedure, popularly called 'shuttle', consisted of several movements of a bill between the two Houses, to and fro, which led to the ultimate victory of the National Assembly.

Art. 20, as amended, provided—

"All bills are examined in turn by the two Chambers of Parliament with a view towards arriving at the adoption of an identical text.

Unless the Council of the Republic has already examined the bill in its first reading, it must make a decision within two months from the date of transmission of a text passed by the National Assembly in first reading.

With regard to budget and finance laws the time at the disposal of the Council of the Republic must not exceed the time taken up previously by the National Assembly in its deliberation and vote. In case the National Assembly decides on urgency procedure the time limit is twice that allowed by the rules of the National Assembly for its debate.

If the Council of the Republic has not come to a decision within the time provided in the preceding paragraphs, the law is ready to be promulgated in the form adopted by the National Assembly.

If no agreement has been reached the examination of the bill continues before each Chamber. After two readings by the Council of the Republic each Chamber disposes of as much time for this purpose as has been taken up by the other Chamber in its preceding reading, but this period may not be shorter than seven days, or one for the bills envisaged by the third paragraph.

If no agreement ensues within one-hundred days from the transmission of the bill to the Council of the Republic for second reading, reduced to one month for budget and finance bills and to fifteen days in case of urgency procedure, the National Assembly may legislate with finality, either by taking up the last version passed by it, or by adopting one or several of the amendments to it proposed by the Council of the Republic.

If the National Assembly exceeds or extends its time limit for the examination of bills, the time limit for reaching agreement between the two Chambers is increased correspondingly.

The time limits provided by this present article are suspended during the interruptions of the session. They may be extended by decision of the National Assembly."

The foregoing elaborate provision made a distinction between (a) a failure of the Council to arrive at a decision within a specified time-limit; (b) a failure to arrive at an agreed text within a specified time limit.

(a) In the case of an ordinary bill transmitted by the National Assembly to the Republic, the bill was taken as passed in the form adopted by the National Assembly if the Council failed to arrive at a decision within *two months* of the date of transmission. In the case of budget and finance bills, this period was reduced to the period which the National Assembly took in its deliberation and vote on the bill.

(b) If the Council made a decision within the above time limit, but the two Houses failed to arrive at an 'agreed text', there followed a process of re-reading of the bill in the two Houses, subject to a time limit, which could be extended or curtailed by the Assembly.

The net result of the above procedure was that there was no machinery like a conference to reach an agreement between the two Houses. The Council could only interpose delay for a prescribed maximum time-limit and after the lapse of that period, the lower House got plenary power to enact the bill by its unilateral action.

(G) *Fifth French Republic*.—The deficiency just mentioned has been sought to be supplied by the Constitution of 1958 by providing for the meeting of a joint

committee of the two Houses for the purpose of resolving differences. The ultimate victory of the National Assembly is, however, ensured in case the joint committee fails. Art. 45 provides—

"Every Government or Parliamentary bill shall be examined successively in the two Assemblies of Parliament with a view to the adoption of an identical text.

When, as a result of disagreement between the two Assemblies it has been impossible to adopt a Government or Parliamentary bill after two readings by each Assembly, or, if the Government has declared the matter urgent, after a single reading by each of them, the Premier shall have the right to bring about a meeting of a joint committee composed of an equal number from both Assemblies charged with the task of proposing a text on the matters still under discussion.

The text elaborated by the joint committee may be submitted by the Government for approval of the two Assemblies. No amendment shall be admissible except agreement with the Government.

If the joint committee does not succeed in adopting a common text or if this text is not adopted under the conditions set forth in the preceding paragraph the Government may, after a new reading by the National Assembly and by the Senate, ask the National Assembly to rule definitively. In this case, the National Assembly may reconsider either the text elaborated by the joint committee, or the last text voted by it, modified when the circumstances so require by one or several of the amendments adopted by the Senate".

(H) *Japan*.—Art. 59 of the Japanese Constitution says—

"A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.

A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.

The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, as provided for by law.

Failure by the 'House of Councillors' to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the House of Representatives to constitute a rejection."

Similarly, Art. 60 provides—

"Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet."

The result of these provisions is that though an attempt to dissolve differences between the two Houses may be made through a joint committee of both Houses, it is the decision of the House of Representatives which shall prevail, after the expiry of the prescribed period of time, whether in the case of financial or other legislation.

(I) *Government of India Act, 1935*.—The Act of 1935 [s. 38 (2), (4)] prescribed joint sitting to resolve disagreements between the two Houses, but the summoning of the joint sitting was to be done by the Governor-General 'acting in his discretion', and at the joint sitting it was the President of the Upper House (Council of States) who was to preside.

INDIA

Removal of deadlock between the two Houses by joint sitting.

If we compare the provisions of this article, with those of Art. 197 relating to the State Legislature, it will be obvious, that while the English precedent of giving predominance to the lower House has been followed in case of difference between the two Houses of the State Legislature, the Australian device of joint sitting has been prescribed for similar difference in the Union Parliament. The reason for this difference in treatment is that the second Chamber in the Union Parliament, viz., the Council of States represents the federal principle,⁹ and that its composi-

(9) Constituent Assembly Debates, Vol. VIII. p. 181.

tion will also be different from the second Chamber of the State Legislatures. The Council of States will also differ from the English House of Lords, inasmuch as it will largely be an elected body worthy of not much less respect than the House of the People.

Cl. (1): When the sitting would take place.

Under cl. (1) there is no time limit as to when the sitting would take place. It may take place at *any* time subsequent to the notification, as the President may direct and even though a dissolution has taken place *after the notification* [cl. (5)].

Under Sec. 31 (1) of the Government of India Act, 1935, the date of sitting was limited by two conditions—(a) it was to be in the next session subsequent to the notification; (b) it was to be after the expiration of 6 months from the date of the notification.

Neither condition restricts the President's power under the present clause.

Nor is there any limitation of time within which the President has to exercise his power to notify his intention to summon a joint sitting under the present Article. The only limitation is that the power cannot be exercised after the President has ordered a dissolution of the House of the People, under Art. 85 (2). Subject to this, the power to convene a joint session can be exercised by the President *at any time* after any of the contingencies specified in Art. 108 (1) has taken place, and even after prorogation of the session.

'The President may'.—The word 'may' suggests that it is not obligatory upon the President to exercise this power whenever any deadlock between the two Houses has taken place. If the President does not summon a joint sitting, there is an end of the Bill (not being a Money Bill),—

(a) if a Bill passed by one House has been *rejected* by the other House; or
(b) there has been a 'final disagreement' between the two Houses regarding amendments, within the meaning of rr. 126, 153 of the Rules of the House of the People, or rr. 102, 131 of the Rules of the Council of States.

Sub-cl. (a): 'Rejected by the other Houses'.

The Rules of the two Houses¹⁰ explain when the House to which a Bill has been transmitted by the other House shall be deemed to have 'rejected' the Bill. Rejection takes place if any of the following motions is negatived by the House to which the Bill has been transmitted:

- (i) that the Bill be referred to a Select Committee;
- (ii) that the Bill be taken into consideration;
- (iii) that the Bill as reported by Select Committee be taken into consideration;
- (iv) that the Bill (or the Bill as amended) be passed.

Sub-cl. (b): 'Finally disagreed as to the amendments'.

As to when the two Houses may be deemed to have 'finally disagreed' as to the amendments to be made in a Bill, we may refer to the Rules of Procedure of the two Houses of Parliament¹¹ which make this clear. This may be illustrated with reference to a Bill which is transmitted to the Council after having been passed by the House:

(a) The disagreement starts if the Council passes the Bill with amendments, and returns the Bill to the House, with the amendments.

(b) The second stage of disagreement takes place if the House next disagrees with the amendments made by the Council or any of them or the House makes further or other amendments in place of those made by the Council, and transmits the Bill for the second time to the Council.

(c) The third and final stage of the disagreement takes place if the Council now insists on the amendments which were made by it but not agreed to by the

(10) R. 127 of the Rules of the House; r. 134 of the Rules of the Council.

(11) Rr. 122-126 of the Rules of the House; r. 133 of the Rules of the Council.

House. In such a case, the Council would return the Bill to the House for the second time with a message that it insists on the amendments to which the House has disagreed. On such a return, there is a 'final disagreement' for the purposes of Art. 108.

In short, when the originating House gets back a Bill from the other House in an unacceptable form for the *second* time, there is a 'final disagreement' between the two Houses. The Rules of the Houses do not provide for or contemplate any further proceedings in the Houses thereafter and, as the Rules stand, there would be an end of the Bill if, after this stage is reached, the President does not summon a joint session.

The first occasion to require a joint session arose when the Rajya Sabha made amendments to the Dowry Bill, 1960 which were not agreed to by the Lok Sabha, which originated the Bill, and the Rajya Sabha next insisted on such amendments. A joint session of the two Houses was, accordingly, summoned by the President to be held on May 6, 1961, to discuss the amendments on which the disagreement took place. The case thus came within the purview of Proviso (b) to Cl. (1) of Art. 108.

Sub-cl. (c) : Computation of the period of 6 months.

Sub-cl. (c) is to be read with cl. (2). Sub-cl. (c) provides that the period of 6 months referred to therein is to be computed from the date of reception of the Bill by the House to which it is transmitted. But there is an extension of the time if that House is at any time prorogued within this period of 6 months or stands adjourned for more than 4 consecutive days. In such cases, the period during which the House stood prorogued or adjourned for more than 4 consecutive days shall have to be excluded from the foregoing computation, and the President cannot make the notification until the extended period expires.

Whether the receiving House may pass a Bill after the lapse of six months after reception.

Sub-cl. (c) of Art. 108 (1) is only an enabling provision, empowering the President to take a step for resolving a deadlock between the two Houses. It does not disable the receiving House to pass the Bill after the lapse of six months, provided the Bill has not lapsed by reason of dissolution or the President has not already notified his intention to convene a joint session under Art. 108 (1).

The language in cl. (3) also suggests that unless and until the President has notified his intention to summon a joint sitting, it is possible for 'either House' to 'proceed further with the Bill'.

Nor do the Rules of Procedure of the Houses impose any such limitation. For, r. 115 of the Rules of the House of the People and the corresponding r. 120 of the Rules of the Council both provide that notice of a motion that the Bill be taken into consideration can be given—

"at any time after the Bill has been so laid on the Table".

In fact, the House of the People has passed Bills after an expiry of six months from the date of the receipt of the Bills from the Council of States *e.g.*, the Indian Railways (Amendment) Bill, 1953; the Railway Stores (Unlawful Possession) Bill, 1954.

Cl. (4) : Procedure at the joint sitting.

Our Constitution differs from the *Australian* Constitution in not requiring an absolute majority of the total number of members of the two Houses (Sec. 57, para. 3) for passage of the amendments at the joint sitting. Under *our* Constitution a simple majority of the total number of members present and voting at the joint sitting will pass the Bill with such amendments as are agreed to by such majority. This will obviously give the House of the People the upper hand,

inasmuch as its membership is double that of the Council of States. The Speaker of the House of the People shall preside at the joint sitting [Art. 118 (4)].

Proviso.

The object of the Proviso is to prevent the introduction of new matters not relating to the final disagreement which led to the joint sitting so as to cause further delay in the passage of the Bill.

Proviso (a) refers to the case mentioned in sub-cl. (a) and (c) of cl. (1) of Art. 108. If the House to which the Bill was transmitted did not make any amendments to the Bill, but simply rejected the Bill or merely withheld the Bill without returning it, the disagreement, obviously, did not arise out of any amendments. The difference, in such a case, arose out of the principle of the Bill. Hence, at the joint sitting, no amendments can be moved except only such amendments as may be necessary by the delay which has intervened since it was passed by the originating House.

Proviso (b) deals with the case referred to in sub-cl. (b) of cl. (1) of Art. 108 where the disagreement arose because one House made amendments to which the other House could not agree.¹²⁻¹⁴ In such a case, amendments would be admissible at the joint sitting, but only such amendments as are 'relevant' to the amendments with respect to which the Houses did not agree,¹²⁻¹³ and the decision of the person presiding at the joint sitting as on the question of such relevancy shall be final.

Other matters relating to the procedure at a joint sitting are to be laid down in rules made under Art. 118 (3) [see *post*].

Cl. (5): Dissolution after notification cannot prevent joint sitting.

This clause is complementary to the provision in Cl. (5) of Art. 107, *ante*. When the President notifies his intention to summon a joint sitting under Cl. (1) of Art. 108, a subsequent dissolution will not cause the Bill to lapse nor to stand in the way of the joint sitting. It is obvious, however, that the proviso in cl. (5) can operate only so long as the election of a fresh Parliament has not taken place.

Of course, as cl. (1) provides, if the Bill has already lapsed by reason of a dissolution, *before* the President has notified his intention to summon a joint sitting, a joint sitting cannot be summoned thereafter, so as to revive the lapsed Bill.

INDEX TO COMMENTS

ARTICLE 108.

Other Constitution :

(A) England, 667 ; (B) U.S.A., 667 ; (C) Australia, 667 ; (D) Canada, 667 ; (E) Eire, 667 ; (F) Fourth French Republic, 668 ; (G) Fifth French Republic, 668 ; (H) Japan, 669 ; (I) Government of India Act, 1935, 669.

India :

Removal of deadlock between the two Houses by joint sitting, 669.

Cl. (1) : When the sitting would take place, 670 ; 'The President may', 670.

Sub-cl. (a) 'Rejected by the other House', 670 ;

Sub-cl. (b) 'Finally disagreed as to the amendments', 670 ;

Sub-cl. (c) Computation of the period of 6 months, 671 ; Whether the receiving House may pass a Bill after the lapse of six months after reception, 671.

Cl. (4) Procedure at the joint sitting, 671 ; Proviso, 672.

Cl. (5) Dissolution after notification cannot prevent joint sitting, 672.

Special procedure in respect of Money Bills.

109. (1) A Money-Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations

(12-13) Together with such formal amendments as may be necessary on account of the delay in the passing of the Bill.

(14) The Dowry Bill, 1960, referred to at p. 671, *ante*, fell under this Proviso.

and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

OTHER CONSTITUTIONS

(A) *England*.—The rule that Money Bills may originate only in the House of Commons is not sanctioned by any statute but is the result of constitutional struggle between the two Houses culminating in the resolution of the Commons in 1678¹⁵ that all aids and supplies are the sole gift of the Commons. But the Lords could still freely amend or reject Money Bills passed by the House of Commons. This has been put a stop to by the Parliament Act, 1911, under which the Lords can neither amend nor reject a Money Bill; they can at most prevent a Money Bill being passed for a period of one month. Sec. 1 (1) of this Act says—

"If a Money Bill, having been framed by the Commons and sent to the Lords at least one month before the end of the session, is not passed by the Lords without amendment, within one month after it has been sent up, the Bill, *unless the Commons direct to the contrary*, shall be presented to the King and become a statute on receipt of the Royal Assent *without the consent of the Lords*".

It is to be noted, however, that the above provision is applicable only to Bills which are certified by the Speaker as Money Bills. If a 'financial' Bill is not so certified, it may become law only with the assent of the House of Lords, as an ordinary Bill.¹⁶

It is to be noted that the provision also gives power to the House of Commons to 'waive their privilege', and by virtue of this provision, it has been possible for the House of Commons to agree to amendments made by the House of Lords to 'Money Bills' as are verbal or consequential in nature or are necessary owing to lapse of time.¹⁷

(B) *U.S.A.*—Art. I, Sec. 7 (1) of the Constitution says—

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."

Thus, excepting the power of initiation, the Senate has equal powers over revenue bills. There is no difference as regards appropriations bills.

(15) (1678) 9 C.J. 235, 509.

(16) Except that in the case of bills relating to the 'aids and supplies', the Lords' right of initiation and amendment are

denied by the privileges of the Commons [May, 15th Ed. pp. 783, 785-8].

(17) Halsbury, 3rd Ed., Vol. 28, p. 309; 16th Ed., p. 813.

Even the expression 'revenue bill' has been construed to refer only to bills to levy taxes and not to include bills which incidentally yield revenue.¹⁸

(C) *Canada*.—Sec. 53 of the Br. North America Act says—

"Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons."

So Money Bills may originate only in the House of Commons (lower House), but the Senate can amend them. On this point, there has been a controversy between the two Houses in Canada which has not yet been finally settled. The House of Commons has made a Standing Order (S.O. 61) which claims that all bills for aids and supplies shall not only originate in the House of Commons but shall *not* be 'alterable by the Senate'. The Senate contends that the Constitution Act simply provides that such bills must originate in the Commons but does not take away the right of the Senate to amend them like any other bill. Hence, the Senate has freely exercised its right to amend money bills and though it has never openly rejected a money bill, it has made serious amendments and the House of Commons has been obliged to accept the amendments.

The position in Canada, thus, differs from that in England.

By convention, however, the Senate has never claimed the right to increase an item of supply or revenue except at the instance of the Government.¹⁹

(D) *Australia*.—The Senate may neither originate nor amend Money Bills. It may only *suggest* amendments.

S. 53 of the Constitution Act provides—

"Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law."

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. The Senate may not amend any proposed laws so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

In practice, the suggestions of the Senate for amending Money Bills are usually honoured by the House of Representatives.

In this connection, it should be noted that the scope of s. 53, denying the Senate direct power to amend a Money Bill, is limited by the provisions of ss. 54 and 55 which provide that the annual appropriation Bill or a Bill imposing taxation shall deal "*only*" with such appropriation or taxation. If such Bill contains any other matter, the provisions containing such other matters shall be invalid.²⁰

(E) *Eire*.—Art. 21 of the Constitution of 1937 provides—

"1. (1) Money Bills shall be initiated in Dail Eireann only.

(2) Every Money Bill passed by Dail Eireann shall be sent to Senad Eireann for its recommendations.

2. (1) Every Money Bill sent to Seanad Eireann for its recommendations shall, at the expiration of a period not longer than 21 days after it shall have been sent to Seanad Eireann, be returned to Dail Eireann, which may accept or reject all or any of the recommendations of Seanad Eireann.

(2) If such Money Bill is not returned by Seanad Eireann to Dail Eireann within such 21 days or is returned within such 21 days with recommendations which Dail Eireann does not accept, it shall be deemed to have been passed by both Houses at the expiration of the said 21 days."

(18) Corwin, *Constitution of the U.S.A.*, 1953, p. 102.

(19) Dawson, *Government of Canada*, 1949, pp. 349-50.

(20) *R. v. Barger*, (1908) 6 C.L.R. 41; *Cadbury v. Fed. Commr.*, (1944) 70 C.L.R. 362 (373).

(F) *Fifth French Republic*.—Art. 47 of the Constitution of 1958 provides—

"The Parliament shall pass finance bills under the conditions stipulated by an organic law.

Should the National Assembly fail to reach a decision on first reading within a time limit of forty days after a bill has been filed, the Government shall refer it to the Senate, which must rule within a time limit of fifteen days. The procedure set forth in Art. 45 shall then be followed.

Should Parliament fail to reach a decision within a time limit of seventy days, the provisions of the bill may be enforced by ordinance . . ."

(G) *Japan*.—Art. 60 of the Japanese Constitution provides—

"The budget must first be submitted to the House of Representatives.

Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet."

(H) *Government of India Act, 1935*.—See Sec. 37, reproduced under Art. 117, below.

The Act made no distinction between money Bills and other 'financial bills'. All financial bills, including money Bills were governed by s. 37.

INDIA

Art. 109 : Procedure regarding Money Bills.

While Arts. 107-8 deal with the procedure in the two Houses as regards Bills other than Money Bills, Arts. 109-110 lay down the procedure for Money Bills. A Money Bill is to originate only in the lower House, following the procedure obtaining throughout the Parliamentary system. Our Council of States shall also have no power to reject or amend a Money Bill. It shall only have the power to suggest recommendations, which may or may not be accepted by the House of the People. This idea of suggesting recommendations is taken from the Constitutions of *Australia* and *Eire*. The English House of Lords has no such power of suggesting amendments, but it may interpose a delay of one month. But the power of our Council of States to interpose delay is shorter,—it is fourteen days [Cl. (5)]. If it fails to return the Bill to the House of the People within 14 days of its receipt of the Bill, the Bill will be deemed to have been passed by both Houses, at the expiration of that period.

So, the power and control of the House of the People over Money Bills shall be absolute, though it has been given the opportunity of having the views of the other Chamber.

The restriction imposed upon the powers of the Council of States by cls. (2)-(5) of Art. 109 is, however, controlled by the provisions of Art. 110 which defines what is a 'Money Bill'. Though by cl. (3) of Art. 110, the Speaker is given the final authority to decide whether a Bill is a Money Bill or not, the Speaker's power is, obviously, controlled by the provisions of cl. (1) of Art. 110 of the Constitution itself which says that a Bill will be a 'Money Bill' only if it deals solely with the matters enumerated in cl. (1) or any of them. If the Bill contains any other matter, it should not be certified by the Speaker as a Money Bill so as to deprive the Council of States of its normal power to amend or to reject.

Cl. (1) : Introduction of Money Bills.

This clause lays down that a 'Money Bill', as defined in Art. 110, can only be introduced in the House of the People. This feature, however, does not belong solely to 'Money Bills' as directly come under any of the sub-clauses of cl. (1) of Art. 110 but belongs also to other financial bills which provide for any of the matters specified in any of the sub-clauses of cl. (1) of Art. 110 but which are not 'Money Bills' according to the definition contained in that Article because

they do not deal *only* with such matters but also include other non-financial clauses [Art. 117 (1), *post*].

Cls. (2)-(5) : Stages after introduction.

These clause lay down the special incidents which belong to 'Money Bills' as defined in Art. 110. In short, these special incidents are that the Council of States has no power to reject a Money Bill and also that it cannot directly amend a Money Bill. It can only make recommendations to the House of the People to amend such Bill, which may or may not be accepted by the House of the People.

When a Money Bill is transmitted by the House of the People to the Council of States, the Council may take any of these courses:

(i) As cl. (2) makes it clear, the Council shall have *no* power to reject such Bill; it can only make recommendations for amendment within 14 days of its receipt in the Council.²¹ The period of 14 days is to be computed from the date of its receipt in the Council and not from the date when it is laid on the Table of the Council [under R. 162 of the Rules of the Council].

(ii) If the Council recommends amendments and the House accepts any of the amendments so recommended,²² the Bill is *deemed* to have been passed by Parliament with such amendments *only* as have been accepted by the House out of the recommendations of the Council, and thereafter it shall be presented to the President for his assent under Art. 111.

(iii) If the Council recommends amendments but the House does *not* accept²³ any of the recommendations, the recommendations of the Council shall be wholly nugatory, and the Bill shall be *deemed* to have been passed by Parliament in the form in which it had been passed by the House before transmission to the Council, and thereafter it will be presented to the President for his assent under Art. 111.

(iv) If the Council does not make any recommendations but simply returns the Bill to the House of the People within 14 days, no problem arises because that means that the Bill is in fact passed by both the Houses.²⁴

(v) If, however, the Council does not take any of the foregoing steps but simply sits upon the Bill, there is a likelihood of a deadlock. Cl. (5), however, prevents such a deadlock by providing that in such a case, on the expiration of 14 days from the date of receipt of the Bill in the Council,²⁵ the Bill shall be *deemed* to have been passed by both Houses in the form in which it had been passed by the House, and then presented to the President for his assent.

Rules of Procedure for the passing of Money Bills.

The Rules of Procedure of the two Houses of Parliament in relation to Money Bills should now be referred to by way of illustrating the constitutional provisions, discussed above.

(i) When a Money Bill is passed by the House of the People, it is transmitted to the Council of States with the Speaker's certificate endorsed on the Bill.²⁶

(21) If the Bill is transmitted by the House at a time when the Council is not in session and is not due to reassemble within a period of 14 days, the effect of such transmission would be to deprive the Council of any opportunity to discuss the Bill. In order to avoid such an unwholesome situation, the House has adopted a practice of withholding the transmission until the Council reassembles in cases where a Money Bill is passed by the House at a time when the Council is not in session [(1955) H. P. Deb., Vol. V, 8951-3]. It is because of this practice that the Travancore-Cochin (vote on Account) Bill, 1956 could not be transmitted to the Council of States (while it was

not in session) and an Ordinance had to be promulgated to give effect to the Bill.

(22) The Travancore-Cochin (vote on Account) Bill, 1956 is an instance when the Council made a recommendation for amending a Money Bill and such recommendation was accepted by the House [L.S. Deb. (II), dated 3-5-56].

(23) So far there has been no such instance [r. 108, Rules of the House of the People].

(24) The motion is—'that the Bill be returned' [r. 103 of the Rules of the House].

(25) Proviso to R. 96 (2) of the Rules of the House.

(ii) When the Bill so transmitted is received in the Council, the following procedure takes place in the Council.

R. 186 of the Rules of the Council provides—

"186. (1) A Money Bill passed by the House and transmitted to the Council shall, as soon as may be, be laid on the Table.

(2) The Chairman, in consultation with the Leader of the Council, shall within two days of the Bill being so laid on the Table allot a day or days or part of a day for the completion of all or any of the stages involved in the consideration and return of the Bill by the Council including the consideration and passing of amendments, if any, to the Bill.

(3) When such an allotment has been made, the Chairman shall at the appointed hour on the allotted day or the last of the allotted days, as the case may be, forthwith put all the questions necessary to dispose of the outstanding matters in connection with the stage or stages for which a day or days or part of a day has been allotted.

(4) After the motion that the Bill be taken into consideration has been carried, the Bill shall be taken up clause by clause. At this stage amendments to be recommended to the House may be moved to the Bill and the provisions of the Rules of the Council regarding consideration of amendments to Bills shall apply.

(5) After the Bill has been considered clause by clause and the amendments, if any, have been disposed of, the Member in charge of the Bill shall move that the Bill be returned.

(6) When the motion that the Bill be returned has been carried, the Bill shall be returned to the House, in the case where the Council does not make any recommendations, with a message that the Council has no recommendations to make to the House in regard to the Bill, and in the case where any amendments have been recommended by the Council, with a message intimating to the House the amendments so recommended.

(7) On a Bill being introduced in the Council or at any subsequent stage, if an objection is taken that a Bill is a money Bill within the meaning of Article 110 and should not be proceeded with in the Council, the Chairman shall if he holds the objection valid direct that further proceedings in connection with the Bill be terminated.

(8) If the Chairman has any doubt in regard to the validity of the objection, he shall refer the matter to the Speaker whose decision on the question shall be final in accordance with Article 110 (3) of the Constitution."

(iii) When the Bill so returned by the Council is received back in the House, the following procedure takes place:

Rr. 103-8 of the House provide—

"103. If a Money Bill passed by the House and transmitted to the Council is returned to the House without recommendation the message to that effect shall be reported to the House by the Secretary and the Bill shall be presented to the President for his assent.

104. If a Money Bill passed by the House and transmitted to the Council is returned to the House with amendments recommended by the Council, it shall on receipt be laid on the Table.

105. After the Bill with amendments as recommended by the Council has been laid on the Table, any Minister in the case of a Government Bill, or in any other case any member, after giving two days' notice, or with the consent of the Speaker without notice, may move that the amendments recommended by the Council be taken into consideration.

106. If a motion that the amendments as recommended by the Council be taken into consideration is carried, the Speaker shall put such amendments as recommended by the Council to the House in such manner as he thinks most convenient for its consideration.

107. If the House accepts any amendment or amendments as recommended by the Council, the Bill shall be deemed to have been passed by both the Houses with the amendment or amendments recommended by the Council and accepted by the House and a message to that effect shall be sent to the Council.

108. If the House does not accept any of the recommendations of the Council, the Bill shall be deemed to have been passed by both the Houses in the form in which it was passed by the House without any of the amendments recommended by the Council and a message to that effect shall be sent to the Council."

INDEX TO COMMENTS

ARTICLE 109.

Other Constitution :

(A) England. 673 ; (B) U.S.A., 673 ; (C) Canada, 674 ; (D) Australia, 674 ; (E) Eire, 674 ; (F) Fifth French Republic, 675 ; (G) Japan, 675 ; (H) Government of India Act, 1935, 675.

India :

Art. 109: Procedure regarding Money Bills, 675.

Cl. (1): Introduction of Money Bills, 675.

Cl. (2)-(5): Stages after introduction, 676 ; Rules of Procedure for the passing of Money Bills. 676.

110. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely—

(a) the imposition, abolition, remission, alteration or regulation of any tax ;

(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India ;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund ;

(d) the appropriation of moneys out of the Consolidated Fund of India ;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure ;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State ; or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

CLAUSES (1)-(2).

OTHER CONSTITUTIONS

(A) *England*.—A Money Bill is defined in Sec. 1 (2) of the Parliament Act, 1911, as follows:

“A Money Bill means a public Bill which, in the opinion of the Speaker of the House of Commons, contains *only* provisions dealing with the following topics:—
imposition, repeal, remission, alteration, or regulation of taxation ;
imposition for any financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation of such charges ;
supply ;
appropriation, receipt, custody, issue or audit of accounts of public money ;

raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to the above topics or any of them.

Bills relating to rates or loans raised by local authorities are to be regarded as Money Bills."

(B) *Australia*.—In the Australian Constitution Act, there is no specific provision defining a 'Money Bill' as such, but that purpose is served (as has been already stated at p. 674, *ante*) by ss. 54-5 which provide as follows:

"54. The proposed law which appropriates revenue or money for the ordinary annual services of the Government shall deal only with such appropriation.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall have no effect."

(C) *Eire*.—Art. 22 (1) of the Constitution of 1937 says—

"1. (1) A Money Bill means a bill which contains *only* provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; matters subordinate and incidental to these matters or any of them.

(2) In this definition the expressions 'taxation', 'public money' and 'loan' respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes."

(D) *Ceylon*.—S. 31 (2) of the Ceylon (Constitution) Order in Council, 1946 defines a 'Money Bill' as follows:

"... 'Money Bill' means a Public Bill which contains only provisions dealing with all or any of the following subjects, that is to say, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt, *expenses of administration* or other financial purposes, of charges on the Consolidated Fund or any other public funds or on moneys provided by Parliament, or the variation or repeal of any such charges; *the grant of money to the Crown or to any authority or person, or the variation or revocation of any such grant*; the appropriation, receipt, custody, *investment*, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof, or *the establishment, alteration, administration or abolition of any sinking fund provided in connection with any such loan*; or any subordinate matter incidental to any of the aforesaid subjects.

In this sub-section the expressions 'taxation', 'debt', 'public fund', 'public money' and 'loan' do not include any taxation imposed, debt incurred, fund or money provided or loan raised, by any local authority."

The italicised words are improvements upon the English definition (Parliament Act, 1911), quoted above.

(E) *Government of India Act, 1935*.—Sec. 37 of the Government of India Act, 1935, provided—

"(1) A Bill or amendment making provision—

(a) for imposing or increasing any tax; or

(b) for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Federal Government; or

(c) for declaring any expenditure to be expenditure charged on the revenues of the Federation, or for increasing the amount of any such expenditure,

shall not be introduced or moved except on the recommendation of the Governor-General.

(2) A Bill or amendment shall not be deemed to make provision for any of the purposes aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered."

INDIA

CLAUSE (1).

Definition of a Money Bill.

These two Clauses adopt the definition given in the Parliament Act, 1911, and in Sec. 37 of the Government of India Act, 1935, with some verbal changes.

'Only'.—This word provides that a Bill shall be deemed to be a Money Bill if it contains any of the matters contained in Cls. (a)-(g), *without any other*

extraneous provision. This is to safeguard the Upper House against an abuse of this provision by the lower House, by treating ordinary bills as Money Bills, adding to them some financial clause.¹ Bills which do not contain such financial provisions *only*, but include general as well as financial provisions, are dealt with by Art. 117, *post*. It is on this ground that the English Speaker has sometimes refused to certify even annual Finance Bill as a Money Bill.²

Sub-cl. (a).—‘Tax’ in this clause excludes taxes imposed by any local authority or body for local purposes. This is made clear by Cl. (2), which corresponds to the 2nd paragraph of Sec. 1 (2) of the (English) Parliament Act, 1911. Though a Bill for reduction or abolition of a tax will be a Money Bill, it would not require the President’s recommendation for its introduction [Proviso to Art. 117 (1), *post*].

‘Imposition of a tax’.—A law ‘imposing’ a tax is one which in itself and by itself impose a tax; it does not necessarily comprehend every law which deals with taxation.³ A statute which prescribes that there shall be a certain tax bearing the rates and conditions to be prescribed later, is a law imposing the tax,⁴ for, in order to be a taxing statute it need not be complete as to the rate, or subject matter or person to be taxed. On the other hand, a statute by which the tax is thus subsequently assessed, or by which the imposing statute is interpreted is not a statute ‘imposing’ a tax.⁵ Imposition of a tax and collection of a tax are not identical; hence a statute containing procedural or punitive provisions framed to secure the collection of a tax imposed, is not a tax relating to imposition of a tax.⁶ Where the substantive object of a statute is not the raising of money, but the regulation of a certain *line of conduct*,⁷ or the imposition of a penalty or exaction for departure from a specified course of conduct in business, it is not a statute imposing a tax.⁸

But a statute which imposes a tax does not lose that character simply because it lays down certain conditions precedent to liability under the statute.⁹ For, a tax may be imposed absolutely or conditionally.⁹

Sub-cl. (b).—As to ‘borrowing’ or ‘giving’ guarantee by the Government of India, *see* Arts. 292 and 293 (2), *post*.

Sub-cl. (c).—As to the Consolidated and Contingency Funds, *see* Arts. 266-7, *post*.

Sub-cl. (d).—*See* Arts. 114, 266 (3), *post*.

‘Appropriation’.—The word ‘appropriation’ in this Article is used in the same sense as in Arts. 114 and 266 (3). It should be distinguished from mere ‘expenditure’. If a bill merely involves expenditure and imposes liability upon the Government, it will come under Art. 117 (3). What the present sub-clause and Arts. 114 and 266 (3) mean is a Bill which names a particular service and specifically authorises the issue of money out of the Consolidated Fund for that service.¹⁰

Sub-cl. (e).—Under Art. 112 (3) (g), additional items of expenditure may be charged on the Consolidated Fund by legislation. Such Bills will come under the present clause. So also bills for increasing any amount already charged.

Sub-cl. (f).—*See* Arts. 266 (1)-(2); 149-151, *post*.

Sub-cl. (g) : ‘Any matter incidental to’.—This sub-clause modifies the effect of the word ‘only’ in cl. (1). It means that the inclusion of any other matter

(1) *See* the use of this word in Sec. 1 of the Parliament Act, 1911; in Secs. 53-54 of the Australian Constitution Act and the observations in *Cadbury, Ltd. v. Fed. Commissioners*, (1944) 70 C.L.R. 362 (373); *Hood Phillips*, 1952, p. 1610.

(2) *May*, 16th Ed., pp. 819-20.

(3) *Crespin & Son v. Co-op. Farmers*, (1916) 21 C.L.R. 205.

(4) *Br. Imperial Co. v. Federal Commr.*, (1926) 38 C.L.R. 153.

(5) *Br. Imperial Co. v. Federal Commr.*, (1926) 38 C.L.R. 153.

(6) *Wynes, Legislative and Executive Powers*, p. 167.

(7) *R. v. Barger*, (1908) 6 C.L.R. 41.

(8) *Bailey v. Drezel Furniture Co.*, (1914) 17 C.L.R. 665.

(9) *Nott Bros. Ltd. v. Barkley*, (1925) 96 C.L.R. 20.

(10) *Cf. Parl. Deb.*, 12-4-51, cols. 6727-8.

would not make a Bill other than a Money Bill if such *other* matter is 'incidental' to any of the matters enumerated in any of the sub-cl. (a) to (f). This is in consonance with the general doctrine of 'ancillary powers' [see under Part XI, *post*]. Thus, the 'imposition' of a tax cannot be effective unless the mode of assessment is also provided in the law. Hence, a Bill for imposition of a tax would remain a Money Bill even though it contains clauses prescribing the mode of or machinery for assessment of the tax. It is to be noted that while in the Parliament Act, 1911, the expression used is '*subordinate* matters incidental to', the expression used in the present sub-clause is—'any matter incidental to'. The idea, probably, was to liberalise the present sub-clause.

CLAUSE (2).

What are not Money Bills.

Cl. (2) is in the nature of an exception to Cl. (1) (a) and enumerates certain levies which might otherwise have been comprised within the words 'tax' or 'regulation of tax' within the purview of Cl. (1) (a). It specifically says that even though a Bill *exclusively* contains provisions relating to the following matters, it will not be a Money Bill:¹¹

(i) The imposition of fines or other pecuniary liabilities, even though such imposition be for the purpose of enforcing the provisions of *another* Bill or Act imposing a tax;

(ii) The demand or payment of fees for licences;

(iii) The imposition of fees for services rendered;

(iv) The imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

It is to be noted that these very items are also enumerated in Cl. (2) of Art. 117, by way of exception to Cl. (1) of that Article.

'Fees'.

The fees which are excluded from the definition of 'Money Bill' by Cl. (2) are fees levied by the State Government or its administrative agencies other than instruments of Local Self-Government, because municipal taxation, as a whole, is outside the definition of 'Money Bill'.^{11a}

The condition for the exclusion of a fee levied by such authority is that it must be a fee for a licence or a fee for services rendered.^{11a} It would, therefore, not include a *tax*, such as an excise duty, which is sought to be levied through the medium of a licence fee.^{11a}

CLAUSES (3)-(4).

OTHER CONSTITUTIONS

(A) *England*.—The relevant provisions of Sec. 1 (3) of the Parliament Act, 1911, are—

"There shall be endorsed on a Money Bill when sent up to the Lords, and when presented to the King for assent, a certificate signed by the Speaker that the Bill is a Money Bill. Before so certifying the Speaker is to consult, if practicable, two members to be appointed from the Chairman's panel at the beginning of the session by the Committee of Selection."

Sec. 3 of the Act says—

"The Speaker's certificate shall be conclusive for all purposes, and shall not be questioned in any Court of law."

(B) *Eire*.—Sec. 22 (2) of the Constitution of Eire introduces a novel provision by making over the question, whether a bill is a Money Bill or not, to a Com-

(11) Such Bills will not also be 'financial bills' within the meaning of Art. 117, by reason of Cl. (2) thereof [see p. 719, *post*], and will not, accordingly, require the Pre-

sident's recommendation for introduction [(1954) H. P. Deb., Vol. IV, 6358-63].

(11a) *Corporation of Calcutta v. Liberty Cinema*, A. 1965 S.C. 1107 (1180).

mittee of both Houses. Subject to this, the Chairman of the *Dail* has final authority.

(C) *Government of India Act, 1935*.—See s. 37 under Art. 117, *post*.

INDIA

Speaker's decision and Certificate.

Cl. (3) follows Sec. 3 of the Parliament Act, 1911, but is better drafted in so far as it makes it clear that not only the certificate of the Speaker to be ultimately endorsed on the Bill, but the initial decision of the Speaker is also final.

Sec. 1 (3) of the Parliament Act, 1911, further provides that in coming to this decision, the Speaker shall "consult, if practicable, two members to be appointed from the Chairman's Panel at the beginning of the session by the Committee of Selection." There is no provision corresponding to this in the Indian Constitution. So, the Speaker, in *India*, is entitled to make the decision on his sole authority and discretion.¹²

Now as to the Speaker's discretion,—it is to be noted that in England, the Speaker's decision has not always been as might have been expected, in view of the statutory definition of Money Bills in the Parliament Act. Thus,—

"In practice, there have been Bills which would at first sight appear to be 'financial', but which have not been certified by the Speaker as Money Bills; even the annual Finance Bill is sometimes not so certified. The converse is equally true, and Bills which do not appear to be financial have been certified as Money Bills. . . ."¹³

Of course, in making the decision, the Speaker should observe the provisions of Cl. (1), but when he makes his decision, his decision, either way, is unquestionable anywhere, on any ground.

The Speaker gives his certificate by an endorsement at the foot of the Bill as follows—

"I hereby certify that this Bill is a Money Bill within the meaning of Art. 110 of the Constitution of India."¹⁴

If the question as to whether a Bill is a Money Bill arises in the Council of States, and the Chairman entertains any doubt, he should refer the question to the Speaker for his decision.¹⁵

INDEX TO COMMENTS

ARTICLE 110.

Clauses (1)-(2).

Other Constitutions :

(A) England, 678 ; (B) Australia, 679 ; (C) Eire, 679 ; (D) Ceylon, 679 ; (E) Government of India Act, 1935, 679.

India :

Cl. (1).

Definition of a Money Bill, 679 ; 'Only', 679.

Sub-cl. (a): Imposition of a tax, 680.

Sub-cl. (b), 680.

Sub-cl. (c), 680.

Sub-cl. (d), 680, Appropriation, 680.

Sub-cl. (e), 680.

Sub-cl. (f), 680.

Sub-cl. (g), 'any matter incidental to', 680.

Clause (2).

What are not Money Bills, 681 ; 'Fees', 681.

Clauses (3)-(4).

(12) In practice, the Speaker consults the Law Ministry before recording his decision whether a Bill is a Money Bill or not but he is not bound to consult anybody. [L.S. Deb., 6-5-53].

(13) Stephen's Commentaries, Vol. I,

p. 375 ; Wade & Phillips, p. 97, May, 15th Ed., p. 794.

(14) R. 96 (2), Proviso, of the Rules of the House of the People.

(15) R. 186 (8) of the Rules of the Council.

Other Constitutions :

(A) England, 681 ; (B) Eire, 681 ; (C) Government of India Act, 1935, 682.

India :

Speaker's decision and certificate, 682.

111. When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Assent to Bills.

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

OTHER CONSTITUTIONS

(A) *England*.—The King being an essential part of the Legislature, royal assent is necessary for the enactment of law,¹⁶ even though it has passed through both Houses. In modern times, however, royal assent is given as a matter of course, to a Bill that has been passed by both Houses or by the House of Commons under the provisions of the Parliament Act, 1911 (as amended in 1949).

In law, the Crown still possesses the prerogative of absolute veto. But this veto power of the Crown has become obsolete since 1707, owing to the development of the Cabinet system, under which all public legislation is initiated and conducted in the Legislature by the Cabinet which is responsible to the Legislature.

Judged by practice and usage, thus, there is at present no Executive power of veto in England.¹⁷

(B) *U.S.A.*—Sec. 7 (2) of Art. I of the Constitution of the United States says—

"Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter its objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by Yeas and Nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law."

In the United States, a bill which is presented to the President for his approval, may meet with any of four consequences: *First*, if the President approves the bill, he signs it, and then it becomes law. *Second*, if the President does not

(16) Cf. *Willow Wren C. C. Co. v. Br. Transport Commission*, (1956) 1 All E.R. 567.

(17) Thus, Hood Phillips (1957, p. 85) opines—"the exercise of this prerogative today would be unconstitutional." Keith (Constitutional Law, p. 106), also observes—

"If the Crown is opposed to a measure at the present day, it would either attempt to

dissuade the Ministry from introducing it, or ask it to make the issue clear by an appeal to the nation by dissolution; if the nation show itself in favour of the measure the Crown must yield. If the Ministry refused to dissolve and determined to demand assent to a bill under the Parliament Act, 1911, the King would have to yield or to dismiss them."

approve the bill, he may within 10 days *return* it without his signature to that branch of the Congress in which it originated, with a statement of his objections. Each House of Congress then reconsiders it and if it is adopted in each House by a two-thirds vote of the *members present*,¹⁸ the bill becomes a law, notwithstanding the absence of the President's signature. The 'qualified veto' is then overridden. If the bill fails to obtain the two-thirds majority in each House, the veto stands, and it fails to become law. *Third*, the President may neither sign the bill nor return it to the House in which it originated, but may let it lie on his desk until the ten-day limit has expired. In that event the bill becomes a law without his signature. But (*fourth*), if in the last-mentioned case, Congress has meanwhile adjourned before the expiry of the ten-day limit, the bill fails to become a law. This method of preventing a bill to go on the statute-book is known as the 'pocket veto', for by simply withholding bills presented to the President during the last few days of the session of Congress, the President can prevent the bill to become law.¹⁹

The qualified veto is in effect an appeal to the Legislature itself which is asked to revise its own judgment. Especially is this true of the United States, where the Executive is obliged to state the reasons for his objections.²⁰ As a matter of fact though the President's veto may be overridden by the Congress by a two-thirds majority of the members who constitute a quorum²¹ in either House, it is not very often that Congress has so overridden the President's veto.²²

It is to be noted in this connection, that this power of veto of the American President is a 'total' veto, i.e., he must either reject or accept the Bill as a whole. He cannot veto any particular provision of a Bill.²³ Congress sometimes takes advantage of this weakness of the President's veto power, by engrafting in a Bill a 'rider' which is acceptable to the President or is necessary for the implementation of his policy. In such a case, the President may be obliged to give his assent to a Bill which he may not like but for the rider.

The veto power given to the President by the American Constitution has, however, proved to be a real and effective check upon the Legislature.^{23a} According to Hamilton (Federalist No. 73) one of the objects of the veto power was "to increase the chances in favour of the community against the passing of bad laws, through haste, inadvertence or design". The power may be exercised to veto laws which are apprehended to be unconstitutional or defective in form not only but those which seem to be objectionable to the President on the merits.²⁴ Sometimes, it is used according to the President's views about expediency or policy as well.²⁵ In the latter case, it is a substantive legislative power in the hands of the President,^{23a} even though negative in form. As Woodrow Wilson said¹—

"In the exercise of the power of veto, the President acts not as the executive but as a third branch of the Legislature."²

The Presidents' veto power relates to ordinary legislation. Amendments of the Constitution need not be presented to the President for his assent.^{24a}

(18) *Missouri Ry Co. v. Kansas*, (1919) 248 U.S. 276.

(19) This does not, however, mean that the President is incompetent to sign a Bill after adjournment but within the ten-day limit [*Edwards v. U.S.*, (1932) 286 U.S. 482; Ogg & Ray, American Government, 1951, p. 346].

(20) Garner, Introduction to Political Science, p. 566; Ogg & Ray, American Government, 1951, p. 346.

(21) *Missouri P. R. Co. v. Kansas*, (1919) 248 U.S. 276.

(22) Up to 1941, the President has vetoed 1663 Bills of which only 10 per cent. have

been eventually passed by the overriding vote of Congress.

(23) Pritchett, American Constitution, 1959, p. 308.

(23a) Pocket Veto Case, (1929) 279 U.S. 655 (677).

(24) Taft, Our Chief Magistrate (125), p. 16.

(25) *Ibid.*, p. 162. (For a criticism of the power, see *ibid.*, pp. 165-170.)

(1) Woodrow Wilson, Congressional Government, p. 52.

(2) In this view the Courts have also concurred [*Edwards v. U.S.*, (1932) U.S. 482 (490)].

(24a) *Hollingsworth v. Virginia*, (1798) 3 Dall. 378 (381).

(C) *Eire*.—Art. 13 (3) of the Constitution of Eire, 1937, says—

"3. (1) Every bill passed or deemed to have been passed by both Houses of the Oireachtas shall require the signature of the President for its enactment into law. (2) The President shall promulgate every law made by the Oireachtas."

Art. 25, on the other hand, provides—

"1. As soon as any bill, other than a Bill expressed to be a bill containing a proposal for the amendment of this constitution, shall have been passed or deemed to have been passed by both Houses of the Oireachtas, the Taoiseach shall present it to the President for his signature and for promulgation by him as a law in accordance with the provisions of this article.

2. (1) Save as otherwise provided by this constitution, every bill so presented to the President for his signature and for promulgation by him as a law shall be signed by the President not earlier than 5 and not later than 7 days after the date on which the bill shall have been presented to him.

(2) At the request of the Government, with the prior concurrence of Seanad Éireann, the President may sign any bill the subject of such request on a date which is earlier than 5 days after such date as aforesaid.

3. Every bill the time for the consideration of which by Seanad Éireann shall have been abridged under article 24 of this constitution shall be signed by the President on the day on which such bill is presented to him for signature and promulgation as a law."

(D) *Fifth French Republic*.—Art. 10 of the French Constitution of 1958 provides—

"The President of the Republic shall promulgate the laws within fifteen days following the transmission to the Government of the finally adopted law.

He may, before the expiration of this time limit, ask Parliament for a reconsideration of the law or of certain of its articles. This reconsideration may not be refused".

This provision differs from the corresponding provision of the Constitution of the Fourth Republic in the following respects:

(i) Instead of 10 days (and 5 days in an emergency), the period of the suspensory veto of the President is fixed at 15 days.

(ii) The provision as to promulgation by the President of the National Assembly, in case of failure of the President to promulgate a Bill within the prescribed period of 15 days, has been *omitted*. The Constitution, thus, does not say what will happen if the President violates his obligation in this matter, and the President, it is to be noted, is irremovable within his term of 7 years.

(E) *Japan*.—In the Japanese Constitution of 1946, there is no veto power against the Legislature. The Emperor is not a part of the Legislature.

Art. 41 says that—

"The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State."

A Bill becomes a law as soon as it is passed by the Legislature, in the manner laid down in Art. 59. After that, the law is issued under the signature of the competent Minister and countersignature of the Prime Minister (Art. 74). There is no provision for withholding such countersignature. The Executive has thus no power to veto a law which has been duly passed by the Legislature in the manner laid down in the Constitution.

(F) *Government of India Act, 1935*.—See Sec. 32 of that Act.

INDIA

President's assent to Bills.

A Bill will not be an Act of the Indian Parliament unless and until it receives the assent of the President. When a Bill is presented to the President, after its passage in both Houses of Parliament, the President shall be entitled to take any of the following *three* steps: (i) He may declare his assent to the Bill; or (ii) He may declare that he withholds his assent to the Bill; or (iii) He may, in the case of *other than Money Bills*, return the Bill for re-consideration of the Houses, with or without a message suggesting amendments.

In case (iii), if the Bill is passed again by both Houses of Parliament with or without amendment and again presented to the President, it would be *obligatory* upon him to declare his assent to it.

Nature of the President's Veto Power.

The veto power of *our* President is a combination of the absolute, suspensive and pocket vetos. Thus,—

(i) As in England and under the Government of India Act, 1935, there would be an end to a Bill if the President declares that he withholds his assent from it. Though such refusal has become obsolete in England since the growth of the Cabinet system under which it is the Cabinet itself which is to initiate the legislation as well as to advise a veto,—such a provision was made in the Government of India Act, 1935. But notwithstanding the introduction of full Ministerial responsibility, the same provision has been incorporated in the new Constitution.

(ii) If, however, instead of refusing his assent outright, the President remits the Bill or any portion of it for re-consideration, a re-passage of the Bill by an ordinary majority would compel the President to give his assent to the Bill. It differs from the qualified veto in the United States in so far as no extraordinary majority is required to effect the enactment of a returned bill. The effect of a return by the Indian President is thus merely 'suspensive'.³

(iii) Another point to be noted is that the Constitution does not prescribe any time-limit within which the President is to declare his assent or refusal, or to return the Bill. The Article simply says that if the President wants to return the Bill, he shall do it 'as soon as possible' after the Bill is presented to him. By reason of this absence of a time limit, it seems that the Indian President would be able to exercise something like a 'pocket veto', by simply keeping the Bill on his desk for an indefinite time.^{3a}

An instance of exercise of the Veto Power.

The only instance of the exercise of the President's veto power over a Bill passed by Parliament, so far, has been in regard to the PEPSU Appropriation Bill. It was passed by Parliament under Art. 357, by virtue of the Proclamation of Emergency under Art. 356. The Proclamation was, however, revoked on 7-3-54, and the Bill was presented for assent of the President on 8-3-54. The President withheld his assent to the Bill on the ground that on 8-3-54, Parliament had no power to exercise the legislative powers of the PEPSU State and that, accordingly, the President could not give his assent to the Bill to enact a law which was beyond the competence of Parliament to enact on that date.^{3b}

This instance shows that the veto power is necessary to prevent the enactment of Bills which appear to be *ultra vires* or unconstitutional at the time when the Bill is ready for the President's assent. It also shows that there may be occasions when Government may have to advise the President to veto a Bill which had been introduced by the Government itself.

Can the President exercise his veto power against Ministerial advice to comply with the Directive Principles?

The foregoing use of the veto power by the President is an instance where the Council of Ministers themselves required its use owing to circumstances which had taken place since the Bill had been passed by the two Houses and rendered the legislation *ultra vires*.

(3) This is more in accord with the French than the American precedent.

(3a) This conclusion is suggested by the fact that the expression 'nor later than six weeks' in the Draft Constitution (Art. 91) was substituted by the words 'as soon as possible' at the instance of Dr. Ambedkar, in the Constituent Assembly [C.A.D., Vol. VIII, p. 192-6], particularly when no reservation is made for the Bill becoming

an Act, without the President's assent, in case he withholds the Bill for more than a specified period.

(3b) It is clear that since 'Parliament' includes the two Houses of Parliament as well as the President, a law cannot be valid unless Parliament has competence over the subject-matter till the date when the President gives his assent to the Bill under Art. 111.

The question is whether there are any circumstances in which it may be constitutional for the President to exercise the veto power contrary to the advice of the Ministers? In the First Edition of this Commentary (p. 196), the Author ventured to answer this question in the affirmative, in relation to the Directive Principles contained in Part IV of the Constitution, in these words—

".....if any Bill is brought in the Legislature which is in direct contravention of any of these Directives, the President or the Governor may refuse his assent to such Bill on that ground, though the Courts may not declare the Act is void, if it is passed".

In writing the Foreword to the above Edition of the Commentary, Dr. Ambedkar expressed his dissent against this Author's view:

"In his commentary on Article 37, which falls within the Part dealing with Directive Principles, Mr. Basu says that "if any Bill is passed by the Legislature which is in direct contravention of any of the Directives, the President or the Governor may refuse to give his assent." Many like me will be alarmed by this view. It is a dangerous doctrine and I am sure our Constitution does not warrant it. I hope that this is the only doctrine which can be so described and that the rest of his views are safe and sound."

The dissent of Dr. Ambedkar is evidently based on the British precedent of the Crown being a constitutional monarch who is unable to do any political act without the advice and countersignature of a Minister responsible to the Legislature. The veto power in England is vested in the Crown and it is legally possible for the Crown to exercise the power even now. But since the last instance of its exercise in 1707, owing to the development of the Cabinet system, the power has become unnecessary and obsolete inasmuch as all public Bills are initiated by the Cabinet itself and the Cabinet is responsible for the legislation till it becomes an Act. In England, there is no question of the competence of the Legislature as might require a use of the power by the Government itself as in the case of the Pepsu Act, noted above, and no case of the Crown using the power against the wishes of the Cabinet can be imagined, because, as May^{3c} observes—

"The necessity of refusing the Royal assent is removed by the strict observance of the constitutional principle, that the Crown has *no will but that of its ministers*, who will continue to serve in that capacity so long as they retain the confidence of Parliament".

But the English precedent is not applicable to India *in toto* because we have a written Constitution and the President has to take the oath [Art. 60] that he "will to the best of my ability *preserve, protect and defend* the Constitution". We have already seen that though in England there has been no occasion for the Government to advise a use of veto power since 1707, in India, we have had an instance where the Government required a use of the power in 1954, because the Bill, if made an Act, would have become *ultra vires* the Parliament.^{3d} Similarly, supposing after the passage of a Bill, the Government, upon a better consideration, comes to the conclusion that the Bill as passed contravenes any of the Directive Principles, it can hardly be urged that it would be unconstitutional for the Council of Ministers to advise the President to refuse his assent to the Bill, even though it has been passed by the Legislature (assuming that the Council of Ministers would be in a position to convince the majority in Parliament who had passed the Bill).

The question is whether it would be unconstitutional for the President to use the veto power and to order, under the counter-signature of a Secretary, that he 'withholds his assent to the Bill', if he is satisfied that a Bill palpably offends against the Directive Principles and that he cannot, as the 'defender' of the Constitution, allow such a Bill to become law. Let us take a concrete example:

Art. 47 directs the State "to bring about the prohibition of the consumption *except for medicinal purposes* of intoxicating drinks".

(3c) May, 16th Ed., p. 593.

(3d) There is no question of *ultra vires* in the case of legislation by the British Parliament. But in case any other defect (e.g., that the amendments made by a House have not been incorporated in the Bill as

presented for assent) is discovered after the Bill has passed out of the two Houses, the only alternative would be to have another Act of Parliament made to correct the mistake or defect in the previous Act [May, 16th Ed., pp. 600-1].

It is to be noted that the Article aims at absolute prohibition and that the only exception permitted is the use of intoxicating drinks for medicinal purposes. Suppose, now, that the Government of the day brings a Bill for enforcing prohibition⁴ but keeps in the Bill exceptions, other than on the ground of 'medicinal purposes', as was done in the Bombay Prohibition Act, 1949,⁵ such as exceptions in favour of clubs, hotels, cargo boats, members of the armed forces,—for the sake of raising revenue, the maintenance of the efficiency of the Armed forces, promotion of tourism and the like. Such grounds are foreign to Art. 47, and it would be quite legitimate for a President to hold that the Bill offends against that Directive Principle. The President cannot leave the Bill for a judicial determination because the Court would be powerless to strike down the law on the ground that it offends against Art. 47.⁶ Where a Bill *prima facie* offends against a Fundamental Right, it may be proper for the President not to take upon himself the intricacies of a judicial determination involved to pronounce the law unconstitutional particularly because it is open to an aggrieved party to take it to the Court; but where a Bill violates a Directive Principle, this is not possible and there is no other mode of annulling the law unless the President intervenes at the stage of his assent.

If, therefore, the President withholds his assent to such a Bill which is patently against the injunctions of the Constitution, can his act be said to be 'unconstitutional'? The Council of Ministers may have been guided by the consideration of revenue or other extraneous considerations which may be relevant from the standpoint of public policy but not of Art. 47, and, owing to party discipline, members of the majority party in Parliament might have been induced to support the Government. Any conscientious objector would, individually, be helpless, in the face of the party machine. The President, who has taken the oath, may not necessarily follow the same path. Even the members of Parliament shall have a fresh opportunity to reconsider if the President does, in fact, veto such Bill. For, the only sanction available against such act of the President will be a proceeding for impeachment in Parliament [Art. 61]. It may be simple for the Government to initiate such a Bill and for the majority in Parliament to pass it to serve the exigencies of Government. But in bringing or sustaining the charge of "violation of the Constitution", under Art. 61 (1), both the Government and the majority in Parliament will have to think thrice whether the President's act (rather than their own) has, in fact, violated the Constitution, when the Directive Principles are binding upon the 'State' which includes the 'Government and the Parliament' [Arts. 12 and 36] and "it shall be the duty of the State to apply these principles in making laws"; and the ultimate responsibility for making laws rests with the President, as a part of Parliament [Arts. 79, 111].

The Proviso : Return for reconsideration.

While the power of veto possessed by the President is total and there is no provision for vetoing any particular portion of a Bill, the President's power of return includes the power to return for reconsideration of any particular provision of the Bill. It is obvious that when a specific provision is thus remitted for reconsideration, the Legislature shall have no power to reconsider the other provisions of the Bill which have not been remitted.

This has now been made clear by the Rules of the Houses of Parliament⁷ by providing that—

"When a Bill which has been passed by the Houses is returned by the President for reconsideration, the point or points referred for reconsideration shall be put before the House/

(4) For the sake of the illustration, the question of competence of Parliament to legislate on the subject of prohibition is not questioned.

(5) Cf. *State of Bombay v. Balsara*, (1951) S.C.R. 308.

(6) This is why in the *Balsara case* (5), the Court had to apply only the tests under Arts. 14 and 19.

(7) R. 129 of the Rules of the House; r. 136 of the Rules of the Council.

Council by the Speaker/Chairman, and shall be discussed and voted upon in the same manner as amendments to a Bill, or in such other way as the Speaker/Chairman may consider most convenient for their consideration by the House/Council."

Procedure for passing a Bill returned by the President.

While the Rules of Council of State consist of R. 136 only, the House of the People has made elaborate Rules on the subject as follows:

(I) Where the Bill originated in the House.

(i) The first stage is the reading of the message of the President by the Speaker and laying it on the Table [R. 129].

(ii) The next stage is a notice by a Minister, in the case of a Government Bill that the "amendments recommended by the President be taken into consideration" and the moving of that motion [Rr. 130-1].

(iii) As stated already, the debate on such motion shall be confined to a consideration of matters referred to in the message of the President or to any suggestion relevant to the subject matter of the amendments recommended by the President, and no further amendment shall be moved to the Bill unless it is consequential upon, incidental or alternative to, an amendment recommended by the President [Rr. 132, 134].

(iv) If the motion that the amendments recommended by the President is carried and the Bill is passed with or without amendments, it is passed by the House, and then the Bill will be transmitted to the Council [Rr. 133, 137].

(v) If, on the other hand, the motion that the amendments recommended by the President is not carried, the member giving notice of the motion may at once move "that the Bill as originally passed by the Houses be passed again without amendment [R. 136; also see latter part of the Proviso to Art. 111], and when the latter motion is carried, the Bill as passed again in its original form is transmitted to the Council [R. 137]."

(vi) The Council of States has the liberty of either agreeing with the Bill as received from the House or passing it with amendments of its own, in which case the Bill will have another journey to the House and back, until the Bill is passed in an agreed form by both Houses or there is a 'final disagreement between the two Houses', so as to call for a joint sitting, under Art. 108.

(II) Where the Bill originated in the Council.

(i) Where the Bill had originated in the Council, the Bill will first be received in the Council, when returned by the President for reconsideration. The Council may then pass the Bill either with the amendments recommended by the President or in the original form (i.e., without amendments), and transmit it to the House. When the House receives the Bill so transmitted, any Minister, in the case of a Government Bill, may move "that the Bill as passed again by the Council be taken into consideration" [R. 144-5].

(ii) Upon such motion, the House may pass the Bill in the form it is received from the Council, in which case, the Bill will be passed by the two Houses [R. 147].

(iii) If, however, the House passes the Bill with amendments of its own, there will be further journeys between the two Houses until the Bill is passed by the two Houses in an agreed form or there is a final disagreement [R. 153].

'Presented to the President'.—As to who shall present the Bill to the President and in what form, we have to refer to the Rules of the two Houses. R. 154 of the Rules of the House and r. 135 of the Rules of the Council provide that after a Bill has been passed by both Houses (according to the provisions of the Constitution), the presiding officer of the House which is 'in possession of' the Bill will authenticate the Bill by his signature and then present it to the President for his assent. In case of absence of the Speaker or Chairman from Delhi, the Secretary of each House is authorised to authenticate the Bill on behalf of the Speaker or Chairman, as the case may be. So, the President can give his assent only to a Bill which has been so authenticated and presented.

Date of passing of an Act.

As in *England*, the date of passing of an Act is the date when the Royal assent is given to a Bill,⁸ under *our* Constitution, a Bill becomes an Act of the Union Parliament on the date when it receives the President's assent.⁹ The date is material since the validity of a legislation will depend upon the powers of the Legislature and the other circumstances existing on that date.⁹ If the President's assent is given to a Bill through mistake or some change is sought to be effected in the Bill *after* the assent has been given, the only remedy is to pass another Act by Parliament to amend or repeal the previously enacted Bill.¹⁰

Proof of assent.

Under s. 57 of the Indian Evidence Act, a Court is enjoined to take judicial notice of all Indian laws (as in *England* under s. 9 of the Interpretation Act, 1899). So, when an Act of Parliament is published in the Official Gazette, as having been assented to by the President, the Court shall take judicial notice of the fact and under s. 114 of the Evidence Act a presumption arises that the Act has been duly passed and assented to by President.^{10a} In such a case, it is not open to a litigant to contend that an Act did not receive the assent of the head of the State because on the date of assent as published, he was not physically present at the place where the assent is purported to have been given, for his assent might have been obtained by some means of communication.¹¹ This is in accord with the law in *England*, where absence of Sovereign from the realm does not invalidate assent to a Bill.¹²

No effect to be given to a Bill before it becomes an Act and is brought into force.

In general, the rights of the parties to a cause are governed by the law as it existed at the date of the plaint. For, when a person has acquired a vested right, he is not to be deprived of that right by the court by reason of any change in the law that may have taken place since the commencement of the action, unless the new statute shows a clear intention to vary such rights,¹³ by giving retrospective operation to itself with respect to pending proceedings, expressly or by necessary intendment.¹⁴

When, however, the facts are not in dispute and the law is changed during the pendency of the action, affecting the rights of the parties with retrospective effect¹⁵ by a *statute* of which the Court is bound to take judicial notice, the Court is bound to administer the law as at the date of its decision, including a decision in appeal.¹⁶⁻¹⁷

But to say that the Court is bound to take cognisance of and to give effect to a statute enacted during the pendency of an action is to refer to retrospective legislation which has been duly enacted during the pendency of the action. The court is not to take account of any pending measure (at any stage prior to its being brought into force) and speculate as to what would be the rights of the

(8) Ex parte *Rashleigh*, (1875) 2 Ch. D. 9 (12).

(9) Cf. *Umayal v. Lakshmi*, A. 1945 F.C. 25 (40). Of course, it is true that in the Constitution there is no provision corresponding to s. 68 (2) of the Government of India Act, 1919, declaring when a Bill would become an Act. But that is no ground for supposing that a Bill would become an Act at any stage prior to the signification of the President's assent. For, it will be seen that there is a heading 'Legislative Procedure' to include Arts. 107-111, which indicates that all the stages up to Art. 111 must be gone through in order to make a law. F.C. 5.

(10) Cf. *Narayana v. State of Orissa*, A. 1954 Orissa 185 (194).

(10a) Cf. May, 16th Ed., p. 601.

(11) Cf. *Harisingh v. State of Rajasthan*, A. 1954 Raj. 117 (120).

(12) May, 16th Ed., p. 594.

(13) Maxwell, Interpretation of Statutes, 9th Ed., p. 229.

(14) *Hutchinson v. Jauncey*, (1950) 1 All E.R. 165 (167) C.A.

(15) *K. C. Mukherjee v. Ram Ratan*, I.L.R. (1935) 15 Pat. 268 (P.C.).

(16) *Shyamkant v. Rambhajan*, (1939) F.C.R. 193.

(17) *Lachmeswar v. Kasiswar*, A. 1946.

parties when such measure becomes law,¹⁸ and either stay a pending action,¹⁸ or dispose of an application for an interlocutory injunction or other order¹⁹ or an application for leave to appeal,²⁰ on the footing as to how the rights of the parties would be altered if the pending Bill became law.

When does an Act come into operation.—See under Art. 245, *post*.

Analogous Provision.—Cf. Art. 200 relating to Governor's power of veto over State Bills.

INDEX TO COMMENTS

ARTICLE 111.

Other Constitutions :

(A) England, 683 ; (B) U.S.A., 683 ; (C) Eire, 685 ; (D) Fifth French Republic, 685 ; (E) Japan, 685 ; (F) Government of India Act, 1935, 685.

India :

President's Assent to Bills, 685 ; Nature of the President's Veto Power, 686 ; An instance of exercise of the veto power, 686 ; Can the President exercise his veto power against Ministerial advice to comply with the Directive Principles, 686.

The Proviso: Return for reconsideration, 688 ; Procedure for passing a Bill returned by the President, 689 ; 'Presented to the President', 689 ; Date of passing of an Act, 690 ; Proof of assent, 690 ; No effect to be given to a Bill before it becomes an Act and is brought into force, 690 ; When does an Act come into operation, 691 ; Analogous Provision, 691.

Procedure in financial matters

112. (1) The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of India ; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India, and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of India—

(a) the emoluments and allowances of the President and other expenditure relating to his office ;

(b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People ;

(c) debt charges for which the Government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt ;

(18) *Willow Canal v. Br. Transport Commn.*, (1956) 1 All E.R. 567 (569).

(19) *Br. & Colonial Furniture Co. v. William*, (1951) 1 All E.R. 404 (405).

(20) *A. G. v. Racecourse Betting Control Bd.*, (1935) 152 L.T. 146 (154) C.A.

(d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court ;

(ii) the pensions payable to or in respect of Judges of the Federal Court ;

(iii) the pensions payable to or in respect of Judges of any High Court which exercises jurisdiction in relation to any area included in the territory of India or which at any time before the commencement of this Constitution exercised jurisdiction in relation to any area included in a *Governor's Province in the Dominion of India*¹ ;

(e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India ;

(f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal ;

(g) any other expenditure declared by this Constitution or by Parliament by law to be so charged.

Some General Principles of Financial Procedure in England and India.

Subject to differences in certain matters to be explained presently, the broad principles of financial legislation obtaining in *England* have been adopted in *our* Constitution.

The financial procedure in *England* is entirely summed up in Sir *Erskine May*'s² famous aphorism—

"The Crown demands money, the Commons grant it, and the Lords assent to the grant."

The following principles may be deduced from it:

(a) The Crown, *i.e.*, the Executive cannot raise money by taxation, borrowing or otherwise, or spend money, without the authority of Parliament. The power to grant money includes the raising of money by a tax or loan as well as the authorising of expenditure.

[This principle has been embodied in Art. 265 of *our* Constitution].

(b) Since the Crown has to act through Ministers, none but a Minister can make the demand for a grant, *i.e.*, either to raise money or to authorise its expenditure.

(c) A private member may move to reduce a particular tax or a vote, but not to *increase* it. Accordingly, any proposal for the levy of a new tax or for the increase of an existing tax must come from the Government. This rule, however, applies to general taxes only, and not to taxes for local purposes, which are popularly known as 'rates'.

[This principle underlies Art. 117 (1) of *our* Constitution].

(d) Similarly, in the matter of *expenditure* though a private member of the House of Commons may move a resolution that public money may be profitably expended upon purposes specified in the resolution, none but a member of the Government can move that a specific sum of money be granted for a specific purpose.

"The Sovereign, being the executive power, is charged with the management of all the revenues of the country, and with all payments for the public service. The Crown, therefore, acting with the advice of responsible ministers, makes known to the Commons the pecuniary necessities of the Government; and the Commons grant such aids and supplies as are required to satisfy these demands, and provide by taxes, and by the appropriation of other sources of the public income, the *ways and means* to meet the *supplies* which are granted to them But the Commons do not vote money unless it be required by the Crown ;

(1) Substituted for the words "Province corresponding to First Schedule", by

the Constitution (Seventh Amendment) Act, 1956.

(2) May, 16th Ed., p. 677.

nor impose or augment taxes unless the taxation be necessary for the public service, as declared by the Crown, through its constitutional advisers."³

In other words, all financial proposals must proceed from the Government and the Commons have no power to *increase* the financial proposals of the Government.

[This principle is embodied in Art. 113 (3) of *our* Constitution].

(e) From the words 'the Commons grant it, and the Lords *assent* to the grant', it is clear that the House of Lords (the Upper House) has a mere subsidiary function in the matter of financial legislation. Hence,—

(i) Money Bills can originate only in the House of Commons. Further, since the Parliament Act of 1911, a Money Bill can neither be amended⁴ nor rejected by the House of Lords. The Lords can at most cause a delay of one month in the passing of a Money Bill [see *ante*]. As May⁵ observes, this superiority in the matter of financial legislation has given to the House of Commons a position of absolute supremacy in the English political system—

"The most important power vested in any branch of the Legislature is the right of imposing taxes upon the people and of voting for the exigencies of the public service. The exercise of this right by the Commons is practically a law for the annual meeting of Parliament for redress of grievances; and it may also be said to give to the Commons the *chief authority* in the State. In all countries the *public purse* is one of the main instruments of political power; but with the complicated relations of finance and public credit in England, the power of giving or withholding supplies at pleasure, is *one of absolute supremacy*."

[This principle underlies Art. 109 of *our* Constitution, which provides that Money Bills can be introduced only in the House of the People and that after it is passed by the House of the People, the Council of States has only the power to *recommend* amendments or to withhold the Bill for not more than a specified period which is 14 days (while it is one month in the case of the House of Lords)].

(ii) Neither in *England* nor in *India* [Art. 113 (2)], the demands for grants are to be presented to the Upper House. The power of voting the supplies belongs exclusively to the popular House. It is only when statutory authorisation is required and the proposals are embodied in the form of a Money Bill that the Upper House is called upon to *assent* to the Bill as passed in the Lower House [Art. 109 (2)-(5)].

Stages in Financial Legislation in England and India.

The procedure under *our* Constitution shall differ from that in *England* on the following points:

(i) In *England*, the Estimates and the Annual Financial Statement (*i.e.*, the Budget), are presented only to the House of Commons. They are not submitted to the House of Lords and the Lords have no concern with them.⁶

But under *our* Constitution [Art. 112 (1)], as under the Government of India Act, 1935 [Sec. 33 (1)], the annual financial statement⁷ shall be laid before *both* Houses of Parliament⁸ and the estimates shall be open to discussion in either House of Parliament,—but the demands for grants shall be submitted only to the House of the People [Art. 113 (2)].

(ii) In *England*, the presentation of the Estimates precedes the 'introduction of the Budget', or the Budget Speech by the Chancellor of the Exchequer.

In *India*, the procedure of financial legislation is to start with the presentation of the Annual financial statement, and then the consideration of the estimates takes place.

(3) May, 15th Ed., p. 654; S.O. 78.

(4) Verbal amendments are sometimes made and accepted by the House of Commons, 'waiving their privilege.'

(5) May, 16th Ed., p. 41; Halsbury, 3rd Ed., Vol. 28, pp. 307-310, 441.

(6) Campion, Introduction, p. 254.

(7) While in *England* there is only one Budget, under the Rules of Procedure in *our* Parliament, the Budget is presented in two parts,—the Railway Budget and the General Budget (see under Art. 112 (1), *post*).

(8) As in the U.S.A.

(iii) Another most striking feature of the *English* procedure is the complicated system of work in the House of Commons and the Committees of the Whole House in the matter of financial legislation. The House of Commons does not consider a financial proposal until it has been considered in one of the two Committees of the whole House,⁹—the Committee of Supply and the Committee of Ways and Means.

As soon as the debate on the Budget Speech has been concluded, the House of Commons in the United Kingdom sets up two Committees—the Committee of Supply, which considers the grants of money that will be required, and the Committee of Ways and Means, which authorises the issue of the sums required to meet the grants voted by the Committee of Supply.

The above Committee system of financial procedure has some defects, which have been pointed out by critics as follows:

(a) There is an unnecessary waste of time and duplication of business in the Committees of the Whole House and in the House. The financial proposals practically come before the members five times and each time there is scope for debate:

(i) in the Committee of Supply; (ii) in the House on Report from that Committee; (iii) in the Committee of Ways and Means; (iv) in the House on Report from that Committee; (v) in the House during second reading of the Finance and Appropriation Acts.

(b) Secondly, though there are so many opportunities, the complicated procedure in fact involves shortage of time for effective discussion. Thus, by a Standing Order [No. 16 (1)], not more than 26 days shall be allotted for the consideration of the annual estimates in the Committee of Supply. Since about 100 to 200 votes or demands for supply have to be dealt with within this period of 26 days, the Committee has to resort to the 'guillotine' in order to close the debate on Supply within the allotted period of time. As a result of this, many of the demands cannot be discussed at all and have to be passed *en bloc*, on the last of the above 26 days, or on the last day that the Committee sits, without any discussion at all.

In India, the *Government of India Act, 1935*, departed from the English system of discussing the financial proposals in the Committees of the Whole House. Under this Act, all the financial proposals contained in the Budget were discussed in the House itself,—thus avoiding the unnecessary 'Report stage'.

The *Constitution of India* adopts the system under the *Government of India Act, 1935*, and rejects the Committee system, which obtains not only in England, but also in the Dominions, e.g., in Canada.¹⁰ So, under *our* Constitution, the proposals for taxes and other impositions as well as the demands for grants will be considered by the House of the People sitting as the House [Arts. 113 (2) ; 117].

But while the *Government of India Act* further shortened the procedure by obviating the necessity of an Appropriation Act, the latter has been introduced in the Constitution [Art. 114].

Procedure for Financial legislation in India.

From the foregoing comparative study, we have already got an idea as to the different stages of financial legislation in India. The procedure through the different stages may be more fully explained as follows:

(a) *Presentation of the Annual Financial Statement*.—After the estimates have been prepared,¹¹ the President shall cause the annual financial statement for the

(9) S.O. 79, 82, 83.

(10) Findlay Shirras, *Public Finance*, (1936), Vol. II. p. 990; Dawson, *Government of Canada*, 1949, p. 415.

(11) By the administrative Ministries and Departments, who forward them to the

Ministry of Finance where they are scrutinised and consolidated. One copy is also forwarded to the Accountant-General of the State where the Union expenditure may take place, and he examines the estimates from the accounting point of view and sends his comments to the Union Ministry of Finance.

ensuing year to be laid before both Houses of Parliament. It is not provided by the Constitution, *who* will present the Statement in the two Houses respectively. Under the Government of India Act, 1935, the Finance Minister personally presented the General Budget¹² to the Lower House. This practice has been followed also after commencement of the Constitution.¹³

The Annual Financial Statement shall contain the estimated receipts as well as the expenditure of the Government of the Union. The estimates of expenditure, again, shall—

(i) distinguish expenditure on revenue account from other expenditure, as under the Act of 1935 [sec. 33 (2)];

(ii) distinguish between items of expenditure which are 'charged upon the Consolidated Fund' and items which are not so charged [Art. 112].

(b) *The general discussion in both Houses.*—As under the Act of 1935, the presentation of the Budget will be followed by a general discussion of the Statement as a whole, in either House. It is to be noted that no item of expenditure will be exempted from this general discussion (and herein the Constitution is improved than the Act of 1935, from the democratic point of view). So, at this stage, each House of Parliament shall be entitled to discuss each of the items of expenditure, including even those that are 'charged' and are thus excluded from *vote*. But this discussion is to be a general discussion, relating to policy,—involving a review and criticism of the administration of the Departments concerned, and a ventilation of the grievances of the people. No motion shall be moved at this stage nor shall the Budget be submitted to the vote at this stage [see under Art. 113 (2), *post*].

One important point to be noted in this connection is that under the *Act of 1935*, it was the Governor-General, who, in his discretion, was empowered to make rules 'for securing the timely completion of financial business' [Sec. 38 (1) (b)], and it was a grievance of the Legislature that the rules curtailed the freedom of the Legislature to make an effective criticism and discussion. But the Constitution empowers Parliament itself to make such provisions *by law* [Art. 119, *post*].

(c) *Voting of the demands by the House of the People.*—The Council of States shall have no further business with the annual financial statement beyond the general discussion.¹⁴

In the House of the People, after the general discussion is over, the estimates shall be submitted in the form of demands for grants on the particular heads, followed by a vote of that House. The House of the People shall have the following powers in respect of each demand: (i) to assent to the demand; or (ii) to refuse it; or (iii) reduce it. It follows, thus, that the House shall have no power to increase a demand, or to alter the destination of a grant, or to put any condition as to the appropriation of the grant.

In the matter of voting of the grants, the system under *our* Constitution departs from that under the *Government of India Act, 1935*, and follows the *English* principle that the Lower House has the exclusive right of granting supplies. Under the Act of 1935, the demands were submitted to both Chambers [Sec. 34 (2)] and the Upper Chamber had practically equal powers subject to the directions of the Governor-General and the provision for a joint session [Sec. 34 (3)]. Under the *Constitution*, the Upper House having no function in the matter of voting the demands, no question of a joint session arises in this matter.

(d) *The Appropriation Act.*—At the next stage, too, the procedure under the Constitution differs from the procedure under the Act of 1935, and follows the *English* practice.

Under the *Act of 1935*, after the demands had been voted by the Legislature, the Governor-General authenticated by his signature, a schedule specifying the

(12) The Railway Budget is presented by the Minister for Railways.

(13) Rr. 206-7 of the Rules of the House of the People.

(14) Cf. r. 182 of the Rules of the Council.

grants made by the Legislature, the 'charged' expenditure and any other expenditure which had been refused or deducted by the Legislature but was in the opinion of the Governor-General necessary for the due discharge of his special responsibilities. The two peculiarities of this system were—(i) There was no provision for any Appropriation Act or any other legislation finally embodying the grants voted by the Legislature and authorising the issue of the money so granted, from the public revenues. The final act was not a legislative, but an executive act. It was the authenticated Schedule of the Governor-General which was the only authority known to Audit, for any appropriation of revenue, by whatever legal procedure it might have been sanctioned. (ii) The vote of the Legislature was not final in the matter of supplies, inasmuch as the Governor-General, in his discretion, had the power to override the adverse vote of the Legislature by his certificate, on the ground that his special responsibilities would be affected by the adverse vote.

Under the *Constitution*, the President shall have no power to override the vote of the House of the People. And, as in *England*, the grants as voted by the House will be embodied in a Money Bill and passed by Parliament as such. This Act will be known as the Appropriation Act and will be the sole legal authority for the appropriation of money from the Consolidated Fund of India.

(e) *The Finance Act*.—Similarly, the new taxing proposals of the Budget will be embodied in another Bill and passed as the annual Finance Act.¹⁵

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England*.—In England, the annual financial statement or the Budget statement of the Chancellor of the Exchequer is presented subsequent to the presentation of the 'Estimates'. Both are presented before and dealt with by two Committees of the Whole House, called the Committee of Supply and the Committee of Ways and Means. While the 'Estimates' refer to the estimates of expenditure during the ensuing year, the 'Budget' contains the revenue proposals, i.e., the ways and means for meeting the proposals of expenditure.

The Estimates contain a comprehensive survey of the needs of the ensuing year and are presented in the form of grants of money required for the different purposes and Departments, during the ensuing year, founded on the estimates of that expenditure as prepared by the different Departments. The Estimates are presented to the Committee of Supply at the beginning of the session, and it is the business of that Committee to consider the estimates and vote such grants of money as it deems necessary.

After some progress has been made in the Committee of Supply in the consideration of the estimates and the voting of grants, the Chancellor of the Exchequer makes his financial statement or 'introduces the Budget', in the Committee of Ways and Means, on some date nearabout 1st April. In this statement, the Chancellor gives a comprehensive survey of the mode in which he proposes to meet the needs as described in the Estimates. In the Budget Speech, the Chancellor reviews the public finance of the last year, gives an estimate of the requirements of the current year, develops his views of the resources of the country, submits his proposals for meeting the requirements, and "declares whether the burdens upon the people are to be increased or diminished."¹⁶

When the resolutions founded on the Chancellor's Statement are passed, fixing the new taxation for the year (i.e., relating to the annual taxes as distinguished from the taxes made permanent by statute), the resolutions are embodied in a bill and passed as the annual Finance Act.

(15) As to the control exercised by the House of Commons over the financial administration, see under Art. 266. *post*.

(16) *Mav*, 16th Ed., p. 794; *Halsbury*, 3rd Ed., Vol. 28, pp. 450-1.

(B) *Government of India Act, 1935*.—Sec. 33 (1) of the Act provided—

"(1) The Governor-General shall in respect of every financial year cause to be laid before both Chambers of the Federal Legislature a statement of the estimated receipts and expenditure of the Federation for that year, in this Part of this Act referred to as the 'annual financial statement'."

INDIA

'Annual Financial Statement'.

This expression is borrowed from Sec. 33 (1) of the Government of India Act, 1935. It stands for the popular word 'Budget'.¹⁷ Though Cl. (1) only says that the financial statement shall contain a statement of the estimated receipts and expenditure for the coming financial year,—as a matter of practice, every budget contains three elements—

(a) a review of the public finance of the preceding year, including the actual receipts and expenditure in that year; (b) an estimate of the receipts and expenditure of the coming year; (c) proposals for meeting the requirements of the coming year.

Besides, the Budget speech of the Finance Minister gives a general review of the economic situation, including the foreign exchange and monetary position of the country in the international market. The Budget has also become an instrument of social policy in so far as that may be shaped by fiscal measures. While the purposes for which and the amount which the Government spends shape the standard of well-being and employment in the society, the taxing measures are a direct agency for altering the distribution of wealth according to the policy adopted by the Government. All this becomes evident from the Budget Speech.

At present, the Budget Speech of the Finance Minister, is given in two Parts—A and B. Part B contains the 'budget proposals', i.e., the changes in taxation and other sources of revenue by means of which the estimates for the coming year are to be met. It is delivered after Part A, containing the review of economic conditions in the preceding year and the prospects of the coming year and the estimate of receipts and expenditure in the coming year, has been read.

'Financial year'.—This refers to the period from the 1st April of a year till the end of the 31st March of the next Calendar year.

'A statement'.—The Rules of our Parliament have introduced an innovation upon the *English* practice on this point. Though the Constitution does not provide for the presentation of the annual financial statement or Budget in parts, the Rules of Parliament have provided—

"Nothing hereinbefore contained shall be deemed to prevent the presentation of the Budget to the House in two or more parts and when such presentation takes place each part shall be dealt with in accordance with the rules as if it were the Budget."^{18,19}

This has paved the way for the separation of the Railway Budget²⁰ from the general Budget and the passing of one Appropriation Act for the general Budget

(17) In *India*, the word 'Budget' had a statutory definition in s. 67A (1) of the Government of India Act, 1919 as "the estimated annual expenditure and revenue of the Governor-General in-Council laid in the form of a statement before both Chambers of the Indian Legislature in each year". It is since the Government of India Act, 1935 (s. 33) that the expression 'annual financial statement' has come to be used instead of the word 'Budget'.

(18) R. 213 of the Rules of the House of the People; R. 183 of the Rules of the Council.

(19) This follows the interpretation by the Speaker [L. S. Deb., Vol. II, 18-7-57] that 'a

statement' includes statements more than one—'singular includes the plural'.

(20) The main considerations which have led to the separation are: (a) Railways, being a major commercial enterprise, stand on a different footing than the administrative departments and have their special problems and needs. (b) Railway policy and administration should be free from political influence as far as possible. (c) For the betterment of the Railways as a public service, it is essential that the Railways should, after making a contribution to the State, be allowed to utilise their surplus earnings to the development of the Railways.

and another Appropriation Act for the Railway Budget.²¹ In practice, the Railway Budget is presented a few days earlier than the General Budget.

But though the Budget of the Railways is separately presented to Parliament, the figures relating to the total receipts and expenditure of the Railways are also shown (in lump) in the General Budget, since the receipts and expenditure of the Railways are part of the receipts and expenditure of the Government of India.²² Again, though the procedure relating to both the Budgets is similar, it is on the presentation of the General Budget that the Finance Minister makes announcements of policy relating to the general economic and financial position of the country.

‘Statement of the receipts and expenditure of the Government of India’.—As will appear from Art. 266, *post*, all revenues received by the Government of India, all loans raised by the Government by the issue of Treasury Bills, loans or ways and means advances and all monies received by Government in repayment of loans are credited to the Consolidated Fund and monies can be appropriated from that Fund only in accordance with law and for the purposes and in the manner provided in the Constitution. All other public monies received by or on behalf of the Government of India are credited to the Public Account. Government expenditure, including expenditure on loans and advances by Government, the repayment of loans, treasury bills and ways and means advances is met out of the Consolidated Fund.

The Annual Financial Statement relates only to the Consolidated Fund, for, no legislative sanction is required for payment out of the Public Account [Art. 266; also Arts. 113 (1), 114 (3)].

The estimates of expenditure included in the “annual financial statement” have to show separately the sums required to meet expenditure which the Constitution has charged upon the Consolidated Fund and the sums from the Consolidated Fund required to meet other expenditure. The estimates have also to distinguish expenditure on revenue account from other expenditure. The latter cover expenditure on capital outlay, loans given by Government and expenditure on the repayment of loans, treasury bills and ways and means advances.

The expenditure in the estimates to be met from the Consolidated Fund is presented to the House of the People in the form of Demands for Grants, except to the extent to which such expenditure is charged on the Consolidated Fund and, in consequence, does not require a vote of the House of the People.

Procedure after presentation of the Annual Financial Statement.

After the Budget has been presented to the House, the estimates, or such of them as the Estimates Committee selects, are examined by that Committee. But the report of the Committee is not a condition precedent for the voting of the grants of the House. The work of the Committee is continuous, and it may examine the estimates even after they are voted by the House²³ [see, further, under Art. 113 (2), *post*].

CLAUSE (2).

Mode of presenting the estimates in the Annual Financial Statement.

By this Clause, the Constitution lays down that the discretion of the Finance Minister to present the Budget in any form he likes is to be subject to two conditions, *viz.*, that the estimates of expenditure must show separately—

- (a) the sums charged upon the Consolidated Fund and sums not so charged;
- (b) expenditure on revenue account and other expenditure.

(21) Cf. Appropriation (Railways), Act (XV of 1952).

(22) Explanatory memorandum on the Budget of the Central Government (1956-57), p. 1.

(23) R. 312, Rules of the House of the People.

These conditions are, in fact, necessary in view of the other provisions of the Constitution. Thus, Art. 113 provides that expenditure charged on the Consolidated Fund shall not be submitted to vote of Parliament, but estimates for expenditure which is not so charged must be submitted in the form of Demands for Grants to the House of the People. In order to make this possible, the charged items are to be shown separately in the Budget. In practice, the charged items are also printed in italics. (See, further, under cl. (3), as to the charged items).

On the other hand, the expenditure to be met from revenue must be shown separately from expenditure which is to be met otherwise, *e.g.*, by means of borrowing, for, if the revenue has to be secured or augmented by taxation, authority of law will be required [Art. 265, *post*].

The discretion of the Finance Minister as to the form of the Budget is also to be guided by the 'suggestions' made by the Estimates Committee of the House, by R. 206 (3). In fact, the Estimates Committee of 1950-51 made certain suggestions which are since being carried out by the Finance Minister in framing the Annual Financial Statement.

'Expenditure from revenue account and other expenditure'.—The sources of the revenues of the Union are dealt with in Part XII, *post*. The present clause lays down that in the Budget, the estimates of revenue (including, *e.g.*, customs, income tax) and expenditure to be met from the revenue are to be shown separately from the expenditure on other account, such as expenditure on capital outlay, loans given by Government and expenditure on repayment of loans, treasury bills and ways and means advances. Part C of the Budget Statement, thus, includes miscellaneous items which are generally described as 'capital transactions'. They include, *e.g.*, the receipts and payments on capital schemes financed by the Government of India, borrowings from the market by loans and treasury bills etc., borrowing from the Reserve Bank by ways and means advances and Savings Schemes such as the Postal Savings Bank, Cash Certificates and the like.

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England*.—In England, expenditure or payments out of the Consolidated Fund are divided under two heads—'Consolidated Fund Services' and 'Supply Services'. The distinction between the two is that payments in respect of the Consolidated Fund Services are made under the authority of some *permanent* Act of Parliament or statute which makes a grant for a fixed number of years. The result is that payments on account of the 'Consolidated Funds Services' have not to be put to the vote of Parliament *annually*. Such payments would continue to be made without vote of Parliament so long as the particular statute does not expire or is not repealed by some subsequent statute. Payments on account of the 'Supply Services', on the other hand, have to be voted by Parliament each year. Thus, the recipient of a Consolidated Fund Service is much more independent of Parliamentary control than a person who, or a Department which, has to rely on the passing of an annual Act for his or its supply.

It is open to Parliament to add to the list of Consolidated Fund Services by passing a permanent Act whenever it is desired to increase the independence of an official. Where, on the other hand, the object is to give to Parliament the opportunity of criticizing each year the work of the official or department, the payment will be included in the 'Supply Services'.

The following are some of the Consolidated Fund Services:^{23a}

(a) The National Debt. (b) The King's Civil List. (c) Local Taxation Accounts,—representing contribution towards the cost of local administration of

(23a) Cf. Halsbury, 3rd Ed., Vol. 28, p. 443.

certain national services. (d) Courts of Justice,—including payments to the Lords of Appeal in Ordinary, Judges of the Supreme Court, County Court Judges and the like. (e) Salaries and allowances, including those paid to the Speaker, the Leader of the Opposition, the Comptroller and Auditor-General. (f) Annuities and pensions, including payments to ex-Judges, ex-Speakers and other distinguished persons and their descendants.

(B) *Ceylon*.—Sec. 66 (2) of the Ceylon Constitution Order in Council, 1946, provides—

“The interest on the public debt, sinking fund payments, the costs, charges and expenses incidental to the collection, management and receipt of the Consolidated Fund and such other expenditure as Parliament may determine shall be charged on the Consolidated Fund.”

Other items charged by the various provisions of the Constitution Order are to be in Secs. 6 (3); 20 (2); 52 (54); 53 (6); 58 (7); 63; 64; 66 (2).

(C) *Government of India Act, 1936*.—See sub-sec. (3) of Sec. 33 of that Act.

INDIA

Cl. (3) : Expenditure charged on the Consolidated Fund of India.

Broadly speaking, the items of expenditure included in this clause correspond to the ‘Consolidated Fund Services’ of England.²⁴ But the enumeration of the charges on the Consolidated Fund²⁵ of India in the present clause is not exhaustive. As sub-clause (g) says, it includes other expenditure declared to be so charged by any other provision of the Constitution. Besides, Parliament is empowered to add to the list by law [see under cl. (g), *below*].

This power of *our* Parliament, which follows the English precedent, was criticised in the Constituent Assembly on the ground that one Parliament should not have the power to curtail the right of its successors to vote on any financial matter. But the successor would not really be bound by any act of its predecessor, according to the fundamental principle of sovereignty of Parliament, and the successor Parliament would be at liberty to repeal the Act of its predecessor which includes any new item within the list of ‘expenditure charged on the Consolidated Fund’. It may be noted that any legislation in respect of such expenditure is a Money Bill within the meaning of Art. 110 (1) (e).

It is further to be noted that any of the items so declared by the Constitution itself (as enumerated in items (i) to (ix) above), cannot be removed from the privilege, without the process of constitutional amendment.

It may also be pointed out that the ‘expenditure charged on the Consolidated Fund of India’ is similar in nature to the ‘expenditure charged on the revenues of the Federation’ in Sec. 33 (1) (3) of the *Government of India Act, 1935*,—both being equally withheld from the vote of Parliament. But the main *difference*, which should not be overlooked, is that under the Constitution there is no function to be discharged by the President in his discretion, so that there is nothing in the list in Art. 92 (3), corresponding to Cls. (e) as well as (f) and (g) of Sec. 33 (3), of the *Government of India Act, 1935*. *Secondly*, under Sec. 33 (4), it was the Governor-General, in his discretion, who was to decide whether any proposed expenditure falls within the “class of expenditure charged on the revenues”. But under the Constitution, there is no such provision. *Thirdly*, two of the items so charged [Cls. (a) and (f) of Sec. 33 (3)] under the *Government of India Act, 1935* were not open to discussion in the Legislature. But under Art. 113 (1) of the Constitution, *all* the items of expenditure charged upon the Consolidated Fund of India, though not submitted to the vote of Parliament, shall be open to dis-

(24) It would be interesting to note however, that while in England, the Consolidated Fund Services formed about 16% of the total expenditure in 1950-51, in the same year, the expenditure charged on the Con-

solidated Fund of India constituted only 6% of the total expenditure.

(25) As to the ‘Consolidated Fund’, see, further, Art. 266, *post*.

cussion¹ in either House of Parliament, including even the emoluments of the President. *Fourthly*, it should be noted that apart from expenditure required for the discretionary functions of the Governor-General, all the items charged under the Act of 1935 have not been so charged under the Constitution. The most important of these which have been excluded from the Constitution are—salaries of Ministers [Sec. 33 (3) (c)] and salaries etc. of members of the All-India Services [Sec. 247 (4) of the Act of 1935]; expenditure on account of defence and political affairs [Sec. 33 (3) (e)].

(i) As regards the salaries of Ministers, this was charged in the Act of 1935, as a matter of reaction against the abuse of powers by the Legislatures under the Government of India Act, 1919. But the power of the Legislature to move for a nominal reduction in the Ministers' salaries by way of criticising a Department or ventilating a grievance, is an essential feature of the system of Parliamentary Government in England,² and there is no reason why it should not be same in India under the Constitution which introduces the English system. It may be expected, however, that the Parliament of India will follow the English convention of moving a token cut [See under Art. 113 (2)], instead of disallowing the salaries of Ministers in toto and thus creating a deadlock in the administration as was done by some Provincial Legislatures under the Act of 1919.

(ii) As regards the salaries and pensions etc. of the All-India Services, they are no longer to enjoy any special privilege under the Constitution, for, the privilege under the Acts of 1919 and 1935 were due to the fact that they were appointed under a covenant with the Secretary of State, which it was beyond the competence of the Indian Legislatures to affect. It is essential for a truly responsible Government that all the public servants must be fully under the control of the Legislature.

Sub-Cl. (c) : Debt Charges.

The debt charges or the charges for the repayment of national debt are withheld from the annual vote of Parliament in order to maintain the confidence of the money market in the credit of the Government. The management expenses of the national debt are also charged on the Consolidated Fund. There are several methods of repayment of public debt:

- (a) Budgeting for a surplus of income over expenditure.
- (b) Arranging for a fixed amount of revenue in the Budget to create a 'Sinking Fund' for the repayment of debt. It is thus a fund set aside annually from the public revenue, so that the accumulated total of the Fund together with interest on it, will be sufficient to redeem the loan or loans at the time of maturity.
- (c) Redemption by terminal annuities; and
- (d) Redemption by conversion of existing debts into debts carrying a lower rate of interest.

Sub-cl. (g) : Other items charged on the Consolidated Fund.

As stated already, besides the items enumerated in sub-clauses (a)-(f) of the present clause—

(i) there are other provisions of the Constitution which specifically charge certain expenses on the Consolidated Fund.

The items charged by *other* provisions of the Constitution are—(a) Administrative expenses of the Supreme Court, salaries of its officers [Art. 146 (3)]. (b) Administrative expenses of the Comptroller and Auditor-General [Art. 148 (6)]. (c) Grants-in-aid to the States [Arts. 273, 275 (1)]. (d) Expenses of the Union Public Service Commission [Art. 322]. (e) Privy Purse of Rulers of Indian States. [Art. 291].

(1) Herein *our* Constitution departs also from the English precedent under which the Consolidated Fund Services are not open for annual discussion.

(2) Lowell. Government of England, 1914, Vol. I, pp. 346-7; Hood Phillips, Constitutional Law, 1952, p. 173.

(ii) Parliament has the power to add to the list, by ordinary legislation.

As instances of Acts charging other expenditure on the Consolidated Fund may be mentioned—

(a) Union Duties of Excise (Distribution) Act (III of 1953); (b) States Reorganisation Act (37 of 1956).

INDEX TO COMMENTS

ARTICLE 112.

Some General Principles of Financial Procedure in England and India, 692; Stages in Financial Legislation in England and India, 693; Procedure for Financial Legislation in India, 694.

CLAUSE (1).

Other Constitutions:

(A) England, 696; (B) Government of India Act, 1935, 697.

India:

'Annual Financial Statement', 697; 'Financial Year', 697; 'A Statement', 697; 'Statement of the receipts and expenditure of the Government of India', 698; Procedure after presentation of the Annual Financial Statement, 698.

CLAUSE (2).

Mode of presenting the estimates in the Annual Financial Statement, 698; 'Expenditure from revenue account and other expenditure', 699.

CLAUSE (3).

Other Constitutions:

(A) England, 699; (B) Ceylon, 700; (C) Government of India Act, 1935, 700.

India:

Expenditure charged on the Consolidated Fund of India, 700.

Sub-cl. (c): Debt Charges, 701.

Sub-cl. (g): Other items charged on the Consolidated Fund, 701.

113. (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and the House of the People shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the President.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England*.—The Consolidated Fund charges or services, being secured by permanent Acts do not require an annual vote of Parliament, and hence do not come before the Committee of supply at all.³ It is only the estimates for the rest of the expenditure, called the Supply Services that are presented before the Committee of Supply. So, there is no opportunity of criticising or discussing the Consolidated Fund Services in Parliament, each year.⁴

(B) *Government of India Act, 1935*.—Sub-sec. (1) of Sec. 34 of that Act was in similar language as cl. (1) of the present Article. Hence, discussion of the non-votable items was permissible (excepting two items).

(3) Lowell, Government of England, Vol. I, p. 284.

(4) Wade and Phillips, Constitutional Law, p. 158.

INDIA

Discussion of expenditure charged on the Consolidated Fund.

This clause departs from the *English* precedent and follows the Government of India Act, 1935, in allowing discussion of expenditure charged on the Consolidated Fund.⁵ No item is exempted from discussion. Hence, though the Indian Parliament may not reduce or refuse the items of expenditure enumerated in Art. 112 (3), either House shall get an opportunity, each year, to criticise the conduct or administration of the services which are charged. Members may also ask for any information relating to these items.⁶

The charged items are also subject to be scrutinised by the Estimates Committee of the House of the People, since they are included in the estimates presented to the House, and the Committee is entitled to refer doubtful points to the Ministry of Finance, for clarification.

CLAUSE (2).

OTHER CONSTITUTIONS

(A) *England*.—Though Standing Order No. 78 [see under Cl. (3), below] merely prohibits the House of Commons from proceeding upon any motion for a grant unless recommended by the Crown, this rule has been extended by construction to prohibit any *amendment* for *increasing* a grant beyond the amount recommended by the Crown, or for *altering* its *destination* as recommended by the Crown. But since reduction is not forbidden, it is a practice for a private member who seeks an increase of any item of expenditure,—to move to reduce it, thereby drawing the attention of the Government to its insufficiency.⁷

It is to be noted that the prohibition against increasing the amount of a grant as recommended by the Crown operates not only against a private member but also against a Minister, so that even a Minister cannot move an amendment for increasing the amount of a grant as included in the Estimates. If a large grant becomes necessary, the modern practice is that the existing demand is proceeded with in the usual course and then a supplementary estimate is presented for the increased amount required.⁸

(B) *Government of India Act, 1935*.—Under that Act, the demands for grants were submitted to both Chambers [S. 34 (2)] and both the powers specified in Cl. (2) of the present Article.

INDIA

Power of the House over demands.

The limitation imposed by the latter part of this clause follows from the principle underlying the next clause *viz.*, that no demand for a grant can be made except on the recommendation of the President, *i.e.*, on the responsibility of the Government. Hence, the House may assent to, refuse or reduce a demand, but cannot increase the same, for, 'increase' of a demand would involve the 'making' of a demand to the extent of the increase. Nor can the House alter the destination of a grant [see also Art. 114 (2), p. 706, *post*].

Scrutiny of the Estimates.

Though the estimates are submitted to the vote of the House of the People, it is not possible for the House in a body to effectively scrutinise the estimates

(5) As to the procedure, relating to expenditure out of the 'Public Account', see under Art. 266 (2), *post*.

(6) H. P. Deb. (II), 24-2-54.

(7) Lowell, Government of England. 1912, Vol. I, pp. 281-2; Halsbury, 3rd Ed., Vol. 28, p. 453.

(8) May, 16th Ed., p. 701.

or to suggest economies before the demands are voted⁹ in the House. This business is, accordingly, done by the Committee on Estimates, which goes on examining the estimates throughout the financial year, for the purpose, *inter alia*, of suggesting economies. It may examine such of the estimates as it itself deems fit or such as are specifically referred to it by the House.

While the function of the Committee on Public Accounts (see *post*) is to scrutinise the expenditure after it has been incurred, it is the business of the Committee on Estimates to examine the proposals for expenditure with a view to suggest economy and to prevent proposals for wasteful expenditure.

Committee on Estimates.

This Committee shall consist of not more than 30 members, elected by the House every year from amongst its members according to the principle of proportional representation by means of the transferable vote, provided that no Minister shall be appointed to this Committee and if a member is appointed a Minister, he shall cease to be a member of the Committee from the date of such appointment. The term of office of the members of the Committee shall not exceed one year.⁹

The functions of the Committee are—

"(a) to report what economies, *improvements in organisation, efficiency or administrative reform*, consistent with the policy underlying the estimates, may be effected;

(b) to suggest alternative policies in order to bring efficiency and economy in administration;

(c) to examine whether the money is well laid out within the limits of the policy implied in the estimates;

(d) to suggest the form in which estimates are to be presented to Parliament."

The examination of estimates by the Committee on Estimates may begin at any time after their presentation to the House and the Committee may continue its examination of the estimates from time to time throughout the financial year and report to the House as its examination proceeds. It shall not be incumbent on the Committee to examine the entire estimates of any year.¹⁰ Again, the demand for grants may be voted notwithstanding the fact that the Committee has made no report.⁹⁻¹⁰

No formal debate takes place in the House on the reports of the Estimates Committee but members may utilise them at the time of the discussion on the Budget at the consideration of the estimates.

There is no doubt that the Committee on Estimates does useful work in examining the estimates before they are debated in Parliament and the Committee, having the power to take evidence, is better able than the House to scrutinise the proposals. But the provision that the demands for grants may be finally voted notwithstanding the fact that the Committee had made no report detracts, to a certain extent, from the powers of the Committee to impose an immediate check on extravagancy.

What is noticeable is the wider powers of *our* Committee on Estimates as compared with those of its English counterpart. In *England*, the Estimates Committee is specifically debarred from matters of policy¹¹ and it can only suggest economies consistent with the policy implied in the estimates. While in suggesting economies, *our* Committee on Estimates is equally circumscribed by the policy underlying the estimates, *our* Committee has the additional power to suggest alternative policies also with a view to ensure efficiency and economy in the administration.

(9) Rr. 310-12 of the Rules of the House.

(10) Usually it selects only a few estimates for its examination and reports on each separately. e.g., on the Ministry of Industry

and Supply; on reorganisation of the Secretariat; Central Water and Power Commission.

(11) May, 16th Ed., pp. 680-1.

Upon this difference (pointed out at p. 649 of the Third Edition of this Commentary), an English observer¹² has commented—

"The *indirect* influence of the Committee . . . is probably more important than its direct influence on the Government . . . To a very real extent, this type of Committee, inspired as it is by the idea not simply of economy . . . but also of acting as a check against an oppressive or arbitrary executive, achieves a special political significance as a substitute for a real Opposition The whole structure of Parliamentary Committees reflects and at the same time reflects this mood of watchfulness over the Government . . . it saves the Indian Government with its large majority from the worst temptations of autocracy."¹³

Procedure after presentation of the Budget.

The following are the relevant rules of the House of the People which govern the procedure that takes place in the House after the annual financial statement is laid before the House under Art. 112 (1):

"205. There shall be no discussion of the Budget on the day on which it is presented to the House.

207. (1) On a day to be appointed by the Speaker subsequent to the day on which the Budget is presented and for such time as the Speaker may allot for the purpose, the House shall be at liberty to discuss the Budget as a whole or any question of principle involved therein, but at this stage no motion shall be moved nor shall the Budget be submitted to the vote of the House. (2) The Finance Minister shall have a right of reply at the end of the discussion. (3) The Speaker, may, if he thinks fit, prescribe a time limit for speeches.

208. (1) The Speaker in consultation with the Leader of the House shall allot so many days as may be compatible with the public interest for the discussion and voting of demands for grants. (2) On the last day of the allotted days, at 5 o'clock, the Speaker forthwith put every question necessary to dispose of all outstanding matters in connection with demands for grants. (3) Motions may be moved to reduce any grant. (4) No amendments to motions to reduce any demand for grant shall be permissible"

Opportunities and scope for discussion of the financial proposals.

From the presentation of the Budget up to the passing of the Annual Finance and Appropriation Bills embodying the taxation and expenditure proposals included in the Budget, the House gets opportunity for discussion, at several stages:

- (i) A general discussion after presentation of the Budget (p. 695, *ante*).
- (ii) Debate when the Demands for Grants are made.
- (iii) Debate on the Finance Bill [see p. 730, *post*].
- (iv) Debate on the Appropriation Bill [see p. 712, *post*].

(a) It has already been pointed out¹⁴ that at the time of the general discussion that follows the presentation of the Budget, there is a discussion of the Budget as a whole and on questions of principle. No motion can be moved at this stage and no voting takes place. Grievances not related to the Finance Minister's speech or directly arising out of the proposed expenditure are not in order during the general discussion on the Budget.¹⁵ Thus, the political situation of the country cannot be discussed during discussion of the Budget.¹⁶ The discussion of the principle involved in the Budget also must be related to some specific aspects of the Budget, instead of being a mere 'roving discussion'.¹⁷ Again, though the financial relation between the Union and the States may be discussed, there cannot be any criticism of the administration of the States,¹⁸ or a matter like the appointment of Chief Ministers in States, which is not a responsibility of the Union.¹⁸

(b) While during the general discussion on the Budget, the debate has a general scope relating to the Budget as a whole, when the Demands are moved,

(12) Morris-Jones, *Parliament in India*, 1957, pp. 187, 315.

(13) A contrary view, namely, that this power of the Estimates Committee tends to weaken ministerial and secretarial responsibility, is expressed in Chanda, *Indian Administration*, 1958, pp. 192-4.

(14) R. 207 of the Rules of the House of

the People (see the rule reproduced at p. , *ante*).

(15) H. P. Deb., 4-3-53. Pt. II, cols. 1379-80.

(16) L.A. Deb., 4-3-41, pp. 974-5; (1953) H. P. Deb., Vol. I, 559.

(17) House of the People Deb., 1-5-53, Pt. II, cols. 5540, 5558.

(18) (1957) H. P. Deb., Vol. V, 691-9.

the debate must necessarily be specific and confined to each head of Demand as it put to the House for its vote, and the administration concerned with the Demand. For the same reason, a ventilation of *specific* grievances is not allowed at the stage of the general discussion.¹⁹

(c) The discussion on the Finance Bill is not so restricted. Members can ventilate their grievances against the administration whether arising out of the proposed expenditure or not,²⁰⁻²¹ the principle being that the citizen cannot be called upon to pay, unless he is given, through Parliament, the fullest latitude of expressing his grievances.

(d) The scope of discussion on the Appropriation Bill is very limited. Only those matters which have not already come up for discussion can be raised at this stage,²¹ confined to the administration of the grants included in the Bill. Questions of taxation or legislation cannot be discussed at this stage.²² [See, further, under Art. 114, *post*].

How the Demands are presented.

In conformity with the present clause, read with r. 206 of the Rules of the House, the estimates of expenditure (other than expenditure charged on the Consolidated Fund of India) are submitted to the vote of the House of the People, in the form of Demands for Grants. The 'demands' are the 'units of appropriation' which require a vote of the House.²³ In *England*, the demands are themselves called 'votes'.²³

A separate Demand is ordinarily made for each Ministry and each such Demand contains first a statement of the *total* grant proposed and then a statement of the *detailed* estimate under each grant, divided into items.

R. 206 of the Rules of the House of the People says—

"(1) A separate demand shall ordinarily be made in respect of the grant proposed for each Ministry, provided that the Finance Minister may include in one demand grants proposed for two or more Ministries or Departments or make a demand in respect of expenditure which cannot readily be classed under particular Ministries. (2) Each demand shall contain, first, a statement of the total grant proposed, and then a statement of the detailed estimate, under each grant divided into items. . . ."

The estimates relating to the heads of expenditure charged on the Consolidated Fund are also shown under each item, but they are printed in *italics* and are not submitted to vote, as already stated.

For convenience of treatment, the Demands of Expenditure met from Revenue are shown separately from the Demands relating to Expenditure met from Capital and Disbursement of Loans and Advances.

An Explanatory Memorandum is supplied with the Budget, explaining the contents under each head, with short notes.

The voting of grants.

This provision in the Constitution differs from the provision in Sec. 34 (2) of the Government of India Act, 1935, inasmuch as under the Constitution, the Council of States shall have no power over grants at all. The estimates will, of course, be laid before both Houses, and there will be a general discussion of the Budget as a whole (including the charged items), in both Houses in the same manner,—as regards the general principles involved therein. But after the general discussion is over, the items of expenditure other than those that are charged shall be submitted in the form of demands for grants, *in the House of the People only*. The voting of the grants is a powerful medium of control of the House of the People over the administration and policy of the different Departments.

(19) (1952) H. P. Deb., Vol. I, 539.

(20) H.P. Deb., 4-3-53, Pt. II, Cols. 1379-80.

(21) H.P. Deb., 1-5-53, Pt. II, cols. 5540, 5558; r. 218 (4) of the Rules of the House.

(22) May, 15th Ed., p. 724.

(23) Cf. May, 16th Ed., pp. 701, 710; Halsbury, 3rd Ed., Vol. 28, p. 444.

It has already been stated (p. 700, *ante*), that there is no provision in the Constitution vesting in the Executive the power to decide whether an item really comes within the items charged by the Constitution or not. Consequently, the power should belong to the Chair to decide whether an item should be treated as charged and withheld from vote of the House, or not.

Procedure for the voting of grants.

(1) In the case of demands for grants, the *English* practice is followed to eliminate a double reading of the demand by the Finance Minister and then by the Speaker; the demands are taken to have been moved by the Finance Minister and they are, accordingly, proposed outright from the Chair.²⁴

The motion for a Demand takes the following form—

"That a sum not exceeding Rs. lakhs be granted to the President (to complete the sum necessary) to defray the charges which will come in course of payment during the year ending the 31st day of March, , in respect of 'Ministry of '."

(2) Amendments may then be moved to reduce a grant. (The different kinds of motions for reduction of grants and the rules of procedure relating thereto are explained below).

The House may refuse a grant or reduce it. But a *motion* for the *omission* of an entire grant is not admissible.²⁵

(3) After the mover of a cut motion speaks, the Government member speaks thereon. The mover is not, usually, given a further right of reply.¹

(4) No amendment to a motion to reduce any demand is admissible.²

(5) The following amendments to a motion for a grant are out of order—

(a) to postpone a vote;³

(b) to increase the amount of the grant proposed;³

(c) to alter the destination of the grant.³⁻⁴

Conditions relating to motions for reduction of grants.

Rule 209 of the Rules of the House of the People now clearly lays down that motions for reduction of grants are of three kinds and they must conform to either of these types:

(a) Refusal of supplies. (b) Token cut. (c) Economy cut.

(a) When the demand is sought to be reduced to a nominal figure (say Re. 1/-), there is a '*refusal of supplies*'. This has been called a '*Disapproval of policy Cut*', for the object of such a motion is to express disapproval of the *policy* underlying the demand. A member giving notice of such a motion shall indicate in precise terms the particulars of the policy which he proposes to discuss. The discussion shall be confined to the specific point or points mentioned in the notice and it shall be open to the members to advocate an alternative policy. The motion takes the following form—

"That the demand be reduced to Re. 1/-."

Such a motion cannot be used for the purpose of ventilating any specific grievance.¹⁹

(b) The object of a '*token cut*' (*i.e.*, cut of a small amount, say, Rs. 100/-) is to bring pointed attention to a specific grievance which is mentioned in definite terms so as to enable the Government to answer. Such a motion shall be known as a '*Token Cut*' and the discussion shall be confined to the particular grievance

(24) Parl. Deb., Pt. II, 20-12-50, cols. 2064-5; (1954) H.P. Deb., Vol. II, 1587-8.

(25) L.A. Deb., 9-3-27, pp. 1913-14; 14-3-27, pp. 2202-3.

(1) L.A. Deb., 27-2-36, pp. 1747-8.

(2) R. 208 (4), Rules of the House.

(3) Campion, Introduction, 1950, p. 269; see also p. 649, *ante*.

(4) But an amendment to the words defining the destination of the grant was allowed where the object was not to alter the destination but to define the purpose for which the grant was designed and to render the motion for the grant consistent with the description thereof in the Estimate (May, 15th Ed., p. 710).

specified in the motion. Each such motion must be confined to one specific grievance.⁵ The motion is moved in the following form—

"That the amount of the demand under the Head 'Ministry of Defence' be reduced by Rs. 100/-."

A token cut is not necessarily a motion of censure.⁶ There is no limit to the number of cut motions that may be moved by the same member to ventilate different specific grievances relating to the same demand, and different members may move similar motions to ventilate different specific grievances.⁷

(c) The object of an 'economy Cut' is to reduce an excessive demand by the amount that is considered to be in excess. In such a motion, the actual sub-heads and the very amount by which the items and sub-heads are sought to be reduced have to be given in precise term.⁸ The motion takes the form—

"That the amount of the demand be reduced to the extent of Rs. 50,000/-."

The object of such a motion is to effect *economy* and the debate on such motion should be relevant to that object.⁹ This motion also cannot be used to ventilate a specific grievance. An economy cut is, obviously, not a censure motion.

The notice of such a motion must indicate precisely the particular matter on which discussion is sought to be raised and must be restricted to one such specific grievance¹⁰ and speeches shall be confined to the discussion as to how economy can be effected relating to that matter.

Conditions of admissibility of Cut Motions.

The general conditions applicable to all motions (summarised under Art. 118, *post*) are also applicable to 'Cut Motions'.¹¹ In addition to those, the following conditions for the admissibility of Cut Motions have also been specified in r. 210 of the Rules of the House of the People:

- (i) It shall relate to one demand only;¹²
- (ii) It shall be confined to one specific matter which shall be stated in precise terms;
- (iii) It shall not make suggestions for the amendment or repeal of existing laws;
- (iv) It shall not relate to expenditure charged on the Consolidated Fund of India;
- (v) It shall not relate to a trifling matter;
- (vi) It shall be for reduction of the demand¹³ and not for increasing it in any manner;
- (vii) It must not alter the destination of a grant [see under Art. 114 (2)].

The Speaker may also disallow any cut motion on the ground that it is an abuse of the right of moving cut motions or calculated to obstruct or prejudicially affect the procedure of the House (r. 230).

Debate on a motion for reduction of a grant.

(a) A cut motion must be directed against one specific subject and the discussion on the cut motion must be confined to that subject.¹⁴ Thus, a member cannot refer to the administration of the Defence Services.¹⁴ Similarly, on a

(5) L.A. Deb., 1-3-32, pp. 1321-3.

(6) L.A. Deb., 13-3-39, p. 1994.

(7) House of the People Deb., 2-5-53. Pt. II, Col. 5644.

(8) But when a number of cut motions have been moved relating to the same grant, the Speaker may request members to concentrate on some of them by some grouping arrangement [H.P. Deb., Vol. II, Pt. I, 24-3-53, Col. 2727].

(9) L.A. Deb., 1-3-32, pp. 1321-3.

(10) (1942) L.A. Deb., Vol. I, 529.

(11) Thus no cut motion can be moved to discuss the conduct of the Speaker or the manner of his enforcement of the Rules of the House. This can be done only on a substantive motion against the Speaker.

(12) An omnibus motion to reduce 'all the demands by ten per cent' is not in order [L.A. Deb., 14-3-22, pp. 3047-8].

(13) R. 208 (3), Rules of the House.

(14) Parl. Deb., 4-3-52, Pt. II, cols. 1892; 1942-3.

motion to reduce the grant for 'working expenses' of the Railway Administration, a member cannot raise a discussion of the entire Railway policy of the Government which can properly be raised during the general discussion of the Railway Budget.¹⁵

(b) The scope of the debate on a cut motion is limited to the *administration* of the *existing* law by the Departments of the Government of India. The discussion cannot, therefore, extend to the merits of the legislation itself or suggestions for amendment or repeal thereof.¹⁶

(c) In general, the object of a cut motion being to discuss policy, suggest retrenchment or draw attention to a specific grievance, it cannot be used as a means to ascertain the opinion of the House on a matter, which can be done only by a substantive motion.¹⁷

The 'guillotine'.

This is one of the devices for bringing the debate on financial proposals to an end within a specified time. In *England*, this device is now embodied in Standing Order 15 (6) of the House of Commons which provides that on the last day but one of the days allotted for the considerations of the estimates, the Speaker has to put to vote every question relating to the estimates that lie undisposed of. The result is that a number of demands have to be voted by the House without discussion. This unsatisfactory state of affairs has been criticised by writers on Public Finance. Thus, *Hilton Young* observes—

"It reduces the whole laborious process of the control of expenditure by the House to something of a farce."¹⁸

But notwithstanding this criticism, this device has been adopted in r. 208 (2) of the Rules of *our* House of the People, which has already been reproduced at p. 698, *ante*. The rigours of this provision may, however, be mitigated if a liberal number of days are allotted for the discussion and voting of the grants under r. 208 (1). Sometimes the Speaker extends the time of the sitting, and the time for application of the guillotine.¹⁹ Apart from this, when the guillotine becomes inevitable, the party whips informally agree to select some of the important cut motions for discussion within the time left, leaving the rest to the guillotine.²⁰

CLAUSE (3).

OTHER CONSTITUTIONS

(A) *England*.—In 1713, the House of Commons adopted a self-imposed limitation, which, as amended, stands thus—

"This House will receive no petition for any sum relating to public service or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund or out of money to be provided by Parliament, unless recommended by the Crown."²¹

The principle underlying this Standing Order has already been explained (*see* p. 692, *ante*). It applies not only to direct motions for grants, but also to any motion which *indirectly* involves the expenditure of public money.²² No such motion can be moved by a private member without royal recommendation, i.e., recommendation of the Government.

"When the main object of a Bill is the creation of a public charge, a resolution for that charge must be passed in Committee of the Whole upon a recommendation from the Crown

(15) L.A. Deb., 26-2-27, p. 1401; 9-3-34, pp. 1915-17.

(16) L.A. Deb., 15-3-24, p. 1587; cf. r. 229, quoted *above*.

(17) (1934) L.A. Deb., Vol. II, 1195.

(18) Hilton Young, *System of National Finance*, 3rd Ed., p. 53; also Morrison,

Government & Parliament, 1954, p. 213; and, in *India*, (1956) H.P. Deb. Vol. III, 4539.

(19) (1953) H.P. Deb., Vol. I, 531.

(20) (1956) H.P. Deb., Vol. I, 1243.

(21) (H.C.) S.O. 78.

(22) Jennings, *Parliament*, 1948, p. 250.

before the Bill is introduced. But when the charge is merely *subsidiary* or *incidental*, the Bill can be brought in previously, the clauses or provisions creating the charge being printed in italics. The words so printed are regarded as mere blanks with an indication of the way they are eventually intended to be filled, and they cannot be considered by the House until a Committee of the Whole has passed the necessary resolutions on a recommendation from the Crown.^{23, 24}

The wisdom of this self-imposed limitation is evident when we compare the system obtaining in the *United States* where the Legislature has the power to change, increase or decrease appropriations as it thinks fit and to compel the Executive to spend money at the instance of individual members of the Legislature. The results of the American system are waste and extravagance, improper pressure on members of the Legislature by their constituencies and the appropriation of public funds for the benefit of individual constituencies at the cost of the general body of tax-payers. The English system, on the other hand, safeguards the tax-payer against—

"the casual benevolence of a House wrought upon by the eloquence of a private member against a scramble for public money among unscrupulous politicians bidding against one another for the favour of a democracy"²⁵

The *English* principle, thus, makes the Government of the day responsible for all taxation and expenditure of the nation, and prevents irresponsible extravagance at the instance of individual members of Parliament.

(B) *Canada*.—Sec. 54 of the British North America Act says—

"It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-general in the session in which such vote, resolution, address or bill is proposed."

(C) *Australia*.—Sec. 56 of the Commonwealth of Australian Constitution Act is—

"A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

(D) *Government of India Act, 1935*.—Sub-sec. (4) of Sec. 34 provided—

"No demand for a grant shall be made except on the recommendation of the Governor-General."

INDIA

Cl. (3): No demand except on recommendation of the President.

The provision in Cl. (3) of Art. 117 is complementary to the present clause. The two together ensure the principle, adopted from the English precedent (p. 703, *ante*), that the Executive shall be solely responsible for the expenditure of the public money, whether that takes place through a Money Bill, or, indirectly, through some general statute involving expenditure.

Form of recommendation.

R. 348 of the House of the People lays down the form in which all recommendation or sanction of the recommendation, required by the Constitution, must be communicated by a Minister to the Secretary of the House of the People—

"The President having been informed of the subject matter of the proposed Bill, motion, demand for grant or amendment accords his previous sanction to the introduction of the Bill or the moving of the amendment or recommends the introduction of the Bill or the moving of the motion, demand for grant or amendment in the House or recommends to the House the consideration of the Bill."

Analogous Provision.—Similarly, proposals for imposition or increase of taxes require recommendation of the President [Art. 117 (1)].

(23) Lowell, Government of England, Vol. I, p. 280 n.

(24) See May, 16th Ed., pp. 755-765 as to the case which have been held to impose

or not impose a charge for the purpose requiring recommendation of the Crown.

(25) Anson, Law & Custom of the Constitution, (1922) Vol. I, p. 272.

INDEX TO COMMENTS

ARTICLE 113.

Clause (1).

Other Constitutions :

(A) England, 702 ; (B) Government of India Act, 1935, 702.

India :

Discussion of expenditure charged on the Consolidated Fund, 703.

Clause (2).

Other Constitutions :

(A) England, 703 ; (B) Government of India Act, 1935, 703.

India :

Power of the House over demands, 703 ; Scrutiny of the Estimates, 703 ; Committee on Estimates, 704 ; Procedure after presentation of the Budget, 705 ; Opportunities and scope for discussion of the financial proposals, 705 ; How the Demands are presented, 706 ; The voting of grants, 706 ; Procedure for the voting of grants, 707.

Conditions relating to motions for reduction of grants, 707 ; Conditions for admissibility of Cut Motions, 708 ; Debate on a motion for reduction of a grant, 708 ; The 'Guillotine', 709.

Clause (3).

Other Constitutions :

(A) England, 709 ; (B) Canada, 710 ; (C) Australia, 710 ; (D) Government of India Act, 1935, 710.

India :

No demand except on recommendation of the President, 710.

Analogous Provision, 710.

114.(1) As soon as may be after the grants under article 113 have been made by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

(a) the grants so made by the House of the People ; and

(b) the expenditure charged on the Consolidated Fund of India but not exceeding in any case the amount shown in the statement previously laid before Parliament.

(2) No amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 115 and 116, no money shall be withdrawn from the Consolidated Fund of India except under appropriation made by law passed in accordance with the provisions of this article.

CLAUSES (1)-(2).

OTHER CONSTITUTIONS

(A) *England*.—Resolutions of the Committee of Supply, voting the grants, are not sufficient to appropriate money for the purposes for which the grants have been made. For that legislation is required. All public revenues, raised by taxation or otherwise, are carried into the Consolidated Fund. No money can issue out of this Fund without an Act of Parliament. It is the Annual Appropriation Act which authorises in detail the application of the amounts voted to the purposes for which they have been granted, and the issue or 'appropriation' of money out of the Consolidated Fund for these purposes. Of course, before the passing of the annual Appropriation Act, interim statutes called Consolidated Fund Acts are

passed from time to time, giving effect to the resolutions of the Committee of Supply, to meet urgent requirements of the Departments.¹ The Appropriation Act, passed at the end of the session, confirms the appropriations made by the Consolidated Fund Acts and also deals with the grants so far undisposed of. The Appropriation Act also limits the expenditure of each Department to the sums granted by Parliament, which are set out in a Schedule to the Act.²

(B) *Government of India Act, 1935*.—There was no provision for an Appropriation Act in the Government of India Act, 1935. It was the schedule of authorised expenditure authenticated by the Governor-General under s. 35 of that Act, which constituted the sole legal authority for any expenditure from the revenues of India. After the demand for grants had been voted by the Legislature, they were included in this Schedule.

INDIA

Cl. (1): Appropriation Act.

The objects of an Appropriation Act have been already explained. Cl. (3) of the present Article and Art. 266 (3), *post*, lay down that no moneys shall be appropriated out of the Consolidated Fund 'except in accordance with law.....' The Appropriation Act² provides that law. The voting of the grants by the House of the People, under Art. 113, would not *ipso facto* authorise the issue of money out of the Consolidated Fund to meet the grants. It will require a Money Bill [Cf. Art. 110 (1) (d), *ante*], to be passed in conformity with the present Article. This Bill, called the Appropriation Bill, will include not only the grants voted by the House of the People but also the non-votable items of expenditure 'charged on the Consolidated Fund of India' [Art. 112 (3)], as shown in the Budget Estimates.

Cl. (2): Scope of debate on and amendment of Appropriation Bill.

Though an Appropriation Bill is in the nature of a formal legislation, to give effect to grants already voted by Parliament and expenditure charged by the Constitution, it would offer scope to a general debate on matters of public importance and administrative policy and questions affecting economy.

But the scope of the debate has been limited by r. 218 of the Rules of the House by providing that matters which have already been discussed during the debate on the demands for grants cannot be raised during the debate on the Appropriation Bill. Cls. (4)-(6) of the Rule impose the following limitations upon the debate on the Appropriation Bill:

"(4) The debate on an Appropriation Bill shall be restricted to matters of public importance or administrative policy implied in the grants covered by the Bill which have not already been raised while the relevant demands for grants were under consideration.

(5) The Speaker may, in order to avoid repetition of debate, require members desiring to take part in discussion on an Appropriation Bill to give advance intimation of the specific points they intend to raise, and he may withhold permission for raising such of the points as in his opinion appear to be repetitions of the matters discussed on a demand for grant or as may not be of sufficient public importance.

(6) If an Appropriation Bill is in pursuance of a supplementary grant in respect of an existing service, the discussions shall be confined to the items constituting the same, and no discussion shall be raised on the original grant nor the policy underlying it save in so far as it may be necessary to explain or illustrate a particular item under discussion."

Thus, subjects on which cut motions were moved and negatived during the discussion on demands for grants cannot again be discussed on the Appropriation

(1) Halsbury, 3rd Ed., Vol. 28, p. 451.

(2) It has been held in our Parliament [cf. Parl. Deb., Pt. II, 24-3-50, pp. 2064-7], that there may be more than one annual

Appropriation Act, authorising expenditure out of the Consolidated Fund. A separate Appropriation Act is thus being passed for expenditure relating to Railways (see also under Art. 112. *ante*).

Bill.³ The Speaker may require members to give advance intimation of the points they intend to raise and may withhold permission if in his opinion they are repetitions of the matters already discussed on a demand for grant.³ In the result, a debate on the Appropriation Bill takes place only if something special has happened in between the voting of the demands and the discussion on the Appropriation Bill.⁴ This is contrary to the practice in the House of Commons, where the debate on the Appropriation Bill, during its second and third readings, affords an opportunity of criticising the entire administrative policy.⁵

There are two limitations to amendments that may be proposed to such a Bill. These are—(i) No amendment may be proposed which will have the effect of varying the amount or altering the destination of any grant. (ii) No amendment shall be proposed varying the amount of any expenditure charged on the Consolidated Fund. Limitation (i) obviously ensures that the grants already voted by the House should not be disturbed.⁶

'Altering the destination of a grant' would also mean a violation of the rule in Art. 113 (3). So, an amendment to alter the destination of a grant as laid in the President's demand, shall be out of order. This is in conformity with the English practice—

"If a financial resolution provides that the money is to be used for the benefit of certain recipients an amendment is out of order which would alter the recipients of the money so as to give it to recipients other than those named under the King's recommendation."

CLAUSE (3).

OTHER CONSTITUTIONS

(a) *England*.—See p. 711, *ante*.

In this connection should be noted the principle that in order to justify payment out of the Public Exchequer, there must be *clear* authority of Parliament for the payment.⁶

(B) *Ceylon*.—Sec. 67 of the Ceylon Constitution Order in Council, 1946, provides—

"(1) Save as otherwise expressly provided in sub-section (3) of this section, no sum shall be withdrawn from the Consolidated Fund except under the authority of a warrant under the hand of the Minister of Finance.

(2) No such warrant shall be issued unless the sum has by resolution of the House of Representatives or by any law been granted for specified public services for the financial year during which the withdrawal is to take place or is otherwise lawfully charged on the Consolidated Fund.

(3) Where the Governor-General dissolves Parliament before the Appropriation Bill for the financial year has received the Royal Assent, he may, unless Parliament shall have already made provision, authorise the issue from the Consolidated Fund and the expenditure of such sums as he may consider necessary for the public services until the expiry of a period of three months from the date on which the new House of Representatives is summoned to meet."

INDIA

No other means of withdrawal.

The Consolidated Fund (Art. 266) would be a reservoir of all the revenues of the Government of India. An Appropriation Act would be the only outlet from the reservoir. Art. 266 (3) also reiterates this provision.

(3) H.P. Deb., 8-4-53, Pt. II, Col. 3923.

(4) Parl. Deb. (II), 5-3-52, c. 1999; (1957) H.P. Deb. (II), 2664-7.

(5) May, 16th Ed., p. 746.

(6) Parl. Deb. (II), 23-2-51, c. 405.

(7) 312 H.C. Deb. 5s. 1138, quoted in Jennings, Parliament, p. 258.

(8) *Auckland Harbour Board v. King*, (1924) A.C. 318.

Scope of Appropriation Act.

In *England*, a question has been raised⁹ whether the inclusion of an expenditure in the Appropriation Act is sufficient Parliamentary authority to give the Government which it does not already possess under the existing law, or whether specific legislation besides the Appropriation Act is necessary to assume those powers; in other words, whether the act of the Executive is legislated by Parliament merely by authorising the expenditure required for it. The controversy has not yet been settled. While the Public Accounts Committee has repeatedly insisted upon such specific legislation, the Government has justified the practice on the ground of emergency or want of time.

In *India*, the question appears to be much simpler because of the wording of Art. 114 (3). It makes clear [see also Art. 266 (3)] that the appropriation Act serves as an authority only for withdrawing money from the Consolidated Fund. Whether specific legislation is required to justify the activity for which the expenditure is authorised will depend on other considerations. Thus,

(a) There are certain provisions of the Constitution which provide that a 'law' is required for doing certain acts. This law must be a law *other than* an Appropriation Act, e.g., a law required to restrict a fundamental right [Art. 19 (2)-(6)]; or to take away a man's property [Art. 31 (1)]; or to impose a tax [Art. 265].

(b) Even apart from these constitutional provisions, if the Executive seeks to do an act which would be a civil wrong or an offence under the ordinary law, reason of encroachment on existing private rights, specific legislation would be required, and the inclusion of expenditure required for the act would be no defence.¹⁰

'Subject to the provisions of Arts. 115-6'.—These words provide that not only the annual Appropriation Acts but also similar Acts passed to provide supplementary, excess or exceptional grants, votes on accounts or votes of credit, shall be authority for appropriation of money out of the Consolidated Fund.

Analogous Provision.—Provisions similar to those of the present articles are made in Art. 204, *post*, as regards the State Legislature.

INDEX TO COMMENTS

ARTICLE 114.

Clauses (1)-(2).

Other Constitutions :

(A) England, 711; (B) Government of India Act, 1935, 712.

Cl. (1): Appropriation Act, 712.

Cl. (2): Scope of debate and amendment on Appropriation Bill, 712; 'Altering the destination of a grant', 713.

Clause (3).

Other Constitutions :

(A) England, 713; (B) Ceylon, 713.

India :

No other means of withdrawal, 713; Scope of Appropriation Act, 714; Subject to the provisions of Arts. 115-116, 714.

Analogous Provision, 714.

Supplementary, additional or excess grants.

115. (1) The President shall—

(a) if the amount authorised by any law made in accordance with the provisions of article 114 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for

(9) May, 16th Ed., p. 749.

(1955) 2 S.C.R. 225 (238).

(10) Cf. *Ram Jawaya v. State of Punjab*,

supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year ; or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year, cause to be laid before both the Houses of Parliament another statement showing the estimated amount of that expenditure or cause to be presented to the House of the People a demand for such excess, as the case may be.

(2) The provisions of articles 112, 113 and 114 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or grant.

CLAUSE (1) (a).

OTHER CONSTITUTIONS

(A) *England*.—In England, a supplementary estimate may be presented—

"either for a further grant to a service already sanctioned by Parliament, in addition to the sum already demanded for the current financial year, or for a grant caused by a fresh occasion for expenditure that has arisen since the presentation of the sessional estimates, such as expenditure newly imposed upon the executive government by statute, or to meet the cost created by a unexpected emergency" (such as an immediate addition to an existing service, or the purchase of land, or of a work of art).¹¹

Supplementary estimates for an existing service become necessary simply due to the fact that the annual estimates are prepared some 5 or 6 months before the commencement of the financial year for which provision is made in the annual estimates.¹²

(B) *Government of India Act, 1935*.—There was provision for Supplementary Estimates in Sec. 36 of that Act.

INDIA

Estimates other than the Annual Estimates.

The authority of Parliament for expenditure of money out of the Consolidated Fund of India is obtained not only by presenting the 'annual financial statement' [Art. 112 (1), *ante*], which contain the *Annual* Estimates (also known as '*main*' estimates), but also by estimates presented at other times, followed by a vote of the House on the grants demanded in such Estimates and an Act of Appropriation in the same manner [Arts. 114 (3); 115 (2); 116 (2)].

These other estimates, dealt with in Arts. 115-6 are:

- (i) Supplementary Estimates. (ii) Votes on account. (iii) Votes of credit.
- (iv) Exceptional grants.

Supplementary Estimates.

Supplementary estimates are looked upon with jealousy by popular legislatures, as they tend to diminish control of the legislature over the national expenditure, but even in England supplementary estimates are occasionally necessary owing to the exigencies of Government or unforeseen circumstances. Thus, the need

for supplementary or additional grants may arise when the amount specified in the annual estimate for a particular existing service is found *insufficient* for the purposes of the current year, or for some *new* service, not contemplated in the ordinary estimates for that year.¹³ In the absence of any such provision, "it would be impossible for the Government to carry on without Parliament being called from day to day".¹⁴

Supplementary estimates must be passed by the House before the end of the financial year. The procedure for passing the Supplementary Estimates is, under Cl. (2) of the present article, the same as that for the Annual Estimates [Arts. 112-4], and the supplementary or additional grants will similarly be embodied in an Appropriation Act.¹⁵

Debate on Supplementary estimates.

As in *England*,¹⁶ the debate on a demand for supplementary grant, in *our* House of the People¹⁷ shall be confined to the items constituting the same and no discussion may be raised on the original grants nor policy underlying them save in so far as it may be necessary to explain or illustrate the particular items under discussion.

It follows that a general discussion on the administration as upon the annual estimates is not possible when a demand for a supplementary grant is made.¹⁸ Though a question of economy relating to the particular item can be discussed, members cannot ventilate a grievance relating to another item or another Department.¹⁹

In general, no question of *policy* can be raised when the supplementary demand relates to a scheme which has been already sanctioned by the House. But when the supplementary demand is in respect of a *new service* for which no sanction has previously been obtained from the House, a discussion of the policy involved must be permissible, but it must be confined to the item on which the vote of the House is sought.^{16,20} It follows that though a cut motion may be moved on a supplementary motion, it must be subject to the above restriction regarding policy.²¹

CLAUSE (1) (b).

OTHER CONSTITUTIONS

(A) *England*.—"The need for an excess grant arises when a department has carried expenditure upon a service beyond the amount granted to that service, during the financial year for which the grant was made".²² The Commons recorded a permanent disapproval of these departmental excesses by resolving in 1849 that "when a certain amount of expenditure for a particular service has been determined upon by Parliament, it is the bounden duty of the department which has that service under its charge and control, to take care that the expenditure does not exceed the amount placed at its disposal for that purpose".²²

Nevertheless, in *England*, excess grants become necessary because during the last weeks of a financial year, it may not be possible to get a supplementary estimate voted by Parliament, owing to shortage of time.

(B) *Government of India Act, 1935*.—There was no provision in this Act for an excess grant.

(13) Ilbert, *Parliament* (H. U. Library); May, 16th Ed., p. 715.

(14) Dr. Ambedkar in the Constituent Assembly.

(15) See, for instance, Appropriation Act (XIII of 1952).

(16) May, 16th Ed., p. 738.

(17) R. 216. Rules of the House of People.

(18) (1952) H.P. Deb. (V), 2129

(19) (1921) L.A. Deb. (II), 875.

(20) (1935) L.A. Deb. (III), 2589-90; (1957) H.P. Deb. (X), 5393-4.

(21) (1955) H.P. Deb. (X) 2206; (1953) H.P. Deb. (I), 1297-8.

(22) May, 16th Ed., p. 718; 738; Halsbury, 3rd Ed., Vol. 28, p. 446.

INDIA

Cl. (1) (b): Excess Grants.

Sometimes the amount granted for any service is found insufficient for the purposes during the financial year and the Department is obliged to spend the excess, by drawing it out of the Contingency Fund [Art. 267 (1)], in advance of Parliamentary sanction. In such a case, sanction of Parliament should be obtained as soon as possible after the excess expenditure has been ascertained.²²⁻²³ A demand for the excess shall be presented to the House as if it were a demand for a grant under Art. 113.

An excess demand differs from a supplementary demand in that the former is made *after* the expenditure has been actually incurred, and after the financial year to which it relates has expired. Hence, there is no question of presenting an 'estimate' for the 'excess'. It is presented in the form of a 'demand' for the excess, as the words 'or cause . . . excess' in cl. (1) indicate. Demands for money *already spent* in excess of voted grant should be made not by way of supplementary demand but in the form of an excess demand.²⁴

Debate on excess grants.

As in the case of a supplementary grant, the debate on an excess grant is restricted to the items which are included in such grant and their application.²²

Cl. (2): Procedure for Supplementary grants.

The procedure for the passing of supplementary estimates and excess grants shall be the same as that for demands for the annual grants, subject to such adaptations as the Speaker may deem necessary.²⁵ The Supplementary Demands refer to the heads of the original Demands and the sums already voted under that head and the sum now required.

The Minister concerned should give general information to the House as to the necessity for the Supplementary Demand.¹

Token Grant.

It sometimes happens that though a supplementary estimate is required for sanction of expenditure on a 'new' service, additional funds are not actually required by the Department since the Department might have made some saving under a sanctioned head which might be utilised for the new service with the sanction of Parliament for such re-appropriation. In *England*, the sanction of Parliament for the expenditure on the new service and the re-appropriation is obtained by demanding a 'token' sum of £10/- for the new service. This is known as the demand for a token (supplementary) vote.²²

R. 217 of the Rules of *our* House of the People² embodies this procedure thus:

"When funds to meet the proposed expenditure on a new service can be made available by re-appropriation, a demand for the grant of a token sum may be submitted to the vote of the House and, if the House assents to the demand, funds may be so made available."

Procedure for excess grants.

It is a function of the Public Accounts Committee³ to examine the items of *excess* expenditure, while scrutinising the Appropriation Accounts, with reference to the circumstances leading to such excess in each case and then to make recommendations to the Government. A demand for an excess grant is then presented by the Government.

(23) L.S. Deb. (II), 22-8-56.

(24) L.A. Deb., 16-3-29, pp. 1989-90.

(25) R. 215, Rules of the House of the People.

(1) Parl. Deb. (II), 29-9-51, 3755.

(2) The constitutionality of this Rule has been maintained by the Speaker [(1957) H.P. Deb. (X), 5267-72].

(3) See R. 308 (4) of the Rules of the House of the People.

INDEX TO COMMENTS

ARTICLE 115.

Clause (1)(a).

Other Constitutions :

(A) England, 715 ; (B) Government of India Act, 1935, 715.

India :

Estimates other than the Annual Estimates, 715 ; Supplementary Estimates, 715 ; Debate on Supplementary estimate, 716.

Clause (1)(b).

Other Constitutions :

England, 716 ; Government of India Act, 1935, 716.

India :

Excess Grants, 717 ; Debate on excess grants, 717.

Clause (2).

Procedure for Supplementary Estimates, 717 ; Token Grant, 717 ; Procedure for excess Grants, 718.

Votes on account, votes of credit and exceptional grants. **116.** (1) Notwithstanding anything in the foregoing provisions of this Chapter, the House of the People shall have power—

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 113 for the voting of such grant and the passing of the law in accordance with the provisions of article 114 in relation to that expenditure ;

(b) to make a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement ;

(c) to make an exceptional grant which forms no part of the current service of any financial year ;
and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of India for the purposes for which the said grants are made.

(2) The provisions of articles 113 and 114 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure.

CLAUSE (1) (a).

OTHER CONSTITUTIONS

(A) *England*.—Owing to the fact that the financial year ends on the 31st March, it is obviously impossible for the House of Commons, which usually does not meet until the middle of January or the beginning of February, to grant the whole of the annual supplies for the ensuing year before the 1st April. At the same time Ministers of the Crown must be supplied with money for the purpose of carrying on the government of the country. As a matter of practice, therefore, Parliament is obliged every year to grant in advance some of the money which is demanded by the Crown for the expenses of the various departments *before* the whole of the estimates for the year have been agreed to by the House of Commons (*Halsbury*).

A vote on account may also be necessary if Parliament is dissolved towards the beginning of a year and the annual supplies cannot possibly be voted by the new Parliament in time.⁴

The votes on account are passed by resolutions of the Committee of Supply. The authority granted by a vote on account is to spend a *limited* amount under each vote. The authority is provisional and by a vote on account, neither the Committee of Supply nor the House is committed ultimately to recommend or to grant the total number asked for under any of the heads.

When the annual grant for any service is finally voted by Parliament, the amount already included in the vote on account is deducted from the total amount of the estimate and only the balance is put to the vote of the House.

(B) *Government of India Act, 1935*.—There was no provision for a vote on account in that Act (see below).

INDIA

Votes on Account.

Following the *English* practice, the present sub-clause makes provision for grants *in advance* to be made by the House for enabling the departments to carry on until the voting of the Annual Financial Statement followed by the passing of the general Appropriation Act is complete. Votes on account may be passed on any day subsequent to the presentation of the Budget. The object of providing limited amounts⁵ by votes on account is to enable Parliament to debate the Budget in detail.

The Budget is usually presented to Parliament towards the end of February or the beginning of March. Under the Government of India Act, 1935, since there was no provision for votes on account, debates on the Budget including the voting of grants and the passing of the Appropriation and Finance Acts had to be hurried through before the end of March (*i.e.*, before the commencement of the next financial year).

But since the commencement of the Constitution, as votes on account are passed in time, the voting of the demands included in the Annual Financial Statement is not completed before the 1st of April, and the Annual Appropriation Act is not passed until after the financial year has started.⁶ The vote on account, followed by the Appropriation (Vote on Account) Act which is passed before the commencement of the new financial year,⁷ authorises the expenditure on the various services during the period that intervenes the beginning of the financial year and the passing of the Annual Appropriation Act.⁷

The 'Vote on Account' is thus a device for enabling the House to consider the demands at leisure. It is passed some time after the presentation of the Budget but before the new financial year starts. It is a grant in advance for carrying on the estimated departmental expenditure of the year, before complete and detailed sanction has been given to that expenditure.⁸

CLAUSE (1) (b).

OTHER CONSTITUTIONS

(A) *England*.—"Unexpected demands upon the resources of the United Kingdom for defence, or for a military undertaking, which on account of the

(4) May, 16th Ed., p. 713; Halsbury, 3rd Ed., Vol. 28, pp. 445-6.

(5) Thus, out of the total grant of Rs. 2,940 crores included in the Appropriation Act for 1945-55, Rs. 262 crores were included in the Vote on Account for that year (see Acts VIII and XVI of 1954).

(6) Thus, the Annual Appropriation Act

for 1954-55 (XVI of 1954) received the assent of the President on 27-4-1954.

(7) The Appropriation (Vote on Account) Act for the financial year 1954-55 (VIII of 1954) received the assent of the President on 18-3-54. It thus covered the expenditure required for about a month.

(8) House of Commons Manual, p. 152.

magnitude or indefiniteness of the service, cannot be stated with the detail given in an ordinary estimate are laid before Parliament by an application, based on an estimate of the total sum required, for a *vote of credit*. Sums obtained upon a vote of credit are, like other grants of supply, available solely, during the financial year in respect of which the grant is made".⁹

(B) *Government of India Act, 1935*.—There was no provision for such grant under that Act.

INDIA

Votes of Credit.

Owing to an unexpected demand for money caused by some national emergency, Government may require funds for which it is not possible to give detailed estimates. In such a case the House would grant the money required by a vote of credit, passed in the same way as annual grants.

A vote of credit is demanded in the form of a lump sum without details, for in the nature of things, a vote of credit is required where the total sum required or the details of expenditure cannot be estimated.

Under r. 215 of the Rules of the House of the People, the procedure for obtaining a vote of credit is the same as that for an original demand, subject to such modifications as the Speaker may deem expedient.

CLAUSE (1) (c).

OTHER CONSTITUTIONS

(A) *England*.—An exceptional grant may be required to meet the cost of an undertaking which forms no part of the current service of the year and is non-recurrent in nature, such as . . . loans to foreign countries, fortifications and works. Demands for financial aid are also sometimes made by a message from the Crown for a grant necessary for the maintenance of the dignity of the Crown, e.g., marriage of the Princess Royal.⁹

(B) *Government of India Act, 1935*.—There was no provision for such grant in that Act.

INDIA

Exceptional Grants.

An exceptional grant or special grant is analogous to a vote of credit in this that an exceptional grant is made for a particular and special purpose which does not form part of the ordinary expenditure of the year. In such a case, the House would grant money for that particular purpose, separately. The procedure for votes of credit and exceptional grant shall be the same as demands for grants, subject to such adaptations as the Speaker may deem necessary. [R. 215].

CLAUSE (2).

Procedure for Vote on Account.

This clause imports the provisions of Arts. 113-4 to the grant of a vote of account. This means that it will have to be moved in the form of a demand for grant and embodied in an Appropriation Bill [called the Appropriation (Vote on Account) Bill].

The House of the People has made r. 214 to explain the procedure relating to a vote on account—

"(1) A motion for vote on account shall state the total sum required, and the various amounts needed for each Ministry. Department or item of expenditure which compose that sum shall be stated in a schedule appended to the motion. (2) Amendments may be moved

(9) *Mav*, 16th Ed., pp. 719-720; *Halsbury*, 3rd Ed., Vol. 28, p. 447.

for the reduction of the whole grant or for the reduction or omission of the items whereof the grant is composed. (3) Discussion of a general character shall be allowed on the motion or any amendments moved thereto, but the details of the grant shall not be discussed further than is necessary to develop the general points. (4) In other respects, a motion for vote on account shall be dealt with in the same way as if it were a demand for grant."

But though the procedure relating to a vote on account is, in general, the same as that relating to a demand for a grant, the recommendation of the President is not separately required for a vote on account inasmuch as these form part of the Demands included in the Annual Financial Statement for which the recommendation of the President has already been obtained.

Scope of debate on a vote on account.

During the debate of a Vote on Account, members may invite attention of Government to matters of policy or ventilate their grievances either through general discussion or through cut motions.¹⁰

But in practice, the demand for a Vote on account is sometimes passed as a formal matter, by consent of the House, in view of the urgency of the grant and the fact that there would be ample opportunity for discussion when the Budget for the entire year was presented.¹¹ R. 214 (3), reproduced above, clearly lays down that details of the grant shall not be discussed, at this stage, further than is necessary to develop the general points.

A cut motion may be moved by way of amendment either for the reduction of the entire demand or for the reduction or omission of any of its items.¹²

Procedure for vote of credit and exceptional grant.

Under r. 215 of the House, the procedure for obtaining these grants is the same as that for the annual grants, subjects to such modifications and adaptations as the Speaker may deem expedient, and under the present Clause, they similarly require to be embodied in an Appropriation Act.

No such demand has so far been presented before our Parliament.

INDEX TO COMMENTS

ARTICLE 116.

Other Constitutions :

(A) England, 718 ; (B) Government of India Act, 1935, 719.

India :

Votes on Account, 719.

Clause (1)(b).

Other Constitutions :

(A) England, 719 ; (B) Government of India Act, 1935, 720.

India :

Votes of Credit, 720.

Clause (1)(c).

Other Constitutions :

(A) England, 720 ; (B) Government of India Act, 1935, 720.

India :

Exceptional Grants, 720.

Clause (2).

Procedure for Vote of Account, 720 ; Scope of debate on a vote of account, 720.

Procedure for vote of credit and exceptional grant, 721.

117. (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1)

Special provisions as to financial Bills.

of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States :

(10) Parl. Deb., 26-2-52, Pt. II, cols. 1283-4.

(11) Parl. Deb., 12-3-51, Pt. II, cols. 4351-3.

(12) (1952) Prov. Parl. Deb. (I), 1283-4.

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.

CLAUSE (1).

OTHER CONSTITUTIONS

(A) *England*.—The rule that 'the Crown demands money' applies not only to supply, i.e., the authorisation of expenditure, but also to revenue, i.e., the authorisation of taxation. Historically, the authorisation of expenditure required the imposition of taxation,¹³ and so, Standing Order 78, which was adopted in 1713, is limited, in its terms, to the authorisation of expenditure. But since then, authorisation of expenditure and imposition of taxation have come to be effected by different legislation. Hence S. O. 78, has come to be applied to taxation as well. As *May*¹⁴ explains it—

"The principle that the sanction of the Crown must be given to every grant of money drawn from the public revenue, applies equally to the taxation levied to provide that revenue. No motion can therefore be made to *impose* a tax, save by a Minister of the Crown, . . . nor can the amount of a tax proposed on behalf of the Crown be augmented, nor any alteration made in area of imposition. In like manner, no *increase* can be considered either of an existing or of a new or temporary tax for the service of the year, except on the initiative of a minister, acting on behalf of the Crown; nor can a member other than a minister move for the introduction of a Bill framed to effect a reduction of duties, which would *incidentally* effect the increase of an existing duty, or the imposition of a new tax, although the aggregate amount of imposition would be *diminished* by the provision of the Bill."

Hence, the exclusive right to propose *fresh* taxation or *increase* of the rates of existing taxes, belongs to the Government, and no private member may bring any motion having either of these effects. But a private member—(a) can move to reduce taxation or can bring in a Bill to repeal or reduce taxes which the Government has not proposed to touch, or can move for a further reduction when the Government proposes to reduce a tax; (b) if the Bill proposes to reduce a tax, an amendment which proposes to increase the rate of the tax up to the existing level, is in order.¹⁵⁻¹⁶

(B) *Canada*.—Sec. 54 of the British North America Act says—

"It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue or of any tax or impost, for any purpose, that has not been first recommended to that House by message of the Governor-General in the session in which such vote, resolution, address, or Bill is proposed."

(13) Jennings, Parliament, 1948, p. 251.

(14) May. Parliamentary Practice, 13th Ed., but its substance appears at pp. 690-1, *ibid*; Campion, 1950, p. 280.

(15) Campion, 1950, p. 285.

(16) Previously, a private member could also move an amendment proposing to *substitute* another tax equivalent in amount to the tax embodied in the Bill. But according to modern practice, such amendment is out of order (May, 16th Ed., p. 793).

(C) *Australia*.—Sec. 56 of the Constitution Act says—

"A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

(D) *Ceylon*.—Sec. 69 of the Constitution Order in Council, 1946, provides—

"No Bill or motion, authorising the disposal of, or the imposition of charges upon, the Consolidated Fund or other funds of the Island, or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force shall be introduced in the House of Representatives except by a Minister, nor unless such Bill or motion has been approved either by the Cabinet or in such manner as the Cabinet may authorise."

(E) *Government of India Act, 1935*.—Sec. 37 (1), as amended in 1947, provided—

"(1) A Bill or amendment making provision—

(a) for imposing or increasing any tax; or

(b) for regulating the borrowing of money or the giving of any guarantee by the Dominion Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Dominion Government, or

(c) for declaring any expenditure to be expenditure charged on the revenues of the Dominion, or for increasing the amount of any such expenditure, shall not be introduced or moved except on the recommendation of the Governor-General."

INDIA

No financial Bill to be introduced except on recommendation of President.

This provision is a counterpart of that in Art. 113 (3). Not only demands for grants but also any Bill or amendment relating to taxation, borrowing and the other matters enumerated in Art. 110 (1) shall require the *recommendation of the President* for its introduction, whether such Bill deals *exclusively* with the money matter so as to be a "Money Bill" within the meaning of Art. 110 (1), or not. The only exceptions are (i) Bills or motions for reduction or abolition of any tax; (ii) imposition of fines, fees and licenses, taxes by local authority. [See also p. 673, *ante*]; (iii) providing for, exclusively, with an 'incidental matter' within the meaning of Cl. (g) of Art. 110 (1), e.g., a Bill which merely seeks to clarify the meaning of a provision in a Money Bill, without itself imposing a tax or the like even though it is a Money Bill as defined in Art. 110).

A private member is not debarred from bringing a Bill or Amendment as comes under Art. 117 (1); but he must annex a copy of the President's assent to the notice of his motion in order that the notice may be valid.

The question of absence of recommendation cannot, however, be raised in the Council of States, after the Bill has been passed by the House of the People,^{16a} or in the Courts [Art. 122 (1), *post*], once the Act has been made [Art. 255, *post*].

Though a bill referred to in the present clause must deal with any of the matters specified in cls. (a)-(f) of Art. 110 (1), there is a difference between the scope of the two provisions. If the bill deals *exclusively* with such matters and contains no provisions relating to any other matter, it is a 'Money Bill' within the meaning of Art. 110 (1) and the procedure provided in Art. 109 must be followed. If, however, the Bill contains provisions relating to different matters of which *some* fall within any of the sub-clauses (a)-(f) of Art. 110 (1), it is nevertheless a 'financial Bill' within the meaning of Art. 117 (1). But whether it is a 'Money Bill' or not, any financial Bill would be governed by Art. 117 (1).

'Money Bills' and 'other financial Bills'.

'Finance' refers to revenue and expenditure. *Our* Constitution divides Bills containing financial provisions into several classes with different incidents, which

(16a) (1956) H.P. Deb. (VII), 2725-6.

should be carefully noted, particularly because the division is not exactly identical, in all respects, with the corresponding division made in *England*.

The main division is into 'Money Bills' and 'other financial Bills'.

(A) *Money Bills*.—No financial Bill is a Money Bill unless it comes within the purview of Art. 110. The following are the special features of a Money Bill:

(i) It must deal *exclusively* with any of the matters specified in any of the sub-clauses of Art. 110 (1).

(ii) Subject to the above, the *Speaker's decision* as to whether a particular Bill is a Money Bill or not is final and even if the Speaker certifies a Bill which does not apparently come within the scope of Art. 110 (1), there is none to question it. Shortly speaking, therefore, *a financial Bill which is certified by the Speaker to be a Money Bill under Art. 110 (4), is a Money Bill*.

(iii) A Money Bill shall be introduced only in the House of the People [Art. 109 (1)].

(iv) It cannot be introduced except on the recommendation of the President [Art. 117 (1)].

But as stated above, there is one exception to this rule, namely, a Money Bill which deals exclusively with an 'incidental matter', as referred to in sub-cl. (g) of Art. 110 (1).

(v) The power of the Council of States over a Money Bill is laid down in cls. (2)-(5) of Art. 109. As has been already explained, when a Bill certified by the Speaker to be a Money Bill is received by the Council of States, the only courses open to the Council are—(a) to return¹⁷ the Bill without amendments or (b) to return¹⁷ it with suggestions for amendments or (c) to withhold the Bill for a period of 14 days.

(B) *Other Financial Bills*.—All financial Bills, other than Money Bills as explained above, are included in Art. 117 (1). These fall under several categories:

(a) *Bills which provide for any of the matters enumerated in Art. 110 (1) but do not consist solely of those matters (e.g., a Bill which contains a taxing clause but does not deal solely with taxation).*

These have two features in common with Money Bills, viz., that—

(i) They shall not be introduced in the Council of States.

(ii) They shall not be introduced except on the recommendation of the President.

But, not being Money Bills, the provisions of cls. (2)-(5) of Art. 109 do not apply to such Bills, so that the Council of States has full power to *reject* or *amend*¹⁸ such Bills as it has in the case of non-financial Bills. Such Bills have to be passed in the Council of States through three readings like ordinary Bills and in case of a final disagreement between the two Houses over such a Bill, the provision for joint sitting in Art 108 is attracted.

(b) *Bills involving expenditure*.—Any ordinary Bill may contain provisions which, if passed, would involve expenditure from the Consolidated Fund of India. Such a Bill shall have all the incidents of an ordinary Bill, viz., that—

(i) It may be initiated in either House.

(17) As has already been seen, the procedure in *England* differs in this respect, for, a Money Bill goes through the formality of a passage in the House of Lords and the Lords can *amend* such Bill. They are not required to 'suggest amendments'. Whether such amendments would be effective or not, however, depends upon the Commons, under s. 1 (1) of the Parliament Act, 1911; Campion, Introduction, 1950, p. 288; May, 15th Ed., p. 794].

(18) In this respect, the powers of our Council of States are wider than those of the House of Lords for, in *England*, the Com-

mons claim the sole right of initiation or amendment of any Bill dealing with public expenditure or revenue [excepting those relating to fines and fees (S.O. 55) or local rates in Private Bills (S.O. 191)], and if the Lords exercise any such powers with respect to such financial Bills (though they are not 'Money Bills'), it would be a breach of privilege of the House of Commons. In practice, the Commons waive their privilege where the amendments made by the Lords are verbal or consequential in nature or do not relate to any charge on the public revenues [May, 15th Ed., pp. 781-792].

(18) L.A. Deb., 5-3-35, p. 3744.

(ii) The Council of States has full power to reject or amend it; but it has one special incident in view of the financial provision (*i.e.*, provision involving expenditure) contained in it, *viz.*, that—

It must not be *passed* in either House unless the President has recommended the consideration of the Bill [Art. 117 (3)].

(C) *Bills providing for certain specified matters, e.g.—*

- (a) the imposition of fines or other pecuniary liabilities;
- (b) the demand or payment of fees or licences or fees for services rendered;
- (c) the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

Though, *prima facie*, such Bills contain provisions which are financial in nature, for the purposes of the Constitution, they are *neither* Money Bills [Art. 110 (2)] *nor* 'financial Bills', so that they have *no* special incidents with respect to their introduction or passage. Like ordinary Bills, they may be introduced in either House, require no recommendation from the President and may be rejected or amended by the Council of States in the ordinary manner.

Amendments requiring recommendation under Art. 117 (1).

Sanction of the President is required not only for a Bill but also for an amendment (before it is moved) if it makes provision relating to any of the matters specified in sub-clauses (a)-(f) of cl (1) of Art. 110 (1). Thus, it has been held that the following amendments require such sanction—

- (a) When a Bill proposes a tax for a particular period, an amendment to extend the operation of the tax indefinitely.¹⁸
- (b) An amendment that the proceeds from the duty proposed in the Bill shall not be carried to the Consolidated Fund but shall be appropriated for other purposes.¹⁹
- (c) An amendment for transferring one item from one part of the Schedule to a Finance Bill to another, which has the effect of increasing the duty.²⁰
- (d) An amendment seeking to impose a new tax.²¹

Amendments not requiring sanction.

The Proviso says that no recommendation of the President shall be required for any amendment which seeks to *reduce* or to abolish a tax, as proposed in a Bill or amendment.

An amendment seeking to increase the rate of duty in one particular but to reduce it in another, the total effect of the amendment being to *reduce* the tax, does not require the President's sanction.

Another exception has been engrafted by the Rules of the House of the People,²²⁻²³ following the English practice, that—

"No previous sanction or recommendation of the President is required if the amendment seeks to increase the tax (proposed in the Bill) *upto the limits of an existing tax.*"

It would follow from this exception that any amendment which seeks to maintain the *status quo* would not require recommendation.²⁴ Thus, where a Finance Bill proposes to remove an existing duty, an amendment for the deletion of that clause which seeks to abolish the duty can be moved without the President's recommendation, though the apparent effect of the amendment would be to increase taxation.²⁴

(19) L.A. Deb., 21-2-27, p. 1095.

(20) L.A. Deb., 19-2-23, pp. 3718-9.

(21) L.S. Deb. (II). 21-4-56.

(22) Proviso to r. 81 of the Rules of the House of the People.

(23) Thus, if a Bill seeks to amend a taxing Act by lowering the rate of tax, an amendment may be moved to the Amending Bill to increase the rate up to the limit of

the rate provided by the original Act, and for such an amendment no sanction of the President would be required. The reason behind this exception is that it does not really seek to increase the burden on the tax-payer inasmuch as the amendment does not seek to go higher than the existing tax [Cf. L.A. Deb., 6-4-39, pp. 345-55].

(24) L.A. Deb., 22-2-34, p. 2583.

Otherwise, an amendment which seeks to increase the rate of an existing tax requires recommendation.²⁵ If, however, an amendment seeks to increase the rate of duty in one particular but reduces it in another so that the *total* effect of the amendment would be to *reduce* the tax, no sanction of the President would be required.¹

Proviso.

Abolition or reduction of a tax is included in sub-cl. (a) of Art. 110. In the result, if a Bill solely provides for abolition or reduction of a tax, it is a 'Money Bill'; if it contains other provisions which do not come within any of the sub-clauses of Art. 110 (1), it is a 'financial Bill' within the meaning of Art. 117 (1). In either case, such a Bill cannot be introduced or moved except on the recommendation of the President [Art. 117 (1)].

If, however, an *amendment* seeks to abolish or reduce a tax, no recommendation of the President would be required for moving it.

While the enacting portion of cl. (1) includes both Bills and amendments, the Proviso makes an exception in the case of amendments only, relating to reduction or abolition of a tax.

CLAUSE (2).

Scope of Cl. (2).

Cl. (2) is an exception to cl. (1) relating both to bills and amendments having any of the specified objects, *viz.*,

- (a) imposition of fines or other pecuniary penalties;
- (b) demand or payment of fees for licences, fees for services rendered;
- (c) taxation by any local authority or body for local purposes.

This clause corresponds to cl. (2) of Art. 110 and the two together provide that such bills or amendments are not subject to the special provisions relating to money or financial Bills.

Hence, no previous sanction of the President is required for introducing such Bill. But if such Bill involves expenditure, recommendation of the President must be obtained [cl. (3)], before the motion for consideration of the Bill is made.

'Fine or other pecuniary penalty.'

The word fine has got several meanings but in this context it has to be understood with reference to the words 'other pecuniary penalty'. Hence, it would mean a 'pecuniary punishment for an offence' (*Litteton*). The Indian Penal Code, for instance, prescribes fine as a punishment for certain offences in addition to or as an alternative to imprisonment. Usually, the statute prescribes a maximum amount subject to which the amount of fine to be awarded in a case is determined by the Court.

The word 'pecuniary' distinguishes the penalty referred to in this clause from forfeiture of property. 'Pecuniary penalty' thus means any sum of money recoverable in a summary manner. An instance to the point is s. 35 of the Stamp Act, 1899 which provides that an unstamped document may in certain circumstances be received in evidence on payment of the usual duty together with the penalty prescribed therein. There are other statutes which declare an act to be unlawful and provide that anybody doing such act must pay a certain penalty *per diem*.

CLAUSE (3).

OTHER CONSTITUTIONS

England.—Though an ordinary Bill which contains a financial clause or imposes a charge on the revenues is not a 'Money Bill' within the meaning of

(25) L.A. Deb., 19-3-23, pp. 3718-9.

(1) Cf. L.A. Deb., 22-3-33, pp. 2381-3.

the Parliament Act, 1911, still the exclusive right of the House of Commons to initiate financial legislations is maintained even in regard to such Bill. If such a Bill is introduced in the House of Lords, the financial clauses are omitted when the Bill is read a third time in the House of Lords; but when the Bill is sent to the House of Commons, the financial clauses are printed in the Bill in special type. The House of Commons re-inserts the financial clauses and then passes the Bill.

Alternatively, the financial clauses are allowed to remain in the Bill in the House of Lords, with a clause just following, to negative the charge; and when the Bill is received in the Commons, they omit the formal negative clause and then pass the Bill.²²

INDIA

Bill involving expenditure.

This clause deals with a Bill which does not relate solely to a proposal for expenditure, and is, therefore, not a 'Money Bill'. An ordinary Bill, which involves expenditure, may be introduced in either House (though not a Bill imposing taxation) and without the previous recommendation of the President. But it shall not be passed by either House except on the recommendation of the President.

So, if either House introduces a Bill having such a consequence, the consideration²³ of the Bill shall be suspended until the President's recommendation is received. Once the President's recommendation is obtained, the Bill will then be passed as an ordinary Bill, so that the upper House (the Council of States) shall have co-ordinate powers even though the Bill has a financial consequence.

The difference between cl. (1) and cl. (3) is that the President's recommendation is a condition precedent to the introduction of a Bill which comes under cl. (1); but a Bill which comes under cl. (3) may be introduced without the recommendation, and it would be in order if the recommendation is obtained before moving the motion for consideration of the Bill. In other words, in the case of a Bill coming exclusively under cl. (3) no motion up to the stage of the motion for consideration can be rejected on the ground that the President's sanction has not so far been obtained.

Another point of difference between cls. (1) and (3) is that while cl. (1) includes both a 'Bill or amendment', cl. (3) relates only to a Bill. Hence, no recommendation of the President is required for moving an amendment involving or increasing expenditure. If, however, an amendment involving expenditure is carried on a Bill which did not previously receive the President's recommendation, such recommendation will be required before the Bill, as amended, is passed by the House.

A Bill involving 'appropriation' and a Bill involving 'expenditure'.

The distinction between 'appropriation' and 'expenditure' has already been explained under Art. 110 (1) (d), p. 673, ante. If the Bill involves appropriation, cl. (1) of Art. 117 applies. But if it does not seek to effect 'appropriation' in the technical sense, but merely imposes liability on the Government, it may be introduced without the President's recommendation and it may be passed provided the recommendation is obtained before consideration.²⁴

'Involving expenditure'.—In England, questions have sometimes arisen as to what constitutes a 'charge' on the public revenues.²⁵ But the expression 'expenditure from the Consolidated Fund of India' in the present clause makes it clear that the clause is confined only to monetary charges and not any other burden on the national revenue or finance.

(22) May, 16th Ed., p. 776.

consideration of the bill is made [Parl. Deb., 12-4-51, Pt. II, cols. 6727-8].

(24) Parl. Deb., 12-4-51, Pt. II, cols. 6727-8.

(25) Cf. May, 16th Ed., pp. 755 et seq.

(23) The President's recommendation should be obtained before the motion for

Of course, the word 'involving' is wide enough to include cases where the Bill does not *immediately* cause an expenditure out of the Consolidated Fund, but authorises or imposes some additional duties for which money will have to be provided.

On the other hand, the present clause would be attracted only if the expenditure from the Consolidated Fund would be caused by the enactment of the Bill in question. If the expenditure is *already authorised* by an existing law, and a Bill simply enables such expenditure being made for the purpose and within the amount authorised by the existing law, it seems that such a Bill would not come within the purview of the present clause. Thus, where there is already an Act which authorises the making of advances for certain purposes up to a certain amount and subsequently a Bill is brought for sanctioning the advance for a particular purpose within the scope of the existing enactment, the Bill cannot be said as involving expenditure, for the expenditure is already authorised by Parliament. If, however, the money is sought to be diverted to a *new* purpose, cl. (3) would be attracted.

Again, if a Bill seeks to extend the life of an Act involving expenditure from the Consolidated Fund, the recommendation of the President shall be necessary for consideration of the Bill.

Special provision for financial memorandum and printing.

For the purpose of application of cl. (3) of the present Article it is necessary that a Bill containing clauses involving expenditure should be differentiated from other Bills. For this purpose, the Rules of *our* Parliament¹ provide—

"(1) A Bill involving expenditure shall be accompanied by a *financial memorandum* which shall invite particular attention to the clauses involving expenditure and shall also give an estimate of the recurring and non-recurring expenditure involved in case the Bill is passed into law.

(2) Clauses or provisions in Bills involving expenditure from public funds shall be printed in thick type or in italics"

As an instance of a financial memorandum referred to in the foregoing rule, the memorandum attached to the Taxation Laws (Extension to Jammu and Kashmir) Bill, 1954 may be reproduced:

"The taking over of the staff now employed by the Government of Jammu and Kashmir on work relating to Customs, Central Excise and Income-tax, as a result of the extension of the Central taxation laws to that State will involve expenditure to the Government of India. The anticipated expenditure on the staff to be stationed within the State would be about Rs. 2.5 lakhs annually. No other expenditure is at present contemplated."

Limitations on the power of Parliament in financial matters.

We may now summarise the limitations imposed by the Constitution upon the powers of either House of *our* Parliament in financial matters. While similar restrictions are self-imposed in England (resting on the Standing Orders of the House of Commons), in India, these are embodied in the Constitution:

(i) No demand for a grant shall be made except on the recommendation of the President [Art. 113 (3)].

(ii) No Bill or amendment relating to a financial matter shall be introduced except on the recommendation of the President [Art. 117 (1)].

(iii) Any Bill which would involve expenditure shall not be passed unless the President has recommended it [Art. 117 (3)].

(iv) No amendment shall be proposed to an Appropriation Bill which would have the effect of (a) varying the amount or altering the destination of any grant or (b) varying the amount charged on the Consolidated Fund [Art. 114 (2)].

(v) No Bill or amendment which imposes or varies any tax or duty in which the States are interested or which imposes any such surcharge as is mentioned in

(1) R. 64 of the Rules of the Council ;
r. 69 of the Rules of the House.

Art. 271 shall be introduced or moved in either House of Parliament except on the recommendation of the President [Art. 274 (1)].

Procedure relating to the Finance Act.

As has been mentioned at the outset (p. 698, *ante*), while the expenditure proposals of the Budget as voted by the Legislature are embodied in the Annual Appropriation Act, taxation proposals are embodied in the Annual Finance Act.²

The procedure for the passing of an Appropriation Act having been already explained (pp. 714-6, *ante*), we are now to see the special features relating to the enactment of a Finance Act.

The Finance Act is the Parliamentary authority for—

- (a) New taxes, to be imposed for the first time ;
- (b) Taxes which are to be increased ;
- (c) Taxes to be renewed or revised annually, under the terms of the Act by which they were imposed.

In short, it² purports "to give effect to the financial proposals of the Government" for the ensuing financial year.

The Finance Bill is a 'Money Bill' [provided it does not deal with any matter not included in Art. 110 (1) (a)]. It cannot be introduced in the Council of States [Art. 109 (1)], nor can it be introduced without the recommendation of the President [Art. 117 (1)]. If it affects any tax in which the States are interested, the President's recommendation must be obtained under Art. 274 (1), apart from that under Art. 117 (1).³

Subject to the special provisions made in R. 219, the procedure relating to a Finance Bill is governed by the general rules relating to Bills contained in Chapter X of the Rules of the House of the People. The special features of the procedure relating to such Bills are—

- (i) The rule of 'guillotine' applies [Art. 219 (2)-(3)].
- (ii) No amendment to such Bill can be proposed which will have the effect of varying or altering the destination of any grant made or of varying the amount of any expenditure charged on the Consolidated Fund of India [Art. 114 (2)].
- (iii) No amendment can be moved to *increase* a tax⁴ or to add⁵ a *new* category of taxes can be introduced, whether by a Minister or by a private member, without the prior recommendation of the President. But no such recommendation would be required if the amendment seeks to increase the rate in one aspect and to decrease it in another in such manner that the *total effect* of the amendment would be to *reduce* the tax.⁶
- (iv) Amendments flowing⁷ out of the Bill are admissible, but not an amendment which seeks to amend a taxing Act which is not touched by the Finance Bill.⁸

(2) Though the usual practice in India, as in England, is to pass one Finance Act for a financial year, sometimes more than one Acts are passed. Thus, in 1956, three Finance Acts were passed—

(i) The Finance Act (18 of 1956), made on 27-4-56, was the usual annual Act, relating to income-tax, excise and customs duties ;

(ii) The Finance (No. 2) Act (76 of 1956), made on 21-12-56, provided for the increase or modification of certain import and excise duties, with effect from 1-2-57 ;

(iii) The Finance (No. 3) Act (77 of 1956), made on 21-12-56, made further amendments in the Income-tax Act, 1956, by way of imposing a tax on capital gains, with effect from 1-4-57. (This last Act, thus, properly, belonged to the next financial year).

The possibility for supplementary Finance Bills is referred to in R. 219 (1) of the Rules of the House of the People which says—

"In this rule "Finance Bill" means the Bill ordinarily introduced in each year to give effect to the financial proposals of the Government of India for the next following financial year and includes a Bill to give effect to supplementary financial proposals for any period."

(3) Cf. (1957) H.P. Deb. (X), 5617-21.

(4) (1957) H.P. Deb. (VII), 10002-3.

(5) (1956) H.P. Deb. (IV), 6009.

(6) (1933) L.A. Deb. (VIII) 2381-3.

(7) (1957) H.P. Deb. (VI), 10338-40.

(8) (1923) L.A. Deb. (II) 3717-21.

Debate on a Finance Bill.

Great latitude of discussion is allowed during debate on the Finance Bill. A criticism of the entire financial policy of the Government as well as of the general administration is in order. Besides, any grievance relating to matters within the responsibility of the Government concerned can be ventilated, the principle being that the citizen should not be called upon to pay, unless he is given, through Parliament, the fullest latitude of representing his views and conveying his grievances.⁹

R. 219 (5) of the Rules of the House of the People thus provides—

"On a motion that the Finance Bill be taken into consideration, a member may discuss matters relating to general administration, local grievances within the sphere of the responsibility of the Central Government or monetary or financial policy of Government."

The reason for this wide latitude in the case of a Finance Bill in contrast to the practice relating to an Appropriation Bill is that in the case of an Appropriation Bill, there are two earlier opportunities for debate, namely, at the stage of the general discussion and again at the stage of granting the demands, so that as a matter of convention, the House passes the Appropriation Bill without further discussion¹⁰ unless there is any point absolutely new and important; but the taxation proposals contained in the Finance Bill cannot be discussed at any earlier stage¹¹ and they must be discussed on the Finance Bill and the members must have an opportunity of ventilating all their grievances and to have their say on each of the taxes the Government proposes to impose, for,—“no taxation without representation”.¹² This does not, however, mean that it is permissible—

(a) to repeat arguments advanced during the general discussion on the Budget;¹³ or to reopen questions discussed previously;¹⁴ or

(b) to criticise matters for which the Government of India is not responsible, e.g., a matter relating to the Provincial administration.¹⁵

Provisional Collection of Taxes.

Since the enactment of the Finance Bill, though introduced immediately after the Budget speech of the Finance Minister, is not completed before the commencement of the next financial year, provision has to be made for the immediate collection of revenue, according to its terms, for the intervening period of time. This purpose is served by giving effect to the proposals contained in the Finance Bill relating to the imposition or increase of the duties of customs and excise, from the expiry of the day on which the Finance Bill is introduced. This is a statutory exception to the principle that a Bill cannot take effect unless it is made into an Act, and this exception has been made by the Provisional Collection of Taxes Act, 1931, the relevant provisions of which are—

"3. Where a Bill to be introduced in Parliament on behalf of Government provides for the imposition or increase of a duty of customs or excise, the Central Government may cause to be inserted in the Bill a declaration that it is expedient in the public interest that any provision of the Bill relating to such imposition or increase shall have immediate effect under this Act.

4. (1) A declared provision shall have the force of law immediately on the expiry of the day on which the Bill containing it is introduced.

(2) A declared provision shall cease to have the force of law under the provisions of this Act—

(a) when it comes into operation as an enactment, with or without amendment, or

(b) when the Central Government, in pursuance of a motion passed by Parliament, directs, by notification in the official Gazette, that it shall cease to have the force of law, or

(9) Parl. Deb., 24-3-50, pp. 2061-3.

(10) (1957) H.P. Deb. (II), 2664-7.

(11) (1950) Prov. Parl. Deb. (III) 2061-3.

(12) (1952) H.P. Deb. (II) 3131-3.

(13) (1944) L.A. Deb. (II), 1414-5.

(14) (1957) H.P. Deb. (VI), 10094-7.

(15) (1944) L.A. Deb. (II), 1580.

(c) if it has not already ceased to have the force of law under clause (a) or clause (b), then on the expiry of the sixtieth day after the day on which the Bill containing it was introduced.

5. (1) Where a declared provision comes into operation as an enactment in an amended form before the expiry of the sixtieth day after the day on which the Bill containing it was introduced, refunds shall be made of all duties collected which would not have been collected if the provision adopted in the enactment had been the declared provision:

Provided that the rate at which refunds of any duty may be made under this sub-section shall not exceed the difference between the rate of such duty proposed in the declared provision and the rate of such duty in force when the Bill was introduced.

(2) Where a declared provision ceases to have the force of law under clause (b) or clause (c) of sub-section (2) of section 4, refunds shall be made of all duties collected which would not have been collected if the declaration in respect of it had not been made."

INDEX TO COMMENTS

ARTICLE 117.

CLAUSE (1).

Other Constitutions :

(A) England, 722 ; (B) Canada, 722 ; (C) Australia, 723 ; (D) Ceylon, 723 ; (E) Government of India Act, 1935, 723.

India :

No financial Bill to be introduced except on recommendation of President, 723.

'Money Bills' and 'Other financial Bills':

(A) Money Bills, 724 ; (B) Other Financial Bills, 724 ; (C) Bills providing for certain specified matters, 725. Amendments requiring recommendation under Art. 117 (1), 725 ; Amendments not requiring sanction, 725 ; Proviso, 726.

CLAUSE (2).

Scope of cl. (2), 726 ; 'Fine or other pecuniary penalty', 726.

CLAUSE (3).

Other Constitutions : England, 726.

India :

Bill involving expenditure, 727 ; A Bill involving 'appropriation' and a Bill involving 'expenditure', 727 ; 'Involving expenditure', 727 ; Special provision for financial memorandum and printing, 728 ; Limitation on the power of Parliament in financial matters, 728.

Procedure relating to the Finance Act, 729 ; Debate on a Finance Bill, 730 ; Provisional Collection of Taxes, 730.

